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FOREWORD

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Ohio Law Journal.

COLUMBUS, OHIO, : : : AUGUST 18, 1881.

PERSONAL.

—Counselor Seth Weldy, of Logan, paid us a flying visit, while passing through the city a few days ago.

—Judge J. S. Brasse, of Lancaster, was in the city Monday last on professional business.

—J. Wheeler Lowe, of the Circleville bar, was in the city last week, on business connected with the Supreme Court.

ERRATA.

By an inadvertent head put on the "Table of Cases reported in full," during the past year, which appeared last week, the belief may obtain that no further index will be furnished. This is error. We will prepare a full index of all things contained in the LAW JOURNAL during the year ending with Aug. 11. This will be prepared and printed as soon as possible.

We have also omitted from the table of Cases reported in full, *Buckingham v Buckingham*, page 261. Also on page 536 in speaking of the cost of obtaining copies of the opinions, we wrote that they could only be obtained by paying "Copying rates" &c. The fiendish compositor made it "losing rates" and steadfastly refused to amend. Now, however, that he is no more, we succeed in getting it to read as we penned it.

NEW BOOKS.

NEVADA REPORTS, Vol. 15, has been received from the publishers, Messrs. A. L. Bancroft & Co., San Francisco. This volume contains fifty-eight cases decided during 1880. Many important decisions concerning the usual range of matters litigated, we find therein, the more valuable and novel being as to *Evidence*, *Libel*, and *Partnership in Mining Rights*. In *Criminal Law*, we note nothing unusual. Various questions as to the sufficiency of indictments, the competency of jurors, and the admissibility of testimony, are passed upon, but no new rules are deduced.

The mechanical execution of the book is exceptionally good. This, however, is easily accounted for. Messrs. Bancroft & Co. produce no other kind of books.

HON O. H. BROWNING, one of the most distinguished lawyers of the State of Illinois, died at his home in Quincy, Thursday evening of last week, in the 76th year of his age.

WE have received from the publishers, William Gould & Son, Law Booksellers and Publishers, Albany N. Y., their *Catalogue of Law Books*.

A catalogue of law books may not be deemed an important publication, and, ordinarily, is not. In this case, however, we find a catalogue which must have required an immense amount of labor to prepare, and is correspondingly valuable to attorneys or legal writers.

The nucleus to this extensive list was prepared and used by Hon. N. C. Moak in his lectures before the students of Albany Law School, Class of 1880-81, and entitled: *Books, their Selection and Use*. By the request of the publishers, however, the book was enlarged to its present size, 400 pages, by the addition of much valuable matter prepared by J. T. Cook, Esq.

Fifty pages of the book are devoted to the abbreviations used in citing elementary works upon the law. This portion is of the greatest value for reference. Thirty pages follow giving the abbreviations used in citing English and American Reports and Legal Periodicals. The rest of the book is made up of alphabetical lists of Elementary legal works; of all American Reports; of all American periodical and miscellaneous Reports; of all noted trials, the proceedings of which have been published; sketches of all the English courts; full lists of English Reports; Irish, Scotch, Indian, Canadian, Mauritius, New Zealand and other Reports; making a volume of the greatest interest and value. In addition to all this matter we note on page 3, certain "rules for citations," which are of such value that a simple notice will not do them justice. We will publish them in full next week.

OLIVER'S CONVEYANCING.

Benjamin Lynde Oliver, the author of *Oliver's Precedents in Real and Personal Actions*, and of *Conveyancing*—an earlier edition—is well known throughout the East as a recognized authority in matters pertaining to the interpretation of written instruments. Both his books have been received by the profession with favor most marked, and have long held an undisturbed place in the catalogue of really good works.

When we consider that a very large part of the litigation thronging our courts and filling our reports, is the direct outgrowth of unskillful attempts at writing deeds, wills and contracts, we must be surprised that greater attention is not paid to securing a better general knowledge

of the chief requisites in a writing of either class. It is notorious that only one attorney in a hundred can draw a deed, or write a will, or shape a contract, that will not be susceptible of two or more different interpretations; while very many most signally fail to inject even common sense or decent phraseology into the instruments they write.

A book of forms of such writings is indispensable in almost all libraries, and if prepared by a first rate lawyer, is of value in all branches of legal practice. Such a book is *Oliver's Conveyancing* now before us. The fourth edition was completed in May, 1881, by Geo. H. Hopkins, of the Portland (Me) bar, and contains many new forms and much new matter of value to the profession.

Oliver's Conveyancing, revised and enlarged, 8 vo. 450 pp., \$4.50 net. Dresser, McLellan & Co., Portland Maine.

SUPREME COURT OF OHIO.

JOHN W. PATRICK

v.

JOSEPH H. LITTELL ET AL.

1. The separate estate of a married woman is chargeable with the performance of her engagements or obligations made or incurred upon its credit or for its benefit; and an agreement by her to pay for services to be rendered in procuring a loan of money to remove a mortgage from such estate, is an agreement made upon its account, and for its benefit.

2. In an action under section 28 of the Code of Civil Procedure, as amended March 30, 1874, against a married woman, upon her obligation in writing to pay for services rendered, or money advanced, for the benefit of her separate estate, it is not error to render a personal judgment against her.

3. Where a loan of money is to be secured by a conveyance of real estate in fee to the lender, with a lease back for a specified number of years, with a privilege of redemption to the lessees at the expiration of the term, the lessees to pay a ground rent equal to eight per cent. per annum on the money loaned, such security is in equity a mortgage and subject to taxation under the statute; and a promise to a third party to pay for services to be rendered in obtaining a loan to be thus secured, is not void as being contrary to public policy, although the object of the lender of the money in adopting such form of security was to evade taxation upon the investment.

Error to the Superior Court of Cincinnati.

The original action was brought by the defendants in error, against John W. Patrick and Ruth A. Patrick, husband and wife, for services rendered and money paid for them, under the following written agreement:

"CINTI, October 9, 1874.

"To Jos. H. LITTELL & Co.

"You are hereby authorized to negotiate for us a loan of \$10,000 on our house and lot, 50x136, known as No. 534 Court st. between Baymiller and Freeman sts., on a basis of a 10 years' lease, we to give a good and sufficient deed of general warranty, free of dower and clear of incumbrances, and to receive a lease for 10 years, with priv-

ilege of redemption at the expiration of said term; we to pay ground rent, at the rate of 8 per cent., that is to say, \$800 per annum, payable quarterly, and all taxes and assessments that are or may be levied against said property. We also agree to pay attorneys' fees for examination of title, and your commission for negotiating loan. Commission to be one per cent.

"J. W. PATRICK,

"RUTH ANN PATRICK."

It appeared that the defendants had paid \$50 attorneys' fees for examination of the title, and had secured the loan of \$10,000 upon the property, in accordance with the above terms. The defendants below refused to receive the loan and the action was brought to recover the agreed commission of \$100, and the \$50 paid for the examination of title.

The petition alleged that the contract so executed by Ruth A. Patrick related to her separate estate, and was for its benefit, and that said Ruth held the legal title to the property described in said contract. These allegations were not denied.

The answer, after setting up Mrs. Patrick's coverture as a first defense, alleged that the transaction only contemplated a mortgage of the property of Mrs. Patrick, to secure a loan, and that the form it was to assume, of an absolute conveyance with lease back for ten years, with right of redemption, was to evade the revenue laws of the State, by enabling the lender of the money to treat the transaction on his part as a purchase of the property, and not as a mere loan of money, secured by lien upon the property conveyed. This allegation was not denied by the reply. A personal judgment was rendered in the superior court, in special term, against both defendants below, and the judgment against Mrs. Patrick was declared to be a lien upon her separate estate. In the general term, upon petition in error by Mrs. Patrick, the judgment of the special term against her, was affirmed.

She now prosecutes this petition in error to reverse such judgments.

Matthews, Ramsey & Matthews, for plaintiff in error.

J. R. Murdock, for defendants in error.

BOYNTON, J.

The plaintiff in error contends that the judgment of the special term of the superior court against her is erroneous for two reasons.

First, that being a married woman when her liability is alleged to have been incurred, and not having charged her separate estate with the performance of her engagement or obligation to pay the defendants for the services rendered in her behalf, or for the money advanced for her, a personal judgment was wholly unauthorized; and, secondly, that inasmuch as the transaction contemplated that the security for the loan should assume the form of an absolute conveyance, with a lease back for ten years, with a right of redemption at the end of the term, instead of an ordinary mortgage, the purpose being to evade the revenue laws of the State by

so covering up the loan as to conceal the real character of the transaction, the engagement or obligation was void as against public policy. As respects this objection, whatever might be the effect of the transaction, if the person from whom the money had been procured were seeking to enforce the provisions of the agreement,—with which point we are not now concerned,—the relation of the defendants in error to the transaction, or to the form of the security to be given for the money borrowed, was not such, in our judgment, as to defeat their right to compensation for the services rendered, or the money advanced. They were constituted agents to procure a loan, upon terms prescribed by the plaintiff and her husband. The written request to procure the same explicitly defined the form of the security the defendants were directed to adopt. It was in pursuance of these directions that the services were rendered and the money paid for the examination of the title to the property, which was to be pledged as security for the debt. The agreement by the defendants was fully executed, and the services rendered were performed in good faith. To refuse them redress, under the circumstances, for the reason stated, would, it seems to us, be applying the doctrine which denies a remedy for the enforcement of contracts contrary to public policy, to a state of facts not justly falling within the operation of the rule. The services they performed were distinctive in their character and perfectly lawful; and, had the transaction been executed throughout in the mode contemplated by the parties, as respects the form of the security to be taken, it would, in fact and legal effect, have been but a loan secured by what in equity would have been regarded as a mortgage only, and the investment, without doubt, have been as much the subject of taxation under the statute relating to that subject, as if a mortgage pure and simple had been taken.

Where the transaction, within the understanding of the parties, is a loan of money upon security, no form which the transaction may assume can so disguise it, as to change its legal character or effect.

It remains to consider the effect of the coverage of the plaintiff upon the obligation she assumed, and upon the right to give a personal judgment against her. The facts are briefly these. Being the owner of a separate estate, which was heavily encumbered by mortgage, she engaged the defendants in error, her husband joining, to secure for her a loan of \$10,000 to enable her to remove the mortgage from her estate. She agreed to pay an attorney's fee for making an examination of her title, and a commission of \$100 to the defendants for securing the loan. The services stipulated for were fully performed, the defendants paying \$50 from their own funds to the attorney making the abstract of title. The plaintiff refused to accept the loan, or to pay for the services rendered in procuring it. We have no hesitancy in pronouncing the agreement made, to be one, not only

having direct reference to Mrs. Patrick's separate estate, but made for its benefit. The object was to remove an existing incumbrance upon the property, and it was to accomplish this object that the services of the defendants were engaged. The fact that the loan was to be secured by a new mortgage upon the same property, affects the question but very little. She was to get rid of a mortgage debt then due and pressing, by substituting another therefor, to become due ten years thereafter.

Whether the separate estate would in fact be benefited by exchanging one mortgage for another, is not the test of liability. A married woman, to the extent of her power of disposition over her separate estate, may charge it with such engagement as she sees fit to make. If subjected to no imposition, a fact always to be determined in view of the relation she sustains to the parties to the transaction, in connection with its nature and subject-matter, she may charge the property to the extent she might bind herself at law, were she *sui juris*, unless in so doing she exceeds some limitation upon her power of disposition. Pollock on Contracts, 78. And that there is now no limitation upon her power to bind her estate to the discharge of liabilities created on account thereof, where the estate is acquired under the statute, will be shown hereafter.

The question now is, whether an intention upon the part of Mrs. Patrick, to charge her separate estate with payment for the services rendered, and money paid by defendants, for the benefit of such estate, will be implied from the character of the transaction and the nature of the engagement entered into. The principles announced in previous adjudications of this court require an affirmative answer to this question.

In *Graves v. Phillips*, 20 Ohio St. 371, it appeared that Mrs. Graves, owning a separate estate, had purchased a piano, and given her note therefor, and that the same was purchased for her separate use, and as her separate property. The court held that an intention to charge her separate estate with the payment of the note might be inferred from its execution. In *Avery v. Van Sickle*, 35 Ohio St. 270, it was held that where a married woman acquires the title to property by purchase, which by force of the statute becomes her separate estate, and executes a promissory note therefor, an implication arises, in the absence of proof showing a different understanding, that she thereby intended to charge her separate estate with its payment. And the circumstances that upon sale of the property so purchased, in proceedings in foreclosure, the proceeds were exhausted in the payment of prior liens thereon, did not effect the creditor's right to payment of the note out of the residue of her estate. So also, in *Williams v. Urmston*, 35 Ohio St. 298, we held that where a married woman, having a separate estate, executes a promissory note as surety for another, a presumption arises that she thereby intended to

charge such estate with its payment. The principle of the first two cases is clearly applicable to the present. The liability, in each, was incurred not only on account, but for the direct benefit, of the estate, and was therefore held to be a just charge upon it. "The test of liability," says Mr. Pollock, "would seem on principle to be, whether the transaction out of which the demand arises had reference to, or was for the benefit of the separate estate." Pollock on Contracts, 75.

Cases that deny the liability of the estate, where the wife becomes a surety, and does not expressly charge her estate with the payment of the debt, admit the liability where the engagement either has reference to the estate, or is for its benefit. *Yale v. Dederer*, 22 N. Y. 450; *Ballin v. Dillage*, 37 N. Y. 35; *Manhattan B. & M. Co. v. Thompson*, 58 N. Y. 81; *Williard v. Eastham*, 15 Gray 328.

It was said, in a late English case, by Lord Justice James, that "it would be very inconvenient that a married woman, with a large separate property, should not be able to employ a solicitor, or a surveyor, or a builder or tradesman, or hire laborers or servants, and very unjust, if she did, that they should have no remedy against such separate property." *London Chartered Bank of Australia v. Lempriere*, 4 P. C. (Law R.) 595.

Holding the separate estate of Mrs. Patrick liable to the defendants' demand, we are also of the opinion that a personal judgment against her was proper. Her obligation is one upon which, were she sole, she would be liable at law. It is a contract or obligation upon which, under section 28 of the Code, as amended March 30, 1874, she might have been sued alone; and being of that character, the statute requires the like judgment to be rendered and enforced, in all respects, as if she were unmarried. 71 Ohio Laws, 47. It was one of the objects of this section, as thus amended, to so far modify the disabilities of coverture, as to authorize a personal judgment to be rendered against a married woman, where such judgment would have been proper, had she remained unmarried.

This provision, as amended, wrought a radical change in the remedy as respects the character of the judgment to be rendered, as did the amendment of April 18, 1870, as to the extent of the property that might be reached to discharge the liability. Prior to the date at which a personal judgment was authorized, the decree, according to the English practice, and that of some of the states, was directed against the estate, declaring the separate estate vested in the wife at the date of the decree which it was within her power to dispose of, chargeable with the payment of the debt. *Picard v. Hine*, L. R., 5 Ch. App. 274; *Davies v. Jenkins*, L. R., 6 Ch. D. 730; *Collett v. Dickenson*, L. R. 11 Ch. D. 687; *Johnson v. Gallagher*, 3 De Gex, F. & J. 520; *Armstrong v. Ross*, 20 N. J. Eq. 109; see *Todd v. Lee*, 15 Wis. 365.

As there was no personal liability, no personal

judgment could be awarded, and the decree only reached property which it was within the wife's power to bind. But under the statute as amended, the same judgment is required, with the same process for its enforcement as would be awarded if the wife were sole; and, saving to her such exemptions as are provided for heads of families, her separate estate is made liable for any judgment rendered against her, to the same extent as would be the property or estate of her husband, for any judgment rendered against him. This subjects all her separate property and estate acquired or held under the act of 1861, and its amendments, with the exception named, to the payment of the debts chargeable upon it; and also all separate estate otherwise acquired, unless restrictions are laid on her power to charge the same by the instrument creating the estate. Before the amendment of 1870 it is doubtful whether the creditor could have reached more than the personal estate of the wife, with the rents and profits of her real estate arising upon a lease for the term for which the wife could have leased the same without the consent of the husband. But now the creditors are substantially let in upon the whole estate, and where there are no liens to adjust, and the wife holds the legal title to the property constituting her separate estate—in other words, where there are no equitable circumstances calling for the exercise of the equity power of the court—a personal judgment, to be collected by execution, would seem not only an appropriate remedy, but to be clearly authorized by the statute. The Married Woman's Property Act of England, of 1870, provided that "a husband shall not, by reason of any marriage which shall take place after this act shall come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts, as if she had continued unmarried." In giving construction to this provision in *Exp. Holland*, L. R., 9 Ch. App. 307, Lord Cairns said: "I think the meaning of the section is, that although the husband is not liable for the debts in question, the separate property of the wife is to be liable, and that for the purpose of reaching it she is to be subject to the ordinary process of law and equity." Section 28 of the Code, as amended in 1874, gives the same process, resort being had to the one that is appropriate to the case.

The objection that it does not sufficiently appear that the plaintiff in error owns a separate estate, is not well founded. The petition alleges, and the fact is not denied, that the contract sued on related to her separate estate, and was made for its benefit. The contract related to no other property than that therein described, to which, it was alleged, she held the legal title. It thus appears that the property to which the agreement

related was held by her for her separate use. Whether she had other property does not appear. Having a separate estate, the whole of it, subject to the exemptions provided for heads of families, was liable for the judgment. Judgment affirmed.

SUPREME COURT OF OHIO

BEAR v. KNOWLES.

1. In proceedings in error, under the civil code, to reverse a judgment, the court must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.

2. The refusal of a court, in which a civil action is pending, to sustain a motion to separately state and number several causes of action which may be united in one petition, is not an error for which the final judgment will be reversed, unless it appears that by such refusal the adverse party has been deprived of a substantial right.

Error to the District Court of Stark County.

Hannah Knowles, the plaintiff below, brought her action against the plaintiff in error, to recover for injuries to her person and to her means of support, by reason of the intoxication of her husband, Hiram Knowles, caused by the unlawful sale of liquor to him by defendant below.

The injury to her means of support is alleged to be caused by the intoxication, rendering him unable to perform his usual labor, whereby she was deprived of food, fuel, clothing, &c.

The injury to her person arose from his beating and ill-treating her while so intoxicated.

The defendant moved the court to compel the plaintiff to separately state and number her causes of action; and in argument claims that there are *two causes of action*; one for injury to her person, and one to her means of support.

This motion was overruled and the defendant excepted. He then answered to the merits, denying all the material allegations of the petition, except that she was the wife of Hiram Knowles.

The issue thus joined was tried by a jury, resulting in a verdict for the plaintiff.

To set aside this verdict the defendant filed a motion for a new trial, alleging that there were errors at law occurring at the trial, and that the verdict was contrary to the evidence; but no bill of exceptions was taken on the overruling of this motion.

The court rendered judgment on the verdict, and on error to the district court this judgment was affirmed.

To reverse this judgment this action is brought. S Meyer & Son and J. J. Parker, for plaintiff in error.

D. Fording and W. C. Pippitt, for defendant in error.

JOHNSON, J.

The record does not disclose any error occurring on the trial. The motion for a new trial was overruled, but no exception was taken by bill or otherwise. From this we are bound to

assume that no error intervened to the prejudice of the defendant.

Nor is it apparent how he could have been prejudiced by the refusal of the court to require the plaintiff to separately state and number her several causes of action.

For the purposes of this, we may assume that the petition states more than one cause of action. On this assumption, these causes should have been separately stated and numbered, and the court of common pleas erred in not sustaining the motion.

Will error lie to reverse the final judgment upon the merits for this assumed error?

We think not. It is true the code requires causes of action, which may be united in one petition, to be separately stated and numbered; but unless it appears that the adverse party has been deprived of some substantial right, by the action of the court, it must be regarded as formal merely, and not prejudicial.

The Code, section 138 (R. S. 5115), requires that "the court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

Here, there was a full trial upon the merits. So far as the record discloses, the plaintiff in error had the benefit of every legal right to which he would have been entitled had his motion been granted. Had he been deprived of any such right, it should have been made to appear by exceptions, made part of the record. If several causes of action, which cannot be joined, are stated in the petition, the vice can be reached by demurrer; but where they may be joined, but are not separately stated and numbered, the defect is a formal one, to be reached by motion, and for which a demurrer will not lie.

That cases may arise in practice where a failure to separately state and number the causes of action may work prejudice, is possible. In such a case, when error does intervene which deprives a party of a substantial right, and that fact is disclosed by the record, error would lie to reverse the judgment.

It does not appear in this case that the plaintiff was deprived of any substantial right by the refusal of the court of common pleas to grant the motion. If it was an error to overrule this motion (and upon that we express no opinion), it is one that must be disregarded by the requirements of section 138 of the Code of Practice.

In the New York Code, there is the same provision as in ours (§ 140), requiring the causes to be separately stated and numbered. In *Goldburge v. Utley*, 60 N. Y. 427, it was held that this section related simply to a question of practice, over which the court has control; that the right is merely formal, and not substantial; and that an order denying this right is not reviewable on error.

This is going farther than the case at bar requires us to go. We simply hold that a final

judgment will not be reversed for such an error, unless it appears of record that the refusal to grant the motion affected the substantial rights of the adverse party in a manner prejudicial to him on the merits. We have not undertaken to determine what unlawful sales of intoxicating liquors constitute one, and what several causes of action, which should be separately stated and numbered.

In deciding this case, we have taken the construction of the petition insisted on by plaintiff in error, that there are two causes of action, one for injury to means of support, and one to the person, which should have been separately stated and numbered.

Judgment affirmed.

[To appear in 36 O. S.]

SUPREME COURT OF OHIO

GEORGE H. PORTER

v.

HENRY WAGNER.

1. A judgment of dismissal of a petition for the specific performance of an agreement and of a counter-claim asking a rescission of the same, is no bar to an action for the recovery of money paid on the agreement, although the cause of action accrued before the rendition of the judgment.

2. Where a judgment between the parties is relied upon as an estoppel, the question is not what the court might have decided in the former action, but what it did in fact decide, as shown by the judgment.

3. A judgment is conclusive by way of estoppel only as to facts, without the proof or the admission of which it could not have been rendered.

Error to the District Court of Trumbull County.

The original action was brought by the plaintiff in error, George H. Porter, against the defendant in error, Henry Wagner. Porter and Wagner had entered into a written agreement whereby the latter agreed to sell and convey to the former certain real estate; and the petition avers that in consideration that the plaintiff, Porter, would release the defendant, Wagner, from the obligations of the contract, the defendant promised the plaintiff and undertook that the said contract should be rescinded, and that he would repay to the plaintiff the sum of \$1,000 which he had paid on the contract, and also the sum of \$10 taxes paid on the land. Judgment was asked for these sums.

Among other defenses, the defendant set up that the matter in controversy had been adjudicated in a former suit between the parties. This defense was controverted by reply.

On the trial it appeared that Wagner, the vendor, in the former suit, had filed a petition for the specific performance of the agreement for the sale of the real estate; and that Porter in his answer to the petition controverted the right of Wagner to have specific performance of the agreement, and charged him with numerous defaults under the agreement. Porter also charged that in consideration that he would release Wagner from the agreement of purchase, the latter promised to repay the \$1,000 paid on the agreement, and \$10 taxes paid by Porter.

The defendant prayed "that said contract may be declared rescinded, and the plaintiff ordered to repay said sum of money to respondent, with interest, and for other proper relief."

The answer was controverted by reply.

The following was the decree rendered in that suit:

"This cause came on for trial upon the issues joined and the testimony, and was submitted to the court for decision, and the court thereupon find that the plaintiff is not entitled to an order for the specific performance of said contract, and the defendant is not entitled to an order for the rescission of said contract, and do therefore order, adjudge and decree that said petition and counter-claim be dismissed, and that plaintiff pay all costs in this cause made before appeal, and that defendant pay all costs made since said appeal, and that execution issue to collect the same."

On the trial of the case now under review, the plaintiff asked the court to charge the jury as to the effect of the decree in the suit for specific performance, in substance, as follows: That the decree did not bar the plaintiff's right of action in this cause, if the jury should otherwise find the issues in favor of the plaintiff.

The court refused so to charge; but charged, in substance, that said decree was a conclusive bar to the right of the plaintiff to recover either on account of said alleged agreement to rescind said contract, or on account of said original contract and the breach thereof, if not rescinded.

To the refusal to charge as asked, and to the charge as given, the plaintiff excepted.

Verdict and judgment were for the defendant. On error, the judgment was affirmed by the district court. The present proceeding is instituted to reverse these judgments.

George M. Tuttle, for plaintiff in error.

H. H. Moses, for defendant in error.

WHITE, J.

The principle upon which the decision of this case turns was determined in *Cramer v. Moore*, decided at the present term, OHIO LAW JOURNAL, 502.

The question is not what the court might have decided in the former action between the parties; but what the court *did, in fact*, decide, as shown by the record. The court found that the plaintiff in that case, Wagner, was not entitled to an order for the specific performance of the contract, and that the defendant, Porter, was not entitled to an order for its rescission; and, as a consequence of these findings, it was adjudged that the petition and the counter-claim each be dismissed.

This left the *legal* rights of the parties under the contract, as distinguished from their *equitable* rights, unaffected by the judgment.

The system of pleading under the code does not affect the question. Since the adoption of the code as well as before, the question in each case is, what was adjudicated in the for-

mer suit. In answering this question, reference must be had, of course, to the pleadings as well as to the judgment or decree.

If the court had decreed specific performance, the money paid by the purchaser would have been credited to him in taking the account with the vendor; or, on the other hand, if the contract had been canceled, he would have been compensated for the money he had paid in performance of the contract. The court, however, did neither, but refused to interfere, and left both parties to their strict legal rights.

The refusal of the court to rescind the contract is not inconsistent with the alleged promise of the vendor to refund the money paid, in consideration of his release from the contract.

That may have been the ground upon which the court refused to declare a rescission; but, whether so or not, such refusal does not negative the existence of such agreement to refund.

A judgment is conclusive by way of estoppel only as to facts, without the proof or admission of which it could not have been rendered. *Burlen v. Shannon*, 99 Mass. 200; *Lea v. Lea*, Id. 493.

Judgment of the district court and that of the common pleas reversed, and cause remanded to the court last named for a new trial.

[This case will appear in 36 O. S.]

SUPREME COURT OF OHIO

SAMUEL DAVIS

v.

CITY OF CINCINNATI.

In an action under section 626 of the Municipal Code (66 Ohio L. 254), to enforce an assessment for the construction of a sewer, it is error, where the proper defense is made, to render a personal judgment against one in possession of the property assessed, but having no other interest therein than as lessee for a term of ten years; he is not an "owner" within the meaning of that section; and it will make no difference, in such action, that the lease provides for the payment by the lessee of all assessments upon the property.

Error to the District Court of Hamilton County.

On February 1, 1882, George H. Pendleton, Elliot H. Pendleton, Martha L. Dandridge, and Anna C. Schech, being the owners in fee of certain premises, situated on Court street and Gilbert avenue, in the city of Cincinnati, executed a lease for the same to Samuel Davis, Jr., for the term of ten years, at a rent of \$600 a year, payable quarterly, and placed him in possession. It was stipulated in the lease that Davis should pay all taxes, charges and assessments of every kind, which were or thereafter should be assessed, taxed, charged and levied on the premises or any part thereof, or which should in any manner depend upon or grow out of the said lease, during the term therein granted. At the expiration of the term, February 1, 1872, Davis continued in possession of the premises, holding over under a verbal agreement with the owners in fee to give him another term of ten years upon the same terms and conditions as those con-

tained in the written lease. He remained in possession until judgment was rendered in this case, as hereinafter mentioned, and for aught that appears is still in possession.

On May 8, 1872, proceedings were commenced in the common council of the city of Cincinnati, with a view to the construction of sewers in certain streets, among others in that part of Court street upon which the property in question abuts. That sewer was constructed by J. B. H. Nolte, under a contract with the city made January 26, 1874, and an assessment by the frontage, amounting to \$739.82, was, on June 12, 1874, levied on the property in question.

The assessment not having been paid, the city, suing for Nolte, brought suit in the court of common pleas, on February 2, 1875, against Davis and the owners of the fee, to recover the same, asking in the petition a personal judgment against them and an order for the sale of the premises. Davis denied that he was the owner of the premises, and claimed that he was not liable to a personal judgment. The cause was submitted to the court, and on request the facts and conclusions of law were found. The facts so found were substantially as above set forth, and judgment was rendered against Davis for \$840.21, the amount of the assessment, penalty and interest, and the property assessed was ordered to be sold to satisfy the amount so found to be due. The court further found that the owners in fee were not liable to a personal judgment. On error, prosecuted by Davis, the district court affirmed the judgment, and this petition in error was filed by him to reverse the judgment of affirmation.

E. A. Ferguson, for plaintiff in error:

McGuffey, Morrill & Strunk for the city, and Paxton & Warrington, and F. K. Pendleton, for the owners in fee.

OKEY, J.

The single question is whether Davis was liable to personal judgment for the assessment. The chapter on sewers in the municipal code (66 Ohio L. 149, §§ 612, 614), provided, among other modes for assessing the cost and expense of constructing main and local sewers, that it might be done according to frontage.

Section 629 of the same chapter was as follows: "All assessments made under the provisions of this chapter shall be a lien on the lots or lands assessed. They shall be transferable, and may be collected against the owner personally, or by enforcement of the lien upon the property subject thereto."

The "owner" referred to in section 626 must, as a general rule, be one having a freehold estate in the premises assessed. Perhaps exceptions to the rule exist. See Rev. Stats. §§ 2783, 4181. The term "owner" does not, as a general rule, include the holders of chattels real. The assessment is on land, and it is an owner of land who is liable to the personal judgment. We are clear that the term "owner" does not include one having no other interest than as a lessee for a term of ten years. Any other construction would lead to absurd consequences. A tenant holding for a month might be personally bound for permanent public improvements of the most expensive character.

Where a party is personally liable for an assessment, his liability is precisely commensurate with the lien upon the property. The only express exception to the rule that such party must be the owner of the fee, is found in section 541 of the municipal code, which, as amended in 1870 (67 Ohio L. 80), is as follows: "Where a special as-

assessment is made on real estate subject to a life estate, such assessment shall be payable by the tenant for life; but upon application of said life tenant to a court of proper jurisdiction, by action against the owners of the estate in fee, such court may apportion the cost of said assessment between said tenant for life and owner in fee, in proportion to the relative value of said improvement to their estates respectively, to be ascertained and determined by said court on principles of equity." Other exceptions to the rule may exist, as already indicated.

But it was urged that here was a lease in which Davis expressly bound himself to pay all assessments, and that this lease had been renewed, so that it was in full force when the improvement was projected, and when the assessment became a lien upon the property; and that, in order to prevent circuity of action, a suit may be maintained by the city directly against Davis. But the liability to a personal judgment for an assessment of this character is statutory; such liability is confined to the owner of the property, and Davis, as we have seen, is not such owner.

We express no opinion upon the question whether, by force of the parol agreement between the owners of the fee and Davis, the liability of the latter to pay assessments did or did not continue after February 1, 1872. But assuming that it continued to be, in all respects, the same that it had been during the preceding ten years, still the agreement between the parties cannot be considered in this statutory action. Whatever liability from Davis to the owners of the fee may exist, is a matter entirely between themselves, and with which the city and Nolte have no concern.

The judgment against Davis will be reversed, and the order of sale will be affirmed.

Judgment accordingly.

UNITED STATES SUPREME COURT

THOMPSON v. UNITED STATES EX REL. CAMBRIA IRON COMPANY.

APRIL 18, 1881.

Proceedings in mandamus against a municipal officer to compel the performance of an official duty do not abate by the expiration of the office of the defendant, when there is a continuing duty irrespective of the incumbent, and the proceedings are undertaken to enforce an obligation of the corporation or municipality to which the office is attached.

In error to the Circuit Court of the United States for the Western District of Michigan. The opinion states the case.

BRADLEY, J.

This case arises upon a petition for a mandamus to compel Thompson, the township clerk of the township of Lincoln, in the county of Berrien, State of Michigan, to make and deliver to the supervisor of the township a certified copy of a judgment recovered against it by the Cambria Iron Company, the petitioners, in order to its being placed upon the tax-roll for collection and payment. The questions arising are much the same as those disposed of in the case of *Edwards v. United States*, reported. The petition states that the Cambria Iron Company recovered judgment against the township of Lincoln, in the Circuit Court of the United States, on the 29th of May, 1876, for the sum of \$6,273.32, besides costs, and caused to be delivered a certi-

fied copy thereof to Thompson, the township clerk, with a request to certify it to the supervisor, to be raised by tax on the township; but that Thompson declared that he would not do it, and pretended that there was no supervisor; that one Mitchell Spillman, who had been supervisor, had resigned; and that if there were any supervisor, still he would not do it; that he himself had resigned, and was not clerk of the township; that the supervisor and himself had both resigned for the express purpose of defeating the collection of petitioner's judgment, and other similar claims. The petition charges that the said supervisor and clerk have fraudulently combined to cheat and defraud the petitioners by falsely pretending to resign, whereas they actually continue to discharge the duties of their offices—setting forth various facts corroborative of the charge.

The court below having granted a rule to show cause why a mandamus as prayed for should not issue, the defendant filed an answer to the petition admitting that a judgment had been entered against the township, as stated in the petition, but averring that it was not a valid judgment, because, as the answer alleged, the court never obtained jurisdiction; that no service was ever had of process in the cause upon the supervisor of the township; that Alonzo D. Brown, upon whom service was made, was not at the time supervisor; and that although one Clapp, an attorney, appeared for the township, he was never employed by the township; that the defendant was, it is true, duly elected clerk of the township in April, 1876, but that he resigned his office before the certified copy of the judgment was served upon him, by filing in the office of clerk [that is, his own office] and depositing with the files of the township a written resignation addressed to the township board; and that he has not acted as clerk since. He admits that he refused to certify the judgment, but did so because he was not clerk, and because there was no supervisor, Spillman, who had been supervisor, having resigned. This answer was demurred to, but the demurrer was overruled and the cause came on for trial. The jury rendered a special verdict, as follows:

"First. That on the 23d day of November, 1875, Alonzo Brown, upon whom the declaration was served in the original case of *The Cambria Iron Company v. The Township of Lincoln*, was supervisor of said township of Lincoln, and was such supervisor at the time the declaration in said cause was served upon him as such supervisor by the marshal.

"Second. That George S. Clapp, who entered his appearance as attorney for the defendant in said cause and appeared and pleaded therein for said township of Lincoln, was duly authorized by said defendant to appear and plead for it in said cause.

"Third. That the respondent, John F. B. Thompson, was, at the time of the service of the order to show cause in this, why a mandamus should not issue against him, clerk of the said

township of Lincoln, and still is such clerk, and has not resigned the said office.

"Fourth. That Mitchell Spillman was, at the time the said order to show cause was served, the supervisor of said township, and still holds the said office, and held the said office on October 1st, A. D. 1876."

The questions raised on the trial were, as in the previous case of Edwards, whether the tender of a resignation by a supervisor or clerk of a township, by filing the same with the clerk, was valid and effectual as a resignation, so as to discharge the officer of his official character, without an acceptance by the township board, or an appointment to fill the vacancy. Such a resignation was relied on to show that Brown, on whom process in the original action was served, was not supervisor, and that Spillman was not supervisor, and the defendant was not clerk when the present proceedings were commenced. As we have fully discussed this question in the previous case, it is not necessary to say anything further on the subject. The ruling of the court below was in conformity with our decision in that case. This also disposes of the question of the appearance of Clapp, the attorney in the original action, he having been employed by Brown, the supervisor.

Another question raised at the trial was whether the petitioner might show the motive and intent with which the supervisor and clerk attempted to resign, with a view to show that it was done for the purpose of defrauding the petitioners, and avoiding to do those acts which are necessary to the collection of his judgment. The court allowed evidence to be given on the subject, and to this the defendant excepted. We do not see why the evidence was not admissible for the purpose of showing that the attempted resignation was simulated and fraudulent. But it is not necessary to decide this point, since the admission of the testimony did not injure the defendant, because the attempted resignations were not completed by the acceptance of the township committee.

Another point raised was that it appeared by the township book, offered in evidence, that the township board did appoint a successor to the defendant as township clerk on the 4th day of November, 1876, after the cause was at issue. On motion of the petitioner's counsel this evidence was stricken out, for the reason that such fact having arisen since the return was made, it was not competent under the issue framed thereon. It does not appear that this matter was in any way brought to the notice of the court, or sought to be put in issue, until the evidence was offered during the trial. In addition to this, the evidence was not conclusive. It did not show that the attempted appointment was effectual. Had the point been properly put at issue the whole matter could have been known. We think the court was justified in striking out the evidence. As a matter of defense, whether in abatement or in bar, it should have been set up by a plea *quis darrein contigu-*

ance, or its equivalent. It could not be given in evidence under any of the issues in the cause. *Jackson v. Rich*, 7 Johns. 194; *Jackson v. McCall*, 3 Cow. 79.

But we cannot accede to the proposition that proceedings in mandamus abate by expiration of office of the defendant where, as in this case, there is a continuing duty irrespective of the incumbent, and the proceeding is undertaken to enforce an obligation of the corporation or municipality to which the office is attached. The contrary has been held by very high authority. *People v. Champion*, 16 Johns. 61; *People v. Collins*, 19 Wend. 56; *High on Extr. Rem.* § 38. We have had before us many cases in which the writ has, without objection, been directed to the corporation itself, instead of the officers individually; and yet in case of disobedience to the peremptory mandamus, there is no doubt that the officers by whose delinquency it was incurred would have been liable to attachment for contempt. The proceedings may be commenced with one set of officers and terminate with another, the latter being bound by the judgment. *Bd. Commissioners v. Knox Co.*, 24 How. 376; *Supervisors v. United States*, 4 Wall. 435; *Von Hoffman v. Quincy*, id. 535; *Benbow v. Iowa City*, 7 id. 313; *Butz v. City of Muscatine*, 8 id. 575; *Mayor v. Lord*, 9 id. 409; *Commissioners v. Sellew*, 99 U. S. 626; and many others.

And so, if we regard the substance and not the mere form of things, a proceeding like the present, instituted against a township clerk, as a step in the enforcement of a township duty to levy the amount of a judgment against it, ought not to abate by the expiration of the particular clerk's term of office, but ought to proceed to final judgment, so as to compel his successor in office to do the duty required of him in order to obtain satisfaction from the township. The whole proceeding is really and in substance a proceeding against the township, as much as if it were named, and is in the nature and place of an execution. If the resignation of the officer should involve an abatement, we would always have the unseemly spectacle of constant resignations and re-appointments to avoid the effect of the suit. Where the proceeding is in substance, as it is here, a proceeding against the corporation itself, there is no sense nor reason in allowing it to abate by the change of individuals in the office. The writ might be directed to the township clerk by his official designation, and will not be deprived of its efficacy by inserting his individual name. The remarks of Mr. Justice Cowen, in *People v. Collins*, 19 Wend. 68, are very pertinent to the case and seem to us sound. That was a mandamus to commissioners of highways who were elected annually; and it was objected that their term would expire before the proceedings could be brought to a conclusion. Justice Cowen said: "The obligation sought to be enforced devolves on no particular set of commissioners, and no right is in question which will expire with the year. The duty is perpetual upon the present commissioners and

their successors; and the peremptory writ may be directed to and enforced upon the commissioners of the town generally. To say otherwise would be a sacrifice of substance to form." In this connection we may also refer to the recent case of *Commissioners v. Sellev, 99 U. S. 626*.

The case in which it has been held by this court that an abatement takes place by the expiration of the term of office have been those of officers of the government, whose alleged delinquency was personal, and did not involve any charge against the government whose officers they were. A proceeding against the government would not lie. *Secretary v. McGarrahan, 9 Wall. 298; United States v. Boutwell, 7 id. 604*.

We think that the proceedings have not abated either by the resignation of the clerk and the appointment of a successor, or by the expiration of his term of office, even if it sufficiently appeared that either of these contingencies had occurred.

The judgment of the Circuit Court is affirmed.

A GREAT LAWYER.

A truly great lawyer is one of the highest products of civilization. He is a master of the science of human experience. He sells his clients the result of that experience, and is thus the merchant of wisdom. The labors of many generations of legislators and judges enrich his stores. His learning is sufficient to enable him to realize the comparative littleness of all human achievements. He has outlived the ambition of display before courts and juries. He loves justice, law and peace.

He has learned to bear criticism without irritation, censure without anger, and calumny without retaliation. He has learned how surely all schemes of evil bring disaster to those who support them; and that the granite shaft of a noble reputation can not be destroyed by the poisoned breath of slander.

A great lawyer will not do a mean thing for money. He hates vice, and delights to stand forth a conquering champion of virtue. The good opinions of the just are precious in his esteem; but neither love of friends nor fear of foes can swerve him from the path of duty.

He esteems his office of counsellor as higher than political place or scholastic distinction. He detests unnecessary litigation, and delights in averting danger and restoring peace by wise counsel and skillful plans. The good works of the counsel-room are sweeter to him than the glories of the forum. He proves that honesty is the best policy; and that peace pays both lawyer and client, better than controversy.

In a legal contest, he will give his client the benefit of the best presentation of whatever points of fact, or of law, that may be in his power; but he will neither pervert the law, nor falsify the facts to defeat an adversary. The motto of his battle-flag is: Fidelity to the law and the facts—*semper fidelis*.

The splendor of his intellectual attainments,

and the beauty of his moral character, like the white robes of righteousness, cover all defects of person, voice and manner.

Governments, corporations, merchants, manufacturers, and producers apply to him for guidance. It is his business to know the principles which govern their various affairs, and the rules under which disaster may be avoided and success attained. He studies thousands of cases which illustrate and declare the ways of prosperity in business, and the secret causes of calamity therein. The results of these cases are stated in the opinions of courts, and they are reliable, because every step thereto has been contested by counsel and subjected to judgment.

It is pleasanter, easier, and cheaper to buy the result of experience from a competent lawyer, than to arrive at the like results by suffering the experience.

A great lawyer knows the nature and limits of power, and defends the rights of persons and of property against its encroachments. The courts listen to him with pleasure, for they know he will illuminate the subject of discussion with learning, reason and authority, even if he fail to convince them that the particular judgment he asks ought to be given.

His associates regard him with affectionate esteem, for he seeks to deprive no one of his just honors or rewards. His dignity requires no stilts to uphold it; and his stores of learning and courtesy are so ample, that, though always giving, he has always enough and to spare.

It is estimated that, year by year, the counsel of a good lawyer will decrease the dangers of failure more than fifty per cent., and largely add to the profits of any commercial or manufacturing business.

He takes the client's place, free from the bias of the self-interest that so often blinds the business man to the approach of peril.

Seeking fame and fortune chiefly by wise counsel to business men, the great lawyer will incidentally win distinction and the reward of toil, by consummate ability in the conduct of causes before the courts. A statesman in the counsel-room, he becomes a general in the forum, and delights the observer with displays of the magnificent art of war. When war is inevitable, he remembers that the truest mercy is to make it in earnest; and he tries the case that must be litigated, so that a thousand may be settled by its results. This is why the public bears so large a share of the expenses of judicial proceedings, and why litigation is so expensive to the client and relatively so unprofitable to the lawyer. The public has the benefit of the contest. The client pays too much for the result. The lawyer receives too little for his time, labor, and learning. It is in his office that his golden opinions bring the amplest golden rewards, to the equal satisfaction of himself and of his patrons. Both are spared the delays, the vexations, and the expenses of a course through the courts.

As a general rule, controversies should be settled under the direction of lawyers. It is only

as an exception that they should go to the courts. There will be litigation enough from the perversity of parties in some cases, and the inherent difficulty of the case in others; and, unless it be manifest that efforts at amicable adjustment will be fruitless, the lawyer should try to effect a settlement. And the client should be as willing to pay for the results of a litigation, without the litigation, as for the same results burdened by delay, vexation, and increased expenses. Thus the true interest of the client is the true interest of the lawyer, and peace-making better than strife.

If it be said that such lawyers as are here described are not abundant, it may be replied that the supply is probably equal to the demand; and that the profession will doubtless conform to this ideal as rapidly as the community may require. But the number of really good lawyers is very great; and, if sought for, they are easily found. Scarcely any community is without them, and the fidelity of the profession, as a whole, to the trusts committed to its charge, is one of its crowning distinctions. It has its vagabonds and imposters, like other callings, but they are more easily known and shunned than those of almost any other pursuit. It is not a difficult matter to learn the legal, moral and social character of any member of the profession; and, if one choose to patronize a mock-auction, he should not complain of the wares he is sure to receive there.

The architects of civil government must necessarily be lawyers. Untrained hands can no more draw constitutions, statutes and ordinances, than build ships, or erect temples. It is the work of the lawyer, in the higher walks of the profession, to discover, to invent, preserve, fortify, defend, and vindicate the best means of securing "life, liberty, and the pursuit of happiness." Could any calling be more beneficial to the community, or more honorable to those who follow it faithfully?

Unfortunately, there are members of the legal profession who are not lawyers. One may be familiar with law-books, may practice law, and even act as judge, and still not be a lawyer in the true sense of the term. With ordinary talent and industry, one may follow law as a trade with a fair measure of apparent success. With great intellectual and moral endowments, and a natural taste for jurisprudence, as the science of human affairs, he may, by prodigious labor and the blessing of Providence, become an eminent lawyer.

The gift of eloquence is as dangerous to a lawyer as that of beauty is to a woman. It tempts its possessor to build his house upon the sand of a mere accomplishment, instead of the enduring rock of an informed and cultivated judgment. But, as great merit and beauty are sometimes found united in the same person, so, also, are brilliant eloquence and equal intellectual power.

The highest type of lawyer must be, in the truest sense, a Christian gentleman. How shall he understand the spirit of the law, if he learn

it not at the feet of the Supreme Law-giver? How shall he advise the tribunals of justice, if he learn not wisdom of Him who alone is perfectly just? How shall he counsel concession to avoid controversy, if he be not taught by the Divine Counsellor, who is the Prince of Peace? Such a lawyer thrives, not on the misfortunes, but on the prosperity, of his fellow-men. His fortune increases with their success. They rely upon his judgment with confidence, and on his fidelity without fear.

Officers of the judicial courts, counsellors of the highest human tribunals, sworn upholders of the Constitution and the laws, and defenders of private and public rights, ministers of justice and equity, the character and conduct of lawyers can never be a matter of indifference to the public mind.

Intimately connected with the administration of the Government and largely concerned in all that constitutes the greatness of the Nation, the virtues of the legal profession and the honors of the leaders of the Bar are inseparable from the national fame.

If such a lawyer be elevated to the bench, his virtues shine with a brighter luster, and his labors are crowned with higher and more far-reaching results. He discerns the soul of justice in the forms of law; penetrates the disguises of wrong; and so applies the legal principles applicable to the case, as best to repress the evil and promote the right. Before his judgment-seat the law is a living science, keeping pace with the advance of civilization, and adapting itself, with wondrous flexibility, to new conditions as they arise. The fetters of obsolete forms are powerless to bind the arms of Justice where he presides. He claims no authority to create new rights, but, in the recognition and enforcement of rights otherwise conferred, he magnifies his lofty office, and sits in judgment, the terror of the evil-doer and the friend of the oppressed. The student who ponders the opinions of such a judge learns the meaning of the maxim: "Jurisprudence is the science of justice."

CHARLES C. BONNEY,
Chicago, Ill.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

HENRY R. ALLERTON

v.

CITY OF CHICAGO AND CHICAGO CITY RAILWAY CO.

The police power is inherent in a municipal corporation, and cannot be transferred.

Power to "regulate the management" of a business includes the power to require a license for carrying it on.

Under a statute authorizing a city to license hackmen, omnibus drivers, "and others pursuing like occupations," the city has the power to require street railway companies to take out licenses for their cars.

The distinction between the taxing and the police power discussed by DRUMMOND, J.

On demurrer to bill in equity.

The council of the city of Chicago passed an ordinance requiring the companies which ope-

rated street cars for the conveyance of passengers upon any lines of horse or city railway within the city of Chicago, to obtain a license in the month of April, of each year, and pay for the same the sum of fifty dollars for each car operated or run. A penalty was imposed for failing or refusing to take out a license. The company obtaining the license was required to place conspicuously in every car so operated and run in the city, a certificate signed by the city clerk, and giving the number of the car, and stating that a license had been obtained, and that the necessary fee had been paid; and a penalty was also imposed for a failure to post or keep such certificate in the car.

The plaintiff, a stockholder in the Chicago City Railway Company, filed this bill to enjoin the payment of the license fee required by the ordinance. The defendants demurred.

DRUMMOND, J.

The only question in the case is, whether the ordinance in question is valid. Several corporations operating street cars in the city of Chicago, have been authorized to construct their railways and operate them, by various ordinances which have been from time to time passed; and these ordinances have been recognized and affirmed, many of them by the legislature of the state. By virtue of these ordinances and acts of the legislature, the companies have the right to run their cars for the transit of passengers through the city. It cannot be said, therefore, that the effect of the ordinance which has been specially referred to, although it is called a license, would be to give the companies the privilege of running their cars. That, they have by virtue of the ordinance and the acts of the legislature. There can be no doubt that the legislature would have the right, under the Constitution of 1848, which was in force when the franchise was granted, to tax the corporations for the use of their franchise. That is a tax which is entirely independent of the value of the cars, tracks and other tangible property of the corporations, and so treated by the Constitutions of 1848 and 1870. But there are many difficulties with this branch of the subject. There are certain conditions required by the Constitution of 1870 as prerequisites to the imposition of a tax of this kind, even conceding that the legislature has authorized the city to impose the tax, and I, therefore, without giving any decided opinion upon that part of the case, prefer to place my decision upon another ground, and to sustain the ordinance as a regulation of the police power of the city. This is always a subsisting power which it is generally held cannot be transferred by the city, but is inherent in its municipal organization. There can be no controversy about the power of the city over many things connected with the operation of the city railways. Admitting that because of the price of fare agreed upon there can be no change in that, yet by virtue of its police power, the city can, to a great extent, regulate the running of the cars, prescribe rules and laws as to stopping and other things connected with

the operation of the railway. This has not been questioned by the counsel of the plaintiff; but it is claimed this cannot be considered a police regulation, because it is manifestly the exercise of the taxing power of the city. It is argued that the price of the license is so large that the intent is manifest. It is very difficult to lay down any absolute rule upon this subject, and to hold that a particular sum may be within the police power of the city, and another sum beyond the power, and a mere tax.

By the general law of 1872, for the incorporation of cities and villages in this state, it is provided that the city council in cities shall have authority to license hackmen, draymen, omnibus drivers, cabmen, expressmen, and all others pursuing like occupations, and to prescribe their compensation. This was obviously intended as conferring a police power upon the city council in relation to the various classes named in the statute. This is a power that has been uniformly exercised, and construing the statute literally, cannot well be questioned. But it is claimed that it does not include the street railway, because it is not pursuing an occupation like any of those named.

Omnibuses may be licensed. They may pass over even the same streets as those occupied by the horse railways, and they may carry passengers in the same manner. The only distinction which can be called substantial between the two classes of occupation, is that one carriage goes upon iron rails, in a regular track, with wheels, and the other carriage goes with wheels upon the ordinary street way.

The Supreme Court of Pennsylvania has held that these street railway carriages are of a like nature as omnibuses, and there can be no doubt, I think, of the right of the city to demand a license from all omnibus drivers, and to include every omnibus which may belong to a particular company or corporation, and to require the payment of a license for such omnibus that may be so owned and used.

The Court of Appeals of New York, in the case of *Mayor v. Second Avenue Railroad*, 32 N. Y. 261, held that an ordinance of the city of New York, in many respects like this, was invalid, as an attempt, through color of a license, to impose a tax upon the railroad company, refusing to treat it as an exercise of the police power of the city. The price charged in that case for the license was the same as in this.

In the case of *Frankford & Philadelphia Passenger Co. v. City of Philadelphia*, 58 Penn. St. 119, where the license fee was the same, and *Johnson v. Philadelphia*, 60 Penn. St. 445, the Supreme Court of Pennsylvania took a different view of such an ordinance, and treated it as a police regulation merely; and such seems to be the view of the Supreme Court of this state, in the case of the *Chicago Packing & Provision Co. v. City of Chicago*, 88 Ill. 221.

In the case of *Frankford & Philadelphia Passenger Co. v. City of Philadelphia*, the city obtained its power to impose the license from a

statute substantially similar to that under which the city of Chicago claims the power in this case. In that case the Act of the legislature declared that the City Council of Philadelphia should have authority to provide for the proper regulation of omnibuses, or vehicles in the nature thereof, and to this end "it shall be lawful for the council to provide for the issuing of licenses to such and so many persons as may apply to keep and use omnibuses, or vehicles in the nature thereof, and to charge a reasonable annual or other sum therefor." In that statute, the words "vehicles in the nature thereof;" in this, the words "pursuing a like occupation" are used. I cannot see that there is any substantial distinction in that respect between the two statutes.

In the case in 88 Illinois, already referred to, the corporation was organized and doing business under the laws of this state. A question arose in that case as to the power of the city to issue a license. It was denied, in the argument of the case, that the power existed, but the Supreme Court held that under the power "to regulate the management" of the business, the city had the right to issue a license, and to prescribe the compensation. That was also under the same law, the Act of 1872, which conferred power upon cities to grant licenses, and regulate omnibus drivers, and all others pursuing a like occupation, and to prescribe their compensation. The Supreme Court of this state decides in that case that the power to require a license is one of the means of regulating the exercise of a pursuit or business; that there are other means that might be adopted to accomplish the purpose, but that these municipal authorities are not restricted as to the means that they shall employ to regulate the business; and various authorities are cited by the court in support of the view which they take; and they repeat the ruling which had been previously made that a license was not, in the constitutional sense of the term, a tax.

The Supreme Court must also have considered and passed upon a question which has been discussed in this case, namely: whether or not the act which gave the authority to the city to license, was a general law under the constitution of this state; and they held that it was, and that it was intended to apply to all cities which might adopt it.

It is true that was a case of licensing a business which was generally admitted to be injurious in its character to those near the place where it was carried on; but it was a question of power, and the point in controversy was whether the city of Chicago had the right to exercise the power of licensing. The license fee demanded in that case was one hundred dollars. It seems to me that the question involved in this case arose substantially in that, and it was decided by the Supreme Court of the state that it was a valid exercise of the power to regulate a particular business. That is also the view taken by the Supreme Court of Pennsylvania in the cases referred to.

In view of these decisions and of several de-

cisions of the Supreme Court of the United States within the last few years (*Munn v. Illinois*, 94 U. S. 113, and others), I think the weight of authority is in favor of regarding this as a police regulation.

One of the difficulties I have had with the case, has been whether it ought not to be regarded as a tax for revenue under the form of a license. It may be conceded that the argument is strong for treating it as a revenue measure; but as I before stated, there are some objections which I consider very weighty, and which would prevent me at this time from placing the decision on that ground. It may be admitted that, viewing it as a police regulation requiring the payment of a fee for the license, in amount it goes to the very verge of the exercise of police power; but as other courts have held that such a tax did not exceed that limit, I cannot hold that it does in this case; and, therefore, I shall, as at present advised, sustain the ordinance in question as a valid exercise of the police power of the city council.

There have been some arguments used by counsel which, I think do not properly apply to the pleadings. It is insisted that the court must construe this as a tax, and not a mere police regulation. It is admitted that the Court of Appeals of New York did construe a similar license fee as a tax. The Supreme Court of Pennsylvania has given a different construction, and held it to be a police regulation. There is nothing in the bill by which the court can regard it absolutely as the exercise of the taxing power of the city. There is nothing in the bill which would authorize the court to hold, if it were a tax, that it was in violation of the Constitution of 1870, as not being uniform upon the particular class on which it operates. It is urged that it cannot be treated as a tax, because, if so, it would not be within this requisition of the Constitution of 1870, because the street railways come in direct competition with some of the steam railways; as that of the Illinois Central and the North-Western to Hyde Park and Evanston. There is nothing in the pleadings which would warrant the court in considering these facts, unless the court should take judicial notice that they do thus come in competition, without any allegation in the pleadings. Under the authorities, and upon the statements contained in the pleadings, the court cannot necessarily construe this as a tax. The court is at liberty, I think, to construe it as a police regulation.

These views have been given for the purpose of enabling the parties, if they desire, to take the case to the Supreme Court of the United States. The District Judge who heard the application for an injunction in the first instance, and granted it, is inclined to hold, as I understand, that this was not the proper exercise of the police power. I hold, for the purpose of deciding the case, that it is; and if the case is to be determined by the pleadings as they at present stand, it can be certified up to the Supreme Court as upon a division of opinion between the judges. If, however, the counsel desire to raise some of

the questions which have been discussed in the argument, I think it would be advisable for them to amend the bill, and if they wish, leave will be granted for that purpose.

SUPREME COURT OF PENNSYLVANIA.

MIZNER v. SPIER.

January 3d, 1881.

An endorsement made upon a note at its date, as follows: "I guarantee the payment of the within note for value received," is a guaranty, and not an original undertaking.

Error to the Court of Common Pleas of Mercer County.

GORDON, J.

The learned judge who tried this case, whilst admitting that his ruling on the facts was wrong, yet refused a new trial, because, as he thought, the writing under consideration being in fact an original undertaking, and not as upon its face what it purported to be, a guaranty, a retrial would but result in a verdict the same as that already rendered. Whilst we grant that the arguments leading to this conclusion are not without plausibility, yet upon a careful review of the authorities, we have been led to a different opinion. The undertaking in controversy was appended to three several judgment notes, drawn by M. R. Kerney, H. Montgomery, and Wm. Corll, to Seth Spier, plaintiff, and reads as follows: "I guarantee the payment of the within note, for value received. L. H. Mizner." Without doubt this is technically a guaranty, and unless there is in the case something which we have failed to discover, by which its legal meaning is altered, it must be so treated. In *Isett v. Hoge*, 2 Watts, 128, an undertaking of a like character was held to be a guaranty. The similarity of this case with the one in hand, will be apparent when the two agreements are compared. The one is, "I do hereby guarantee the payment of the above note to said Henry Isett;" the other, "I guarantee the payment of the within note for value received." Thus, though there is between these two contracts a slight verbal difference, their legal effect and meaning are precisely the same. To attempt to distinguish these two cases would be idle, and unless we overrule *Isett v. Hoge*, it must govern. But, as we would, for its overruling, be supported neither by authority or reason, we must permit it to stand, and under its authority, hold that Mizner's undertaking was an agreement to pay only in case of the insolvency of the makers, or after due diligence had been used to collect the notes from them.

Nor do we discover anything in the authorities cited for the plaintiff, which, in any degree, impugns the doctrine of *Isett v. Hoge*. In *Armsbaugh v. Gearhart*, 1 Jo. 482, the agreement was, "I will see the within paid." There is in this nothing more or less than an unconditional promise to pay the obligation when due, if for any reason the payer is in default. It is a contract of suretyship and not of guaranty. So in

Campbell v. Baker, 10 Wright, 243, though the word guaranty was used, yet as the guaranty was to pay "when due," the undertaking obviously had reference to the liquidation of the note at the time specified, and not to the solvency of the maker. A like case is *Roberts v. Riddle*, 29 P. F. S. 468, where the guaranty was to pay the bond "according to its term," and as one of its terms of course was its payment when due, the undertaking was, in effect, not different from that in *Campbell v. Baker*. Some stress seems to be laid on the fact that the guaranty in the case in hand, was made at the time of the execution of the note, this, however, affects not the character of the contract, but only the consideration by which it is supported. As was said in *Snively v. Johnson*, 1 W. & S. 309, where the guaranty is made at the same time with the principal contract, it becomes an essential ground of the credit given to the debtor, and supports both the promise of the debtor and of the guarantor. On this point this case is authority, but not so when used to support the main proposition of the plaintiff. The words of the contract expressed a warranty, and by all parties the case was treated as one of warranty; the insolvency of the maker was proved by the plaintiff as a prerequisite to his recovery, and the only question was that of consideration, which was settled as above stated.

The disposition of this point leaves nothing further for us to say, except that the defendant's fourth and fifth points should have been affirmed without qualification. If it was true that the principal debtors, or any of them, residing within the county of Mercer, or, for that matter, within the State of Pennsylvania, were solvent when the notes fell due, it was the duty of the plaintiff to have used proper diligence in the collection of these claims, and, failing in this, the guarantor was discharged. Mizner's assent to the stay of the executions of 1874, was of no force, if at that time Montgomery was insolvent, for in such case, the attempt to make the money on them would be fruitless, and if he was already released from his undertaking, there would be in this no such new consideration as would serve to re-bind him. But if at that time Montgomery was solvent, able to pay the notes, in whole or in part, the stay, if given at Mizner's instance, would be consideration enough to re-bind him to his original contract, or, what comes to the same thing, to estop him from setting up the previous negligence of the plaintiff, by way of defense.

The judgment is reversed and a new venire ordered.

THE SUBJECTION OF THE STATE TO LAW

The statement that the State is not subject to the law, seems to most American lawyers an absurdity. They, who are accustomed to see almost every obnoxious statute assailed as unconstitutional, and therefore void; who derive so

large a proportion of their incomes from successful resistance to attempts by the government to collect its revenues; and who know few greater intellectual pleasures than the perusal of an opinion on the construction of our fundamental law by one of the jurists who have been, or still are, upon the bench of our highest tribunal,—are surprised at hearing that the State can still say, like the Roman emperors, "*Legibus soluti lege vivimus*." Yet in the writings of the great pioneer in, if not the creator of, the science of jurisprudence, John Austin; in the best text-book on the subject, that of Professor Holland; and in an acute criticism of the latter by so skilled a master of the art of analysis as Mr. Albert Dicey,—we find it laid down as axiomatical, that the sovereign power is free from any legal duties, and can lawfully do what it will, while the first and last criticise such a doctrine as is asserted by the other, and maintain that it is also without particular legal rights, and is necessarily beyond the sphere of positive law.

That the latter, admitting the former theory, is logically correct, it seems not difficult to establish. For as rights and duties, whether legal or moral, are correlative, one's right to do a thing merely consisting in his capacity of, with the aid of public officers, preventing others from or punishing them for stopping him; and as in every developed system of law which accomplishes its main purpose, the prevention of bloodshed, he has a right to every act from which he is under no legal duty to forbear,—the State, if it can be considered as standing in any other relation to law than as its creator, and is subject to no duties, must have a right to everything, and it is absurd to speak of its having more to one than to another.

A theory so much at variance with our common modes of thought, however, in spite of our respect for those who defend it, should be examined carefully before it is allowed general acceptance. The argument in its support may be briefly stated. Law, it is said, is a rule of conduct prescribed and enforced by the State. If the State be subject to it, then it is in subordination to itself, which is an absurdity. An individual is only subject to a duty when he is compelled to act or forbear by the State; which, as it is impossible for it to be both master and servant, cannot properly be said to compel itself, and hence must be free from duty. Therefore, when the seat of the sovereign power of a community is ascertained, the limits of law are reached, for the creator cannot be subject to his creature. "Besides," says Austin, "where the sovereign government appears in the character of defendant, it appeals to a claim founded on a so-called law which it has set to itself. It therefore may defeat the claim by abolishing the law entirely, or by abolishing the law in the particular or specific case. Where it appears in the character of demandant, it apparently founds its claim on a positive law of its own, and it pursues its claim judicially. But although it reaches its purpose through a general and prospective

rule, and through the medium of judicial procedure, it is legally free to accomplish its end by an arbitrary or irregular exercise of its legally unlimited power." (Austin's Jurisprudence, 4th ed, London, 1873, vol. i. p. 296).

The fallacy, as is usually the case, will be found to lurk in a confusion of two ideas, represented by a single term. The word "State" may mean either the concrete collection of individuals who form the governing body of a society, or an abstraction otherwise expressed by the term, "its organized power." That the latter is not subject to municipal law, which only occupies itself with tangible objects, is self-evident; but this rule does not apply to the former.

The organized power of society cannot be properly said to be subject to the law of which it is a part; but the men who wield the power are, collectively as well as individually, restrained from passing its limits until they have been enlarged. The ultimate seat of the sovereign power of the United States is in three-fourths of the sovereign powers of the States. But even they, without the consent of their separate governments, could not lawfully destroy the individual existence of the rest, as Louis Napoleon did that of the French Provinces, unless, indeed, they should, by impeachment and appointment, place a set of men upon the bench who would declare a nullity the constitutional provision, "that no State, without its consent, shall be deprived of its equal right of suffrage in the Senate." But, until one of these things had been accomplished, the governing body would be powerless in the matter unless it subverted the law by force, which can be accomplished by a minority, as has been recently proved in the Southern States. And as in the science of pure mechanics, so in that of jurisprudence, friction, which here results from the conflict of law with morality, or, if the reader prefer the term, public opinion, must be eliminated from our calculations. A revolution, no matter how peaceably conducted, is still illegal.

Moreover, the fact that a law may be repealed is no more inconsistent with its existence than that it may be overturned by force. Austin's reasoning, that, because the government may repeal the law by which it has bound itself, it is under no legal duty to obey it, would equally prove that John Doe is under no obligation to pay his debt to Richard Styles, because Congress may at any time pass a bankrupt law discharging him. Nor is the argument of Mr. Dicey of much more weight; when speaking of Professor Holland's statement, that in public law (Holland's Elements of Jurisprudence, p. 79), "the State is present as arbiter, but is at the same time one of the parties interested," and that "law without an arbiter is a contradiction in terms," he says (2 Law Magazine and Review, 4th series, p. 395): "Surely an arbiter who arbitrates between himself and another is in strictness no arbiter at all. * * * The very term implies the existence of at least three persons. Where the State arbitrates between itself and another person, there are, turn it which way you will, only

two parties to the transaction;" whence he claims that it cannot be properly termed a legal one. Here, again, appears the confusion between the two ideas attached to the word "State." The judge is, to be sure, a part of the organized power of society, but is by no means the same as the person or persons in whom is the supreme power of enacting laws, and who are most directly interested in the result of the lawsuit. He frequently belongs to a political party which is in the minority, and his interests may lie in deciding against, rather than for, those who are represented by the name in the title of the cause; and, if he have a permanent tenure of office, is independent of them.

If, then, the above reasoning be correct, no fault can be found with the recent statement of the Supreme Court of the United States, that the maxim "the king can do no wrong" has no place in American jurisprudence (*Langford v. United States*, 101 U. S. 341); and there is therefore no reason why it should not eventually be abolished from that of all countries. An excessive respect for the writings of John Austin, upon whose great talents, in obedience to the law of reaction, almost as much too high an estimate is probably now placed as they were too meanly rated during his lifetime; an insularity of thought which seems to prevent most Englishmen from seeking for truth beyond the limits of Great Britain; and possibly the reflex of the teachings of an anthropomorphic theory of religion,—have hitherto prevented those who have analyzed public law from separating the accidents attached to personal from the essential elements which continue in self-government, its highest form. Otherwise, it would have been observed ere now, that, in this country at least, the regulation of the mutual rights and duties between individuals and the State, like those between individuals themselves, has passed through the stages of evolution from disorder, through custom and morality, to positive law. And the perception of this truth would help men to realize that the establishment of a true international law is not only not impossible, but less distant than is usually supposed. Nor is this discussion without practical value. The great failing of the common law, due to its growth by and encouragement of indirect judicial instead of direct statutory legislation, is the resulting tendency in men bred under it to loose modes of thought and want of precision in expression. If we are to avoid much trouble in the age of codification, which is clearly at hand, there must be a great advance in our capacity for the drawing and the interpretation of statutes. For those, and even the constitutions, of the present day abound in commands of imperfect obligation and phrases, which, before, and sometimes even after, they have been passed on by the courts, are hopelessly obscure. Nothing will help us more in this than accurate definitions and clear ideas of the leading terms of

law; and these it will be hard to obtain until the scope of law itself is understood.

ROGER FOSTER.

—*American Law Review.*

MAINE.

(*Supreme Judicial Court.*)

Strout v. Proctor.

Attorney and Client.—Disbarring Attorney.—P., an attorney at law, was charged with violating his official oath in not conducting himself in his office with all good fidelity to his clients; and it was set out that by false pretences and representations he obtained the signature of Mrs. H. to a bill of sale of her household goods and other chattels to his wife; that, after obtaining the bill of sale, he advised and induced her to leave the State, falsely alleging that she was about to be arrested by an officer and put in prison, and that it was necessary for her to leave the State immediately to avoid arrest; that, after her departure he took possession of the property and refused to deliver them up to Mrs. H., who was compelled to bring replevin to recover the goods, in which action she recovered judgment. *Held*, that, by assuming to advise and act for Mrs. H. under the circumstances of this case, he subjected himself in his relations with her to the obligations of an attorney to his client. The case presented is one which not only warrants, but requires the removal of P. from the office of attorney and counsellor of this court.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Aug. 17, 1881.]

No. 1135. *Samuel Hoffmire v. A. H. Cunard.* Error to the District Court of Morrow County. Andrews & Allison and G. W. Geddes for plaintiff.

1136. *James G. Miles, assignee v. B. W. Simington et al.* Error to the District Court of Morrow County. A. K. & J. C. Dunn for plaintiff; Dalrymple & Powell and J. J. Gurley for defendants.

1137. *Julius L. Lamprecht et al. v. John G. Kehrwicker.* Error to the District Court of Morrow County. A. K. & J. C. Dunn for plaintiffs; Thomas E. Duncan and Olds & Dickey for defendant.

1138. *Enoch Higgins v. Joseph Grove.* Error to the District Court of Morrow County. A. K. & J. C. Dunn for plaintiff; Dalrymple & Powell for defendant.

1139. *Enoch Higgins v. Milton Grove.* Error to the District Court of Morrow County. A. K. & J. C. Dunn for plaintiff; Dalrymple & Powell for defendant.

1140. *First National Bank of Mount Gilead v. Jason J. Cover, assignee.* Error—Reserved in the District Court of Morrow County. Dalrymple & Powell for plaintiff; A. K. & J. C. Dunn for defendant.

1141. *Adam F. Mike v. John C. Youngblood.* Error to the District Court of Stark County. Lynch, Day & Lynch for plaintiff; J. Amerman and J. J. Parker for defendant.

1142. *Joseph Socie v. Village of Nelsonville.* Error to the District Court of Athens County. De Steiguer & Jewett for plaintiff; Grosvenor & Jones for defendant.

1143. *Mary E. Bierce et al. v. Elizabeth Bierce et al.* Error to the District Court of Pickaway County. Ramsey, Matthews & Ramsey for plaintiffs.

1144. *Alexander Starbuck et al. v. Leo A. Brigel.* Error to the District Court of Hamilton County. Ramsey, Matthews & Ramsey for plaintiffs; Long Kramer & Kramer for defendant.

Ohio Law Journal.

COLUMBUS, OHIO, : : : AUGUST 25, 1881.

PERSONAL.

—Hon. R. A. Harrison has returned from several weeks sojourn in Canada, looking rugged and hearty, after a much needed rest.

—Hon. G. G. Collins left for New York City Monday last, to be gone about two weeks.

—Secretary of State Townsend has our thanks for a copy of the last annual report from his office, just received.

—Counselor Ferd. Siegel, of the Columbus bar, is back again from a beneficial trip among the northern lakes.

—Amos Denison, Esq., Secretary of the Cleveland Bar Association, will be supported by the Cuyahoga Republicans this fall for State Senatorial honors. Mr. D. is a young lawyer of fine ability, sterling integrity and good habits, and will do good service as a Senator, if elected.

—The law firm of Frazee & Welsh, of Akron, O., is presented to the readers of the LAW JOURNAL, in our advertising columns, this week. We can recommend them as correspondents of undoubted reliability, and that business entrusted to them will be promptly attended to and faithfully accounted for.

—The newly-formed legal firm of Norris & Howdon, of Kent, Ohio, place their card in our advertising columns this week. Mr. Norris has been, for several years, one of the leading lawyers of Portage county, while Mr. Howdon is a graduate of the Cincinnati Law School, admitted with the class of June, 1881. These gentlemen will be safely entrusted with legal business, and will bring amply sufficient ability to its transaction.

THE vacation season is drawing to a close, and members of the bench and bar will soon be back at work again, hearing and trying the knotty questions of the law. The LAW JOURNAL will endeavor to keep apace with the work and progress of the profession, and with all due haste diffuse the Ohio law as soon as

the Judges of the Supreme Court read their opinions and hand them down for promulgation.

RECORDS AND BRIEFS.—Attention is called to the facilities of the OHIO LAW JOURNAL printing department for executing promptly orders for Records, Briefs, Book and Commercial printing generally. Our type being new and of approved styles, we are enabled to execute all orders in first-class manner and in the shortest time possible. We will take pleasure in filing Records, Briefs, and other papers, with the Supreme Court, for our patrons.

In the Supreme Court of Iowa it was recently held (in *State v. Schultz*.) that one who, though not a graduate in medicine is a specialist in the treatment of diseases, and administers medicine to a patient with the honest intention and expectation of a cure, is not liable criminally for death caused thereby.

JOURNALISTIC ADVANCEMENT.

Legal journalism has received a wonderful impetus within the past decade. For years it shared the conservatism of the profession and seemed to abhor what is commonly called enterprise as thoroughly as did the lawyer of the olden days, who armed himself *cap a pie* with the etiquette of a lofty calling. We used to condemn that gross characteristic of common men, styled energy, as wholly as did Mortimer Lightwood, through whom Dickens has made the briefless barrister immortal. But of late the most sensitive of us must admit that the tendency of lawyers and lawyers' literature is in the other direction. One publishing house now sends us all the opinions of the courts of last resort, of some dozen States, and for good measure adds those of the Circuit Court of the United States. The South, too, is not behind the North in this field, as witness McGloin's Reports of all the Louisiana cases, and the new departure of the *Kentucky Law Journal*. We may well expect a new regime in law when a learned and honored judge of New York, in an address to the graduating class of the Columbia Law School, boldly espouses and defends, on high moral grounds, the practice of taking cases on contingent compensation. Without now explaining our views on this question, it is not too much to say that it denotes a radical change, either for good or evil; for if it is right it is far better that, after such discussion as it will now receive, it be openly acknowledged as a sound rule of professional procedure, than that it shall continue under the ban of professional ethics, and yet secretly adopted and practiced by almost every member of the profession. But

whether lawyers shall or shall not still be hedged about by a time-honored conception of morals, we see with unalloyed satisfaction the improvement of Law Journals. The latest and most comprehensive advance in this particular of the year, or indeed of any year, is the proposed extension and enlargement of the OHIO LAW JOURNAL. It is but fair to say that no paper has improved more rapidly in the last few months than it; but the announcement it makes in its issue of the 7th of July almost takes one's breath away. *It proposes to publish all the opinions of the courts of last resort of all the States as soon as possible after being delivered.* This certainly marks the high tide of enterprise in this department, and while we yield in advance our hearty admiration for the plucky spirit that prompts the venture, we withhold our further judgment until we see it before us in tangible shape.—*The Western Jurist.*

[The proprietors of the OHIO LAW JOURNAL propose to publish, monthly, the NATIONAL REPORTER, which is to contain all the decisions of the courts of last resort of all the States, as soon as they can be obtained from the courts. The OHIO LAW JOURNAL will continue as a weekly publication.]

SUPREME COURT OF OHIO.

JAMES BARNETT

v.

ANGELINE WARD.

1. Words charging a woman with sleeping with a man not her husband, impute to her a want of chastity, and therefore are actionable *per se*.

2. The fact that a woman bears a different name from a person with whom she is charged to have been intimate, tends to prove that she is not the latter's wife.

3. The defendant, in an action of slander, was charged with saying of the plaintiff that she slept with a man, not her husband. The proof showed the statement to be that such person was in bed with her. *Held*, the want of correspondence between the allegation and proof raises a mere question of variance, and is not a failure of proof within the meaning of section 133 of the code of civil procedure.

Error to the District Court of Warren County.

The action below was brought by Angeline Ward against James Barnett, upon a petition in the following words and figures:

The plaintiff, at the time of the committing by the said defendant of the grievances herein-after named, was, and still is, an unmarried woman, and did then sustain a good name and character among her neighbors and acquaintances for virtue and chastity, and was never suspected of the crime of fornication. Yet the said defendant, well knowing the premises, and maliciously intending to injure the good name and character of the said plaintiff, and to cause it to be believed that she had been unchaste and guilty of fornication, on, to wit, October 20, A. D. 1873, at Warren county, Ohio, in a certain discourse which he there had, of and concerning the plaintiff, and in the presence and hearing of divers good people, falsely and maliciously spoke

and published, of and concerning the said plaintiff, the false, scandalous and malicious words following:

1. That is to say, "She" (meaning the plaintiff), "slept with John Fox."

2. "Angeline Ward" (meaning the plaintiff), "was sleeping with John Fox" (meaning an unmarried man), "when her watch was stolen."

3. "Fox" (meaning an unmarried man, as aforesaid), "said he was sleeping with Angeline" (meaning the plaintiff), "when her watch was stolen."

4. "She" (meaning the plaintiff), "was sleeping with John Fox" (a man having that name), "when her watch was stolen."

5. "Angeline Ward" (meaning the plaintiff) "was sleeping with John Fox" (meaning a man who had before that time stolen the plaintiff's watch) "when her watch was stolen."

6. "She" (meaning the plaintiff), "was sleeping with Fox" (meaning a man by the name of John Fox), "the night her" (the plaintiff's) "watch was stolen."

7. "John Fox" (meaning a man who had stolen plaintiff's watch) "was sleeping with Angeline" (meaning the plaintiff) "when her watch was stolen."

And by means of the speaking of said defamatory words the said plaintiff hath been greatly injured in her good name and character, to the damage of the plaintiff \$10,000.

To this the defendant demurred.

First—For the reason that the words set forth did not import the crime of fornication.

Second—Petition did not state facts sufficient to constitute a cause of action.

The demurrer was overruled, and the following answer was filed by defendant:

First—He denies that he spoke the words in the petition set forth by plaintiff as spoken by him, and denies that he spoke either of the sets of words in the petition set forth, and charged in manner and form as therein set forth; and he denies any and all malice therein charged.

Second—He denies that the plaintiff sustained damages or was injured, as in the petition set forth; and he denies each and every material allegation in said petition set forth.

The case went to trial upon the following testimony:

Lewis Hurst testified: That the defendant stated, in his hearing, the following words of and concerning the plaintiff: "How in the devil did he come to get it without he had been sleeping with her?"

Ann Turney testified: That the defendant stated in her hearing, "That is how he came to find the watch; he was in bed with her."

Thomas Turney testified: That the defendant stated in his hearing, of and concerning the plaintiff, "I said, 'how did he ever think of going to look for the watch in the bed?' He said, 'he was in bed with her, and that is how he found the watch.' A few days after defendant was at my

house, and he said 'the way he (Fox) found the watch, he was in bed with her?'"

William Buts testified: The defendant was going to Franklin and asked him to ride with him, and he (witness) got in defendant's wagon, and defendant said: "He had heard that the fellow was sleeping with her, and he wondered how he had got the watch."

And this being all the testimony offered by the plaintiff, she rested.

And thereupon defendant, by his counsel, moved the court to arrest the testimony from the jury, and to direct a nonsuit, for the reason that the testimony of the plaintiff did not sustain the allegations in the petition, and because the words proved are not the words, nor the substance of the words, alleged in the petition. And the court sustained the motion, and the plaintiff excepted to the ruling of the court, and thereupon moved to amend her petition by alleging the words as proved by the witness Turney. And it appearing that the words so proven by Turney were spoken before the filing of the petition, and more than one year before said motion, the court overruled said motion to amend, and to which ruling the plaintiff excepted, and judgment was rendered for the defendant; whereupon the plaintiff tendered her bill of exceptions, which was signed and sealed by the court, and contained the proceedings, evidence and rulings of the court, as herein above set forth.

On petition in error the district court reversed the judgment of the court of common pleas, and remanded the cause for a new trial. It is here sought to reverse the judgment of the district court.

BOYNTON, J.

It has long been the settled law of this state, that words uttered in the presence and hearing of others, imputing to a woman a want of chastity, are, in themselves, actionable. It being their immediate and direct tendency to exclude her from society, and to bring her into disgrace among those who may credit the charge imputed, thereby producing an injury from which damage necessarily results, a presumption of damage is made to supply the place of actual proof. The plaintiff in error, not doubting the rule thus stated, claims, nevertheless, that the judgment of the district court ought to be reversed upon each of three grounds. First. That the charge laid in the petition does not impute a want of chastity to the defendant in error. Secondly. That it was not made to appear that she was an unmarried woman; and lastly, that there is a fatal variance between the words laid and the proof received to sustain them. Both courts below were of the opinion that the facts stated in the petition constituted a cause of action, and in that opinion we fully concur. The plain and obvious import of the language, charging the defendant in error with sleeping with John Fox, during the night her watch was stolen, was to impute to her illicit intercourse with Fox. No one could hear the

language uttered without understanding from it that the person uttering it intended to charge that such intercourse had, in fact, taken place. As was said in *Shields v. Cunningham*, 1 Blackf. 86, a phraseology more indecent might have been used, but no set of words, however plain and explicit, would have conveyed the idea with more certainty. See *Townshend on Slander*, Libel, § 172; *Guard v. Risk*, 11 Ind. 156.

The objection that no testimony was offered, showing, or tending to show, that the plaintiff was an unmarried woman is equally untenable. It is quite immaterial whether she was married or single. It is only important to know that she was not the wife of Fox, and this presumptively appeared from the circumstances that she did not bear his name. If, in the face of this presumption, and notwithstanding it, it was claimed that she was the wife of Fox, the burden was on the defendant below to establish the fact by proof.

It is finally objected, that there is a fatal variance between the words laid in the petition, and those proved to have been spoken.

If the validity of this objection were to be determined by the rules governing the practice before the adoption of the code, a more difficult question would perhaps arise. The rule at common law required the words to be proved substantially as laid. Numerous cases held, that the same meaning, in different words, would not support the charge. However this may have been under the former practice, the question arising under the objection here made is to be determined by the rules established by the code. *Thomas Turney* testified, that the defendant below stated in his hearing, of and concerning the plaintiff, that "the way he, Fox, found the watch, he was in bed with her."

Without looking into other parts of the testimony, we think the variance between this language and the words alleged to have been spoken was not such as to justify the court in arresting the case from the jury, and in directing a nonsuit. The code provides, that no variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice, in maintaining his action or defense on the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as may be just. Code, § 181.

The court is not authorized, in view of this provision, to determine from hearing the testimony of the witnesses given at the trial, whether the variance is so far material as to have misled the defendant to his prejudice, unless the allegation to which the proof is directed is so far unproved in its general scope and meaning, as to amount to a failure of proof. Code, § 183. Where there is not such failure of proof, in order to invoke the action of the court, it must be

shown, not only that the party has been misled to his prejudice, by the variance, but the respect in which he has been misled must also be made to appear to the satisfaction of the court.

The court then determines whether it will grant leave to amend or not. If leave is granted the trial proceeds, unless a continuance becomes necessary by reason of the amendment. In the present case, it not only was not shown that the defendant below was misled to his prejudice by the supposed variance, but, that he was so misled was not even suggested. Indeed, it is not easily seen how he could have been misled by a variance so slight. The words proved, as well as those in which the charge was laid, imputed to the plaintiff below a want of chastity. The words proved were slightly variant from those alleged, but they were clearly of the same import and meaning. That the defendant below could have been misled by a difference in phraseology apparently so immaterial, is hardly to be believed.

At all events, in the absence of any claim, or showing, that the defendant below was misled to his prejudice by the variance, the court was not authorized to dismiss the action.

It follows, therefore, that there was no error in the judgment of reversal.

Judgment affirmed.

[This case will appear in 36 O. S.]

SUPREME COURT OF OHIO.

MARIA COLLIER

v.

JOHN GRIMSEY ET AL.

A testator by his will gave to his widow the use of certain real estate during widowhood, and provided, that when she ceased to be his widow "the profits and benefits" of the land should be equally divided between his children and a grandson. He then directed that when his son Samuel should arrive at the age of twenty-one years, the land should be sold, provided his wife's widowhood should have ceased before that time, and directed the proceeds of the sale to be divided, to two of his sons and his grandson two shares each, and to the rest of his children one share each. He appointed executors "to act and see the accomplishment of" his will, according to its true intent and meaning. *Held:*

1. That by the terms "profits and benefits" the testator did not intend to devise the fee.

2. That the direction to sell the land was not contingent upon the termination of the estate of the widow before Samuel became of age; but that the direction to sell was imperative, and that the time of the sale was to be after Samuel became of age, and after the widow's estate ceased.

3. That under the direction to sell, the land is to be regarded, for the purposes of distribution, as converted into money; and that the children and grandchildren took, at the death of the testator, a vested interest in the proceeds of the sale.

4. The duty of making the sale and dividing the proceeds is imposed by the will on the executors, and as one of them declined to qualify, the duty of executing the trust devolved, under the statute, upon the other.

5. The grandson having died, his personal representative, in an action to enforce the trust, ought to be made a party.

Appeal—Reserved in the District Court of Columbiana County.

The plaintiff, Maria Collier, is the half sister,

on the part of her mother, of Oris M. Painter, deceased, and as such is the sole distributee of his personal estate. The object of the petition is to enforce a trust alleged to arise under the fourth item of the will of Samuel Painter, deceased.

The following is a copy of the will:

"Whereas, I, Samuel Painter, of Perry township, in the County of Columbiana, and State of Ohio, being of a sound and disposing mind and memory, do make this my will, hereby revoking all other will or wills *heretofore* by me made, this *only* to be and remain my last will and *testimony* in manner, as follows:

"1st. I direct my funeral expenses *and* and all my just *debts* to be paid.

"2d. I bequeath to my two sons and grandson, *nameley*, Seth Painter, Samuel Painter, and Oris M. Painter, a certain tract of land, being and lying in Vanwart County, in the State of Ohio, containing three hundred and thirty two acres and seventy six hundredths, *wich* land I hold by patent from under the hand of Martin Van Buren, president of the United States, dated twenty-first day of August, eighteen hundred and thirty seven, to them and their *heirs*, for ever to be *equely* divided between them, one hundred and eleven acres each.

"3d. I bequeath to my three daughters, *nameley*, Louise Thomson, wife of John Thomson, Lucinda Grimesey, wife of John Grimesey, and Lydia Ann Painter, a *certain* tract of land lying in Goshen township, *Mahoing* County, State of Ohio, containing thirty-two acres, to be *equely* divided between them according to value.

"4th. I will and bequeath to my wife Mary, the *hold* and *soald* use of all my *real* estate not *heretofore* bequeth, so long as she remains my widow, and at the time she *seeth* to be my *widow*, the *proffets* and benefits of the above said *real* estate shall be *equely* divided between my six children and my grandson Oris Painter, share and share alike.

"I direct that when my son Samuel Painter shall *arive* at the age of twenty-one years, that the above *mention* real estate shall be *soald*, (provided that my wife's *widow-hood* shall have *seeth* before that time,) and to be *divided* between them as follows: Seth, Samuel and Oris two shares each, and the rest of my children one share each.

"And *lastley*, I constitute, *nomanate*, and *appoint* my son Seth Painter, and my son-in-law John Grimesey, my executors, to act and see the accomplishment of this, my last will and *testimony*, according to the true intent and *meaning* thereof. In witness *thereof*, I *hearunto* set my hand and *seal* this thirty-first day of August, in the year one thousand eight hundred and *fourty* eight."

The testator at the date of his will was in the 60th year of his age, and he died July 29, 1851. His will was duly admitted to probate in the same year, and letters testamentary were granted to John Grimesey—the other executor named, Seth Painter, declining to accept the trust. The widow elected to take under the will. At the date of the will she was fifty-five years of age;

and the testator's son, Samuel, was, at that time, in the 9th year of his age.

The widow's estate determined on May 18, 1874, by her death. The testator left six children surviving him, and his grandson, Oris M. Painter, who was a son of a deceased son of the testator. Oris died September 17, 1864, intestate, and without issue, leaving the plaintiff his half-sister, as before stated.

The petition states that all of the legatees named in the fourth item of the will, except Oris, "conveyed away their interests in said premises, under said will, by deeds in fee, and that the defendant, John Pow, holds said interests, and is now in the possession of the same."

The petition also avers, "that said real estate was devised to be sold by said will, and the proceeds to be divided among the legatees, and thereby became personal property, and that on the death of said Oris M. Painter, all his personal estate descended to plaintiff as his sister of the half blood, including his interest of one-fifth in the real estate aforesaid, and that she, the plaintiff, is the owner of all said Oris M. Painter's interest in said lands."

The plaintiff prays, in substance, for the sale of the premises by the executor, and for general relief.

John Grimesey, the acting executor, and John Pow, are made defendants.

In the court of common pleas the case was heard on petition, answer and reply, and a decree was rendered for the plaintiff.

On appeal, the defendants on leave withdrew their answer, and each filed a demurrer to the petition on the ground that there was a defect of parties, and also on the ground that the facts stated did not constitute a cause of action.

On the motion of the defendants the cause was reserved for decision by this court.

Clarke & McVicker, for plaintiff.

Kennett & Ambler, for defendants.

WHITE, J.

The main controversy depends upon the construction of the fourth item of the will. The question is whether the sale of the lands therein provided for, is directed to be made on the arrival of Samuel at the age of twenty-one years, and after the termination of the estate of the widow; or, whether the direction to sell is made contingent on the widow's estate terminating before Samuel's arriving at age. The claim of the defendants is that the power of sale is thus contingent; and, hence, that as Samuel became of age before the determination of the estate of the widow, the provision directing a sale and the division of the proceeds ceased, on his arriving at age, to be operative. They further claim that on the determination of the estate of the widow, the fee of the land passed to the children and grandson of the testator, under the devise of the "profits and benefits" of the real estate. We do not question that a devise of the rents and profits, or of the "profits and benefits" of lands, without qualification or limitation, will impliedly carry the fee. But in order to determine whether

there is such qualification or limitation, we must look into the whole will, with the view of ascertaining the sense in which the terms were used by the testator; and when such sense is ascertained to give it the effect intended. Such terms cannot be held to carry the fee when it appears from other parts of the will that the fee is otherwise disposed of.

Whether the fee is otherwise disposed of, in the present case, depends upon the clause in item four, already referred to, directing the land to be sold.

The clause not only directs a sale, but it makes a disposition of the proceeds of the sale. It provides that the proceeds of the sale shall be divided between the children and the grandchild as follows: To Seth, Samuel, and Oris, two shares each, and to the rest of the children one share each. According to the claim of the defendants, the bequests of two shares each to Seth, Samuel, and Oris, are made contingent upon the estate of the widow terminating before Samuel became of age. If her estate ceased a day before he became of age, the land was to be sold, and Seth, Samuel, and Oris, were each to have two shares of the proceeds. But if the widow's estate should cease a day after Samuel became of age, there was to be no sale, and these bequests were not to take effect.

That such was not the intention of the testator seems to us to be clear. The object of the testator in postponing the sale until his wife's widowhood should cease, was, it seems to us, to preserve to her, during her widowhood, the use of the land; and that the following is the true reading of the clause: "I direct that when my son Samuel Painter shall arrive at the age of twenty-one years, that the above-mentioned real estate shall be sold, provided that my wife's widowhood shall have ceased before that time," that is, before the making of such sale.

The provision in the preceding clause, directing "the profits and benefits" of the land to be divided equally between his children and grandson, is not without effect upon the construction we give to the subsequent clause. That provision was intended to dispose of the use or annual rents and profits of the land for the period that might intervene between the termination of the widow's estate and the sale, whether her estate ceased before or after Samuel became of age.

The direction to sell the land is imperative, and, it seems to us, the duty of making the sale is imposed on the executors. There is no discretion vested in them whether the lands shall be sold or not. The direction is that the real estate shall be sold, and the proceeds of the sale divided among the persons designated.

The bequest is of money, the proceeds of the sale of the land, and not of the land. The beneficiaries under the will take the property with the character impressed upon it by the testator. In the present case they take it as money, and in the character of pecuniary legatees; and the fact that Oris died before the time arrived for making the sale did not change the nature of

the bequest. His interest became vested at the taking effect of the will, and, on his death, his right passed to his personal representatives. *Reading v. Blackwell*, Baldw. C. Ct. 166; *Rinehart v. Harrison's Ex'rs*, Id. 177.

That the testator intended that the sale of the land and division of the proceeds should be made by the executors, is shown, we think, by the language used in the last clause of the will. He appoints his son, Seth Painter, and his son-in-law, John Grimesey, his executors, and directs them "to act and see the accomplishment of this my last will and testament, according to the true intent and meaning thereof." It seems to us the testator could not have intended to devolve the making of the sale and distribution of the proceeds upon his heirs; but that he regarded this as a matter to be accomplished by his executors.

As one of the executors refused to act, the duty of executing the trust devolved, under the statute, upon the other executor. S. & C. Stat. 1629, § 65.

The remaining question is, whether there is a defect of parties. As the interest vested in Oris is to be regarded as personal estate, his personal representative ought to be made a party. He died intestate; hence, if there has not been, there ought to be an administrator appointed of his estate, so that, to the extent that may be necessary, the money belonging to his estate may be applied to the purposes of administration.

The interests acquired under the will by the other legatees having been, by them, vested in John Pow, he is the proper party to represent such interests.

If the property in question could be considered as land devised to Oris, it would have descended from him as ancestral property to those who were of the blood of the testator from whom the estate came. But as it must be regarded as of the personal estate of Oris, while the heirs may have been proper, we are not prepared to say that they are necessary parties.

The demurrer on the ground that the petition does not show a cause of action is overruled; and as to the ground of there being a defect of parties it is sustained.

[This case will appear in 36 O. S.]

SUPREME COURT OF OHIO.

CARTER COOK

v.

PENRYN SLATE COMPANY.

1. In an action by a creditor of a firm to charge the defendant as a member of such firm, neither the reports from a mercantile agency, nor the declarations of other third parties, are competent evidence to establish such liability.

2. When an issue of fact is tried to the court, the admission of incompetent evidence will be ground for reversal, if it appears that upon the competent evidence in the case, the finding ought not to have been made.

3. Where the conduct of a party is relied upon to charge him as a member of a firm of which he is not in fact a member, it should appear that the creditor relied on such conduct, and trusted the firm on the faith of such party being a member.

* Error to the Superior Court of Cincinnati.

The original action was brought by the defendant in error, a New York corporation, against J. W. D. Hall and Carter Cook, partners, under the firm name of Hall & Cook, on a promissory note, of which the following is a copy:

"\$1,165.98.

CINCINNATI, NOV. 1, 1872.

"Ninety days after date we promise to pay to the order of A. F. Waters, agent, eleven hundred and sixty-five 98-100 dollars at Fourth National Bank, Cincinnati, Ohio. Value received.

"HALL & COOK."

The petition averred that A. F. Waters, the payee, was the agent of the corporation in taking the note.

Carter Cook alone answered. He denied the execution of the note on his behalf.

The issue was submitted to the court for trial, a jury being waived. It appeared on the trial that Carter Cook was a member of the firm of Hall & Cook, in Cincinnati, from April 1, 1871, to February 1, 1872; that at the date last named the firm was dissolved, and a firm of the same name was formed by L. B. Cook, a son of Carter, and said Hall. All the customers of the old firm were notified of the dissolution, and of the formation of the new firm; but there was no publication in any of the newspapers of notice of such dissolution. The sign over the door of "Hall & Cook," in ten or twelve inch letters, was allowed to remain; but the names of the members of the firm, which were painted on the side of the door in one and a half inch letters, were changed, the name of L. B. Cook being substituted for Carter Cook. After the change in the firm, Carter Cook had nothing to do with its business; but he engaged in business in Cincinnati for himself, carrying on the roofing, stove and tinning business.

It appears from the testimony of George H. Waters, a witness for the plaintiffs, that he was their traveling agent, and took the order for the goods for which the note was given, and also the note after the delivery of the goods. He states that he took the order from Hall at the store, on the 11th of September, 1872, and that neither Carter Cook or L. B. Cook was present. He also testified as follows:

"After I got the order, on same day, I inquired at store of Dunn & Witt, who were the partners in Hall & Cook? and Mr. Brown, the book-keeper of Dunn & Witt, told me Carter Cook was one of the partners; I did not notice names of individual partners on the order; I learned that Carter Cook was one of the partners at store of Dunn & Witt, and thereupon had the order filled; I noticed nothing on sign but Hall & Cook; did not notice names of individual partners on door; the note was signed by L. B. Cook; I supposed he had authority to sign the firm name; he gave it to me; Hall was not there; I never saw Carter Cook before this suit was brought; I never personally inquired of mercantile agency about Hall & Cook, but my brother did."

The order was written under one of the printed

letter heads prepared by Hall & Cook while Carter Cook was a member of the firm, and in which the names of J. W. D. Hall and Carter Cook were printed as constituting the firm. These letter heads were left in the drawer at the dissolution of the old firm, and they were used by the new firm without the knowledge of Carter Cook.

The plaintiffs offered in evidence the following reports from a mercantile agency:

"Hall & Cook, Cincinnati, O. Roofers. New firm. 'C.' is capitalist, and is estimated worth 60 to 70 M \$. Hall has no means; the business will be well managed, and they will in all probability be good for what they buy."

"Hall & Cook, 259 W. 3d St., Cincinnati, O. Tin and slate roofing.

"Sept. 18, '72.—Are amply responsible for all they buy, and in excellent credit; safe customers. Estimated worth all the way from 60 to 100,000 \$."

The introduction of this evidence was objected to by the defendant, but his objection was overruled and the evidence admitted, to which he excepted.

Goods were subsequently furnished by the plaintiffs to Hall & Cook, amounting to the sum of two hundred and fourteen dollars and nineteen cents; but it is not sought to charge Carter Cook with this amount.

Afterwards, Hall & Cook became insolvent, and made an assignment for the benefit of creditors to Carter Cook. The plaintiffs presented their account against Hall & Cook, including the note sued on, to Carter Cook, as assignee, for allowance.

Subsequently to the giving of the first order, several letters were written to the plaintiffs by Hall & Cook, under the printed letter heads of the old firm; but in the view taken by the court of the case, they need not here be particularly noticed.

The court found the issue in favor of the plaintiffs, and gave them judgment for the amount due on the note.

On error, this judgment was affirmed by the court in general term. The present proceeding in error is prosecuted to reverse these judgments.

J. H. & J. A. Clemmer, for plaintiff in error:

Notice, by publication in newspaper, of dissolution of firm, is not necessary to protect outgoing partners against persons not having previous dealings with the firm. Every new creditor is bound to inquire who are the parties really interested at the time in the firm. Story on Partn. § 160; Parsons on Partn. 413.

An advertisement is not indispensable. Its place may be supplied by something else. Lindley on Partn. 420; Wardell v. Haight, 2 Barb. 549; Lovejoy v. Spofford, 8 Otto, 430.

R. C. Pugh and Wm. H. Pugh, for defendants in error:

Notice of dissolution of partnership should be published in a newspaper. 28 Conn. 43; 24 Vt. 642; 2 Starkie on Ev. 811, 813. Proof of notice necessary. Lindley on Partn. 45, 355; 3 Kent Comm. 66; 2 McLean, 458; 8 Wend. 423; 22 Wend. 193; 20 N. Y. 240; 24 N. Y. 550; 3 Pick. 177; 2 Pet. 199.

As to liability of Cook as partner, see 12 Ohio St. 179; 1 Smith L. C. 968; 3 Camp. 310; 1 Brod. & Bing. 9; 6 Smedes & M. 335; 17 Vt. 449; 2 McLean, 347; 2 Starkie on Ev. 804.

WHITE, J.

The court erred in the admission in evidence of the reports of the mercantile agency. The question in issue was whether Carter Cook was a member of the firm at the time the goods were ordered and the note was given; or, if he was not a partner in fact, whether his conduct was such in regard to the transaction that the plaintiffs were authorized to charge him as such partner. There is nothing in the evidence to show that the defendant authorized these reports or was in any way connected with them. They cannot, therefore, be used to charge him with liability. So, also, is the testimony of the witness, Waters, incompetent, that on the same day he got the order he inquired at the store of Dunn & Witt, who were the partners in the firm of Hall & Cook, and was informed by the bookkeeper that Carter Cook was one of the partners. If he was ignorant of whom the firm was composed his duty was to make inquiry of those he was about to credit, and not of strangers.

The case was tried to the court, and if the finding ought to have been for the plaintiffs, upon the competent evidence in the case, the defendant would not have been prejudiced by the admission of the incompetent evidence. But from an examination of the record, we cannot say that such is the case. It seems to us that the court took an erroneous view of the case, and was influenced in reaching its conclusion by the incompetent evidence.

The plaintiffs never dealt with the old firm; nor does it appear, as we understand the record, that they knew of what persons it was composed until long after its dissolution.

Whether Carter Cook was guilty of such negligence by leaving the printed letter heads of the old firm in the possession of the new, as would charge him as a partner where credit was obtained by their use, we need not now inquire, for it does not appear that they operated to obtain such credit. Waters, who took the order and had it filled, as he states, says that he did not notice the individual names on the order; and, consequently, he could not have given credit to Carter Cook by reason of his name being printed thereon.

Judgment reversed and cause remanded for a new trial.

[This case will appear in 36 O. S.]

SUPREME COURT OF OHIO.

MELVIN v. WEIANT.

Words spoken of a man imputing to him an act of sodomy, are not actionable without an allegation of special damage. *Davis v. Brown*, 27 Ohio St. 323, followed.

Error to the District Court of Marion County.

H. T. Van Fleet, for plaintiff in error.

Scofield & Johnston, for defendant in error.

BOYNTON, J.

The original action was one of slander, the petition in which charged the defendant with maliciously speaking of and concerning the plaintiff, in the presence of others, words imputing to him an act of sodomy. A demurrer to the petition was sustained, and judgment given for the defendant. On error to the district court, the judgment of the court of common pleas was affirmed. The object of the present proceeding in error is to reverse both judgments. We fully agree with counsel for the plaintiff, that the words spoken of his client were of the grossest and most scandalous character. It would be difficult to put into words, a charge, which, if believed, would more certainly exclude from society the one against whom the same was made, or more surely expose him to public odium and disgrace. Formerly, in England, the offense was deemed of a nature so heinous, that the delicacy of the common law would not permit it to be named in its indictments. 4 Blackstone Comm. 215.

But, notwithstanding this, the act itself has never been declared a crime in Ohio. Nor has it ever been enacted that an imputation that a person is guilty of such act, however untrue and malicious, shall lay the foundation for an action of slander. It may be, and quite likely is, true, that this want of statutory regulation upon the subject, has resulted, in the one case, from a reluctance to believe that a human being could be found sufficiently depraved to perpetrate so foul an act; and, in the other, so reckless of another's rights as to charge the existence of such act, without the most undoubted proof of its truth.

However this may be, the fact remains that no statutory regulation upon the subject exists, and from this it follows that the words set out in the petition, are not in themselves actionable, and consequently, unaided as they are by matter showing special damage, lay no foundation for recovery, unless, because of the character of the act imputed by them, they are held to constitute an exception to the general rule. See *Hollingsworth v. Shaw*, 19 Ohio St. 480. This precise question was before the commission in *Davis v. Brown*, 27 Ohio St. 323, where it was held no such exception prevailed.

To this ruling we are inclined to adhere. Some members of the court, in view of the heinous character of the charge, and of its direct and certain tendency to degrade and exclude from decent society the person against whom the same is made, would have inclined to regard the in-

jury as one which the law, now existing, is adequate to redress, while the remaining members are of the opinion that *Davis v. Brown* was correctly decided.

We are all agreed, however, that that case ought to be overruled. If injustice may result, as doubtless it may, from adhering to the rule there asserted, the remedy is with the legislature.

It would be an easy matter to make sodomy a crime, or to give the party wrongfully charged with committing it, a right of action against his accuser.

Judgment affirmed.

(This case will appear in 36 O. S.)

SUPREME COURT OF OHIO.

THE COVINGTON TRANSFER CO. v. KELLY.

In an action by a railroad passenger (who was, in fact, without fault himself), for a personal injury, against a defendant whose negligence directly and proximately concurred with the negligence of the railroad company in producing the injury, the concurrent negligence of the company cannot be imputed to the plaintiff so as to charge him with contributing to his own injury.

Error to the Superior Court of Cincinnati.

Upon the trial of the case to a jury, issue having been joined by the defendants severally, and after the plaintiff had introduced all his testimony, the action was dismissed as to the railroad company on its motion, the court being of opinion that the testimony did not tend to prove a cause of action against it; thereupon further testimony was offered upon the issue between the plaintiff and the Transfer Company, and the following bill of exceptions was taken by the defendant, now plaintiff in error:

"Be it remembered, that at the trial of this cause at the May term, A. D. 1876, Superior Court of the City of Cincinnati, it appeared from the testimony that the plaintiff, at the time of the happening of the injury complained of, was a passenger on a car owned and operated by the Cincinnati Consolidated Street Railroad Company, and there was evidence tending to show that the injury to the plaintiff was caused solely by the negligence of the Covington Transfer Company; and the defendant, the Covington Transfer Company, having offered evidence tending to prove that the injury to the plaintiff was caused solely by the negligence of the Cincinnati Consolidated Street Railroad Company, and also evidence tending to prove that the injury was caused by the joint negligence of the Covington Transfer Company and of the Cincinnati Consolidated Street Railroad Company, asked the court to charge the jury, that if they found from the testimony that the injury to the plaintiff was caused by the joint negligence of the Covington Transfer Company and of the Cincinnati Consolidated Street Railroad Company, then the Cincinnati Consolidated Street Railroad Company alone would be liable to the plaintiff for the damages caused by such injury, and their verdict must be in favor of the Covington Transfer Company, which charge the court refused to give, and charged the jury that if they found from the testimony that the injury to the plaintiff was caused by the joint negligence of the Covington Transfer Company and of the Cincinnati Consolidated Street Railroad Company, then both the Covington Transfer Company and the Cincinnati Consolidated Street Railroad

Company would be liable to the plaintiff for the damages resulting from said injury, and that the jury could render a verdict against the said The Covington Transfer Company, although the Cincinnati Consolidated Street Railroad Company had been dismissed from the action. To which refusal to give said charge, and to the charge as given, the defendant, The Covington Transfer Company, by its counsel, then and there excepted, and presented this, its bill of exceptions, in that behalf, and prayed the court that the same might be signed, sealed, allowed and ordered to be made a part of the record in this cause; which was done, accordingly at this the term of the trial, to wit: the May term, A. D. 1876."

Verdict and judgment having been rendered in favor of plaintiff below against the Transfer Company, the latter prosecutes this proceeding to reverse the same on the ground of misdirection to the jury, as set forth in the bill of exceptions.

The original action was brought by Kelly against the Covington Transfer Company and the Consolidated Street Railroad Company, to recover damages for a personal injury. The cause of action was thus stated:

"Plaintiff states that before and at the time of the committing of the wrongs and injuries hereinafter complained of, the defendant, The Covington Transfer Company, a corporation duly created under the laws of Kentucky, and having a managing agent and place of business in the city of Cincinnati, Hamilton county, Ohio, was the owner of the certain wagon and horses hereinafter referred to, and the said defendant, The Cincinnati Consolidated Street Railroad Company, a corporation duly created under the laws of Ohio, was the owner of the street railroad car hereinafter also referred to, and which was used by it to convey passengers in said city for certain hire and reward.

"Plaintiff says, that on the 8th day of August, 1874, he became and was a passenger in the said car of said street railroad company, to be safely carried therein over its road, for certain hire and reward, and he was then received in said car, as said passenger, by the said street railroad company, and for which he paid to it the customary and required fare.

"That on said 8th day of August, 1874, while being thus seated and conveyed in said car, which was then running along Third street, eastwardly, between Smith and Park streets, in said city of Cincinnati, the said defendant, The Covington Transfer Company, by its servants and agents, carelessly, negligently and unskillfully drove the said wagon belonging to it violently into the said street railroad car, and in the direction where the plaintiff sat therein as aforesaid, and the said defendant, The Cincinnati Consolidated Street Railroad Company, then and there, in disregard of its duty, did, by its servants and agents, carelessly, negligently and unskillfully conduct the running of said street railroad car, so that by carelessness, negligence, unskillfulness and default of said defendants, The Covington Transfer Company and The Cincinnati Consolidated Street Railroad Company, through its servants and agents as aforesaid, and without any fault, neglect or carelessness whatever on his part, the right hand of the plaintiff was very badly cut and bruised and the bones thereof fractured and broken, causing him very great pain and suffering, rendering him totally unfit to attend to his necessary business for a long period, involving him in great expense in endeavoring to cure the said injuries, having been under constant treatment in a hospital, and yet, notwithstanding, his said hand has continued to be hitherto so badly bruised and fractured

that particles of broken bones are frequently taken therefrom, and the hand is now entirely useless, and so crushed, its bones so fractured and ligaments thereof so lacerated, as to be, and the same is, rendered permanently injured and crippled, and so will remain during his life, and whereby, on account of the premises, he has sustained damages in the sum of \$2,000."

Dodds & Wilson, for plaintiff in error:

Long, Kramer & Kramer for defendant in error.

McILVAINE, C. J.

The exact question presented by this record, as we understand the bill of exceptions, arises upon the fact assumed in the request to charge and in the charge as given to the jury, that the wrongful acts of the defendants below, the railroad company and the transfer company, were not only concurrent in point of time and place, but in such manner that the wrongful act of each was a direct and proximate cause of the injury complained of by the plaintiff; and this being so, it matters not whether the act of each, without the concurrence of the other, would have produced the injury, or, that the negligence of neither would have caused it without such concurrence; so that upon general principles and reason both or either ought to make compensation therefor. The general rule undoubtedly is, that where damage is caused by the joint or concurrent wrongful acts of two or more persons, they may be prosecuted therefor jointly or severally. To this general rule of liability whether joint or several, there is an exception, however, based upon reasons as sound as is the rule itself, namely: that where the injured party, by his own negligence or wrongful act, contributes to his own injury, the law will not afford him a remedy against all or any of the persons whose wrongful acts, in connection with his own, produced the injury. But the case before us does not come within the exception above stated, for the reason that it is here admitted by the pleadings, that the plaintiff below was *in fact* without fault on his part. It is contended, however, by the plaintiff in error, that the plaintiff below was so identified with or related to the railroad company by the contract for carriage, that the fault of the carrier must be imputed to him as passenger.

The imputation thus contended for, however, is not based upon any alleged fault of the plaintiff below in entering into the contract for carriage with the railroad company; for there is not even a suggestion that the contract was one which a reasonably prudent man would not have made; but simply upon the ground that the plaintiff below was a passenger upon the car of the company at the time when an act of carelessness, contributing to his injury, was committed by one of the company's servants, namely: the driver of the car.

If the driver could, in any just sense, be regarded as the agent or servant of the passenger, or if the railroad company, whose servant the driver was, had been, under the contract, subject to the direction or control of the passenger, then, with some show of reason, it might be said that the passenger was responsible for the negligence of the driver.

But such was not the nature of the contract. The passenger was, it is true, entitled to a seat in the company's car; but was not entitled to direct or control the time or manner of its movement. That the company was bound to exercise the highest degree of care to the end that the passenger might be safely carried, is true; but it was not subject to the direction or control of the passenger, either as to employment of servants or as to the manner in which the service should be performed. It seems to us,

therefore, that the negligence of the company or of its servants should not be imputed to the passenger, where such negligence of the company or its servants was the sole cause of the injury. Indeed, it seems as incredible to my mind that the right of a passenger to redress against a stranger for an injury, caused directly and proximately by the latter's negligence, should be denied, on the ground that the negligence of his carrier contributed to his injury, he being without fault himself, as it would be to hold such passenger responsible for the negligence of his carrier, whereby an injury was inflicted upon a stranger. And of the last proposition, it is enough to say that it is simply absurd.

While we acknowledge the high authority of cases holding views contrary to those above expressed (*Thoroughgood v. Bryan*, 8 Com. Bench, 115; *Armstrong v. Lancashire Railway Co.*, 10 Exch. Law R. Series 47, and *Lockhardt v. Lichtenthaler*, 46 Pa. St. 151), we find, on the other hand, many cases of equally high standing holding, and, we think, with better reason, that the negligence of the carrying company cannot be imputed to a passenger who is rightfully on its train, and who is guilty personally of no fault or negligence, in an action by such passenger against another party, whose negligence has contributed directly to his injury. *Chapman v. New Haven R. R. Co.*, 19 N. Y. 341; *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. 492; *Bennett v. N. J. R. R. Co.*, 36 N. J. 225; 1 Smith Lead. Cas. 450, 6 Am. Ed.; 43 Wis. 513; 14 Minn. 81; 11 Allen, 500; 59 N. H. 420.

We are also aware that by an almost unbroken line of decisions it is held that the negligence of a common carrier of goods, contributing to the injury of such goods while in its possession, is a good defense to an action by the owner of the goods against a third person whose negligence also contributed to the injury.

Whether these decisions conflict with the doctrine announced in this case depends entirely on the question whether or not a distinction, on principle, can be made between cases of carriers of goods and carriers of passengers. That there is a marked distinction between the relations of the parties to these different contracts is quite certain. The common carrier of goods has actual possession of and absolute control over them, and is an insurer against loss or damage, except when occasioned by the act of God or a public enemy; while the carrier of passengers is only bound to the exercise of care; so that, in case of injury to a passenger over whose conduct the carrier has no physical control, his own misconduct bars his remedy, whether the injury was caused by the concurring negligence of the carrier or the joint negligence of the carrier and others; but in the case of goods, where the thing carried is incapable of contributory negligence, the law requires its safety to be insured. Now it may be that public policy, in the interest of trade and commerce, will not permit the liability of the carrier, who has failed in his duty in relation to goods, to be shifted to another, either with or without the consent of the owner; and, therefore, it may be that the law, in such case, requires the owner to seek redress from the carrier alone. But, however this may be, we are unanimous in the opinion that for a personal injury to a passenger, who is himself without fault, occasioned by the joint and concurring negligence of the carrier and another person, there is no sound principle of law which precludes the injured party from seeking redress from both or either of the wrongdoers.

Judgment affirmed.

[This case will appear in 36 O. S.]

RULES FOR CITATIONS.

Citations, if not sufficiently definite to point at once to the authority intended to be referred to, frequently cause loss of time and great vexation. The observance of a few rules would greatly tend to simplify them and sometimes give counsel the benefit of an authority which is lost for want of time or patience in the court to hunt it up if incorrectly given. The following rules, though by no means as full as could be given, will, if observed, it is believed, be useful:

1. In using abbreviations never use simply the initial letter. Thus B. and A. may refer to Barnewall and Adolphus, or Barnewall and Alderson; B. and B. to Ball and Beatty, or Broderip and Bingham; C. and M. to Carrington and Marshman, or Crompton and Meeson; M. and S. to Maule and Selwyn, or Moore and Scott; it is far better to use Barn. and Adol., Barn. and Ald. Ball and B., Brod. and Bing., Carr. and Marsh., Crompt. and Mees. Maule and S., Moore and S., etc. So in New York, "Barb." is the usual citation for Barbour's Reports, of the Supreme Court of that State, and in Arkansas "Barb." was, until within a few years, the usual citation for Barber's Reports of that State. So in New Jersey "Harr." was until recently the usual citation for Harrison's Reports of that State, and in Delaware "Harr." was, and still is, the usual citation for Harrington's Reports of that State. H. and M. in England is used for Hemming and Miller's Chancery Reports, and in Virginia for Hening and Munford; while they might be understood in England and Virginia, obviously neither should be used elsewhere. Always make the abbreviation long enough, and definite enough, to indicate clearly what it is intended to represent.

2. In citing a case from reports always give the name of the parties, plaintiff and defendant. If by mistake a wrong volume or page be given by counsel or the printer, the authority may generally be easily found from the table of cases in the English, the United States, or a State, digest.

3. If examining a report of any country or State other than your own, remember reports may be differently cited by the courts of the former than by those of your State, and if a citation puzzles you, endeavor to find the method of citation by the courts of the forum.

Thus in Upper Canada, the Queen's Bench Reports of that Province are cited as U. C. R. (Upper Canada Reports), as the Queen's Bench is the court (the highest court of original jurisdiction), and the Common Pleas as C. P.

If you were to so cite them in New York, no idea of the report intended would be conveyed, but to make your citation intelligent and definite to a judge of that State, you would cite them thus: "U. C. Q. B.," "U. C. Com. Pl.," "Grant's U. C. Chy.," etc. In England, Coke's Reports are, by common consent, spoken of as the reports of that country and are frequently

cited thus: *Hoe's Case*, 5 Rep. 70 b.; *Wymark's Case*, 5 Rep. 74 a.

4. In citing a reprint of any original report, where the original paging is given by figures in the margin or elsewhere, always cite it as of the original report and not by the reprint. Thus: *The King v. Sandhurst*, 6 Adolph & Ell. 130, and not *The King v. Sandhurst*, 33 Eng. Com. Law Rep. 90. If the judge to whom the citation be made do not possess the English Common Law Reports, but does the original report, he will be able, if cited as of the original, to readily find the case.

If you cite from the English Common Law Reports and prefer to aid him still further, you may very properly cite it thus: *The King v. Sandhurst*, 6 Adol. & Ell. 130; 33 Eng. Com. L. Rep., when, if he possess the English Common Law Reports, he will at once be informed that 6 Adolphus & Ellis is in volume 33 of the English Common Law, and will not be compelled to look to see which volume of the English Common Law contains that volume of Adolphus & Ellis.

Thus also: *Ruston v. Ruston*, 2 Dall. 233, 1 Am. Dec. 283; *Clark v. Barnes*, 76 N. Y. 301, 32 Am. Rep. 306; *Moet v. Pickering*, 8 Chy. Div. 372, 25 Eng. Rep. 356.

In order to facilitate finding the original reports in the British Crown Cases, English Reports, English Admiralty Reports, English Chancery Reports and English Common Law Reports, an alphabetical list of the volumes in each is hereafter given. It follows the chronological list of English Reports.

5. In citing elementary works, which have more than one edition, always give the edition cited. If you are in doubt whether there be more than one, err on the safe side and give it. If the paging of the original edition be preserved by figures in the margin, give the marginal paging also. Thus: 1 Par. on Cont. (6th ed.) 147, marg. p. 136. If the court do not happen to have the sixth edition, the passage cited, if in the others, will be readily found by the marginal paging.

6. If the work be divided into sections or paragraphs, as many recent works are, cite it by the section. The citation can then usually be found in any edition.

7. In citing statutes always cite the *original* of the statute and then the amendment thereto, if any. Thus, 1 Laws 1870, p. 179, § 1, as amended by 1 Laws 1872, p. 764, § 1.

8. If a compilation of statutes be cited, always cite the *original* of the compilation by the marginal or original paging and then the *edition* cited and the page of that, and the amendment, if any. Thus, 2 R. S. 457, § 2, 2 Edm. St. 477, as amended by Laws 1873, p. 588. If the judge or person looking for the citation do not possess the edition cited, he will readily find it in some other.

9. If the compilation of statutes cited, contain anything more than the original of the compilation and amendments thereto, always

cite the original statute first, and then the compilation. Thus:

Laws 1858, chap. 322, § 5, 3 R. S. (6th ed.) 688.

Laws 1855, chap. 511, § 7, 3 R. S. (6th ed.) 580,
§ 9.—*Catalogue of Law Books*, Wm. Gould & Son,
Albany New York.

BREACH OF PROMISE.

The action for breach of promise to marry applies the most prosaic of remedies to the most sentimental and romantic of complaints. The ashes are weighed on the cold altar after the sacred flame has gone out. Tender confidences, whispered protestations, the passionate phrases of love letters, all those mysterious signs and symbols which love dotes upon, are carefully put together by twelve plain jurymen to establish a transaction, as though the wooing of a human heart were like bargaining for a pair of lungs. From this phase of life's tragedy, poets and romancers turn with a shudder. But to such sufferers as seek the courts, our common law imparts a consolation which ought, at all events, to expel the last symptoms of a lingering passion from the breast of the suitor.

We purpose, in these pages, to set before the reader the main principles pertaining to such promises, illustrating them more particularly by reference to our latest decisions.

1. *Foundation of the Right of Action*.—A contract to marry must be clearly distinguished from the marriage contract or marriage institution, which rests upon solemn foundations of its own. Promises to marry have been treated by the common law, from the earliest times, on the general footing of agreements. Policy forbids that specific performance of such a contract be enforced in equity. But, for breach of the promise, an action would always lie for damages at the common law, as in other cases of *assumpsit*; though in aggravated cases, we shall find damages assessed somewhat after the manner of a tort.

In the early reports, nevertheless, doubts were entertained as to the jurisdiction of common-law courts in such suits; and this because the contract to marry was so nearly allied with marriage, while marriage, from the time of Pope Alexander III, or the latter part of the twelfth century, was in England a matter for the cognizance of spiritual or ecclesiastical courts only. A motion to arrest judgment, where the plaintiff had a verdict, was argued on this ground, in *Holcroft v. Dickenson*, in 25 Charles II, but three of the four judges (Chief-Justice Vaughan dissenting), pronounced in favor of the plaintiff.

This historical uncertainty concerning the practice of bringing the common-law action in common-law courts, was adverted to in a recent Indiana case, where counsel for the defense made the very ingenious argument, that, at the first settlement of the United States, there was no such common-law right of action at all.—*Stretcher v. Parker*, decided in 1839, was, as counsel contended, the earliest breach of prom-

ise case ever maintained in England, in a common-law court.

Admitting all this, however, the question in Coke's day was one of jurisdiction local to England, and the doubt did not touch the right of action at all. "Indeed," observes Worden, J., "the principle which upholds such action is as old as the principle which gives damages in any case for the breach of a contract, and it is immaterial whether any case can be found in England, prior to 1607, in which such action has been maintained."

2. *Parties to the action.*—In practice, it is found that the suit for breach of promise is almost exclusively a woman's weapon; not, we may imagine, because those light perfidies are wholly on the man's part, nor necessarily because, when injured, he feels the humiliation less, but rather on account of sexual differences of temperament and disposition. If the promise to marry does not bind one of two adults, neither, on principle, ought it to bind the other; and hence the right to sue for breach is against the party who breaks the promise, of which sex this may be. *Harrison v. Cage* is an English case, of William III's time, where the discarded lover actually sued for his false mistress, and won a verdict; and this strange reversal of the sexes, in the face of justice, did not deter the Court from declaring unanimously that the plaintiff was entitled to judgment.

The usual contract rules apply as to the competency of parties. A lunatic's promise to marry would not bind that party; nor does a minor's, unless the minor ratifies the engagement on reaching majority. And here, we may observe, that the age at which a marriage binds a male or female is one thing, and the age of majority for the marriage promise, another—the consideration of policy applying quite differently. A late English statute requires more than a ratification—to wit: a new and distinct contract—in order to bind an infant, on his promise, after he has come of age, and this statute covers promise to marry.

3. *What Constitutes the Promise to Marry.*—The general principles which underlie the whole law of contract must determine when and in what manner parties become bound to this most solemn of mutually dissoluble contracts. The practical difficulties are these: Sexual fascination, not to add the very solemnity of such affairs, will draw a light-minded person very close to a promise, who does not intend one; even with the serious, the disposition is to leave more to inference than plain expression; and, moreover, mere favors and attention on the one hand, or, on the other, deliberate arrangements between man and woman for dalliance and loose companionship, by no means amount to promises to marry.

If a man seriously and directly asks a woman to marry him, and she accepts with equal seriousness and directness, the case is a clear one of promise to marry; and the more so, if these words have passed in writing. But doubts must

arise where, as so often happens, circumstances less positive are relied upon to establish the agreement.

Some mutual contract to marry is requisite, in order that one may sustain an action for breach of promise; but no particular form of words can be pronounced essential. It is sufficient if such language were used as to show that, in fact, the minds of the parties met. And, while the mutual intention should be serious and honorable, serious and honorable intentions may be presumed in any case, from acts and declarations justifying that inference; for, where one so conducts as to induce the other to believe there is an engagement between them, and to act accordingly, and yet, after knowing that impression is produced, keeps on in the same tenor, such party, it is said, can not set up a light or jesting purpose afterwards or deny that the engagement, in fact, existed.

But as to the evidence of a contract to marry, more direct proof is now commonly required than formerly, since modern statutes permit parties themselves to take the stand and tell their own story. While the old rule prevailed, excluding such interested witnesses, the contract was sometimes inferred from proof rather of such circumstances as usually attend an engagement. "This rule," observes Chief Justice Church, "permitted an implication from what was proved of a contract not proved." Whatever the expression of earlier cases, then, a promise to marry can not commonly be inferred, alone, at this day from one's devoted attention, frequent visits, and apparently exclusive attachment; nor from mere presents, or letters not to the point; nor from the plaintiff's sole announcement to friends, or her wedding preparations, without the defendant's knowledge; nor from what the man's mother or father may have said to the woman, without his knowledge, and *vice versa*; nor from the woman's unexplained possession of an engagement-ring. Neither a mere courtship, nor even an intention to marry, can constitute, *per se*, a contract to marry.

But the giving and accepting of an engagement-ring, if properly shown, is a most important circumstance. And the understanding of a marriage intention, having been once elicited, from pertinent words, acts, or conduct of the parties to the transaction, we may find their courtship, their correspondence, the presents which passed between them, and the like, all material in their bearing upon the main conclusion, and still more material for fixing the amount of damages to be awarded in the suit.

Homan v. Earle is an important illustration of our general principle, both because of Chief Justice Church's lucid exposition of the law, and the delicate shading of the facts. Here, a woman, evidently without reproach, had been led into a marriage engagement by a man whose conduct seems to have been purposely ambiguous. As the Court observed, both parties to the suit were highly respectable, belonging to the

same church, equals except in pecuniary resources, the plaintiff about thirty, and the defendant fifty. The defendant, left a widower, began his visits soon after the death of his first wife, to the plaintiff, who had been her intimate friend. His visits grew longer and more frequent; there were rides, and walks, caresses, and the usual endearing words. He gave the woman to understand that his wife had said something in her favor before she died. He spoke significantly of intending to marry when the year was out; of taking a wife of a certain description, which she answered; of expecting her to know, some day, all his business. She cautioned him, after he had gone on in this way for two months, that she considered this meant a great deal, and at the same time she offered him his freedom. This warning only made him press his suit the more ardently, though he was far from making himself explicit. But, coming to her after a few days' absence, he made, as she testified, a formal declaration of love, which she reciprocated. The two were then separated for six weeks; after which the visits went on during a brief season much as before. By this time, however, a curious proceeding, on the man's part, leaves us to infer that he had begun courting another woman, with whom he had lately become acquainted, and whom, in fact, he married in about six months afterwards. Drafting a letter one day with his own hand, to the effect that the plaintiff regarded his visits as evidence of friendship, and "nothing more," he persuaded her to copy and sign it. He wished this, he told her, because he did not want others to think they had any understanding together, so soon after his wife's death. The defendant's conduct, when the new engagement came out, indicated that he was conscious of having wronged the plaintiff. The Court refused to disturb the verdict, rendered for the woman on these facts, notwithstanding "negative evidence," such as the absence of presents, a ring, letters, and definite plans of marriage.

4. *Promises to Marry, as Affected by the Statute of fraud.*—Treating promises to marry like all other contracts, we find old authorities assuming that, where the contract is not to be performed within a year, it is void, under the Statute of Frauds, unless expressed in writing. Thus, if A., in January, 1880, promises to marry B. in February, 1881, B. can not feel sure that the engagement binds, unless the promise is put in black and white.

But the latest cases incline to construe the statute so as not to effect promises to marry, but promises in consideration of marriage, such as marriage settlements. Where A. promises to marry B. within thirteen months, two years, etc., such a promise does not come under the statute at all, for it is capable of being performed within a year, and that is enough. An agreement to marry may commonly be regarded as a continuing contract, by mutual consent, and hence, unaffected by the statute.

5. *At What Time a Promise to Marry may be Re-*

garded as Broken.—If a person engaged to marry B., marries C. instead, such party puts it out of his or her power to fulfill the former engagement, and B. may sue at once for breach of promise. If, again, the wedding with B. was fixed for a certain day, and A. inexcusably fails to appear, B., who was ready, may treat the contract as broken. And modern precedents, moreover, both in England and the United States, favor the rule, that a breach of contract arises upon a positive refusal to perform, although the time specified for performance has not yet arrived. Hence, where parties had engaged to marry "in the fall," fixing no day, and the man, in October, announced his determination not to perform the contract, it was held that the woman might bring her action immediately.

But, on principle, some tender should precede all such common-law suits; and the plaintiff, (due allowance being made for the natural modesty of the sex), ought to allege and prove an offer and refusal. Readiness, however, is held to be enough on a woman's part, since it is for the man *ducere uxorem*.

6. *Revision of a Contract to Marry.*—A mutual release from a marriage engagement is the true way for parties to get rid of it. They who enter into such a promise mutually, have mutually the power to rescind. But such a release must have been fairly and honorably procured, in order to avail the party who sets it up. The man or woman who breaks off an engagement discharges the other party; but the latter has the option of treating this as a breach, and making it the foundation of a suit for damages. The reasons upon which the defendant seeks to justify breaking it off may, however, be shown, in mitigation of damages. Release of the promise, like the promise itself, may usually be by word of mouth.

7. *When Promises to Marry are Against Public Policy.*—If there is any one thing that a woman clearly understands, it is that a man who is already married is not at liberty to take her to wife. The thought of making such a marriage under such circumstances is a moral sin, while the passionate compact to do so, when opportunity shall occur, not only places the promising parties in a most perilous relation towards one another, but doubly exposes the conjugal party, whose rights obstruct their inclination, to wanton and wicked sacrifice. And yet, so blind is jealousy, or the guilty passion, that we find women, in two States, fighting her way to the tribunal of last resort, quite recently, for the purpose of compelling a fickle man to pay damages, who had agreed, when married, to marry the plaintiff as soon as death or divorce should rid him of his wife. It is well that in both these States, (New Jersey and Illinois), the agreement was pronounced contrary to public policy, and void.

But guilty complicity is what excludes the plaintiff, and, hence, one may doubtless sue for breach of promise, if ignorant, at the time of the engagement, the defendant was already mar-

ried. In Tennessee, this reservation has been indulged to a grave latitude. A married man courted a young woman, who supposed him single, offering himself by letter. She accepted in form; whereupon he confined to her at once, in his next epistle, that he had a wife then living, from whom he expected to procure a divorce, on getting certain papers passed. Instead of repudiating the contract, inquiring into the affair for herself, or keeping in reserve, as a woman should, she encouraged his love, pressing him fervently to hurry up those papers. He could not procure the divorce, because he had no grounds for one, and then she sued him for his breach of promise. The plaintiff was an intelligent and well-educated person. And yet, it was held, that, not being *in pari delicto*, she could maintain her action upon the offer she had accepted while supposing him single, and that her subsequent knowledge of his marriage could only be set up in diminution of damages.

No action can be maintained for breach of a promise to marry, made in consideration of illicit sexual intercourse between the parties.

On the whole, we may question whether this right to sue for breach of promise of marriage is not productive of more evil than good. It is admitted that only one sex makes practical use of such a remedy, though its logical application should be mutual; and of that sex, moreover, but few of the finer-grained. It is admitted, too, that the marriage state ought not to be lightly entered into; that it involves the profoundest interest of human life, transmitting its complex influences direct to posterity, and invading the happiness of parents and near kindred; that the step, once taken, is well nigh irrevocable. From such a standpoint, we view the marriage engagement as a period of probation, so to speak, for both parties—their opportunity for finding one another out; and if that probation results in developing incompatibility of tastes and temperament, coldness, suspicion, an incurable repugnance of one to the other, though all this may impute no vice to either, nor afford matter for judicial demonstration, duty requires that the match be broken off. What, then, shall be the consequence to the party who takes the initiative? Analyze our reported breach of promise cases, and you will see that the fair plaintiff is frail on the point most essential to womanly self-respect, in the majority of instances; that she has unwisely granted to her lover the indulgences of a husband, or that she was a soiled dove when he offered himself, or, more brazen still, that she had been loose with other men, while plighted in affection. That the man's virtue, in such cases, will usually bear comparison, we need not contend; since, in practice, it is not he that invites litigation. In the interests of morality, then, and for the sake of compensating the innocent few, who complete this record, and whose vows, moreover, were made in a befitting spirit, should so much festering corruption be yearly exposed to a jesting community, under the misnomer of a blighted affection?

Are the fallen victims to passion to represent the victims of exalted love? Courts have found it necessary of late, to insist emphatically, that a man is not bound by a contract to marry a lewd woman, which he entered into in ignorance of her character. This stricture, however, by no means, debars all the lewd woman from suing for breach of promise, nor even all the impenitent. And, however honorably one may have acquitted himself of an imprudent engagement, before its consummation, the right which is conceded him by law, of showing a justification by way of mitigating damages, does not cover the case; for, letting alone the difficulty of proof, most men would rather pay hush-money, than have the whole story of a love-folly trumpeted in the newspapers.

Seduction furnishes another, and properly speaking, quite a distinct case from the loss of a marriage opportunity. For this offence, so revolting to every instinct of manly honor, a moral and physical wrong renders it proper that the victim should have some right of action. But, instead of taking seduction as the time-honored appendage to breach of promise, and other collateral suits, it seems fitter, as some of our States now provide by law, to make seduction a distinct and independent ground for action. Where, too, a man, whether under promise to marry or not, gets a woman with child, she should have some sort of recourse, for the child's sake, if not her own. In this latter case, and, indeed, in the former, a criminal magistrate will feel that the law does its best, when, by a judicious exercise of influence, he can prevail upon the guilty pair to unite in marriage; for thus the lesser scandal is permitted, in order to avoid the greater. JAMES SCHOULER.—*Southern Law Review*.

EVIDENCE AS TO CHARACTER.

There are three modes in which character might possibly be put in evidence with a view to raise a presumption as to a man being innocent of a crime charged against him; first, by giving testimony as to previous acts of the accused under somewhat similar circumstances to those of the act in question; secondly, by persons who have had opportunities of forming an opinion as to the disposition of the accused, testifying the result of their experience; and, thirdly, by the testimony, not of the witness's own estimate of the accused, but of the estimate in which he is held by the community amongst whom he has lived and with whom he has mingled. The first of these modes, evidence of specific acts, has never been tolerated in our courts. Nothing could be more unfair to prisoners, according to every English idea of criminal jurisprudence, because, on the one hand, the evidence that a man had on one or two occasions not committed a felony, would go a small way to raise a presumption of innocence; and, on the other, if, as would be necessary, similar evidence was to be allowed to the prosecution, proof of one or two

previous transgressions would create such a violent prejudice against the prisoner, that in many cases conviction would depend much more on the nature of the antecedents of the accused, than on the proof of the commission of the crime charged. Moreover, the endeavor to substantiate or disprove the various acts alleged, would incumber the issue to be tried with such labyrinths of doubtful and collateral questions, as to insure the hopeless embarrassment of juries and endless prolongation of trials.

Endeavors have been frequent to bring to bear on the question of guilt or innocence the opinion formed by individual witnesses as to the character of the accused. Indeed, such evidence is practically often given in all courts. The questions generally asked of a witness to character are: "How long have you known the prisoner?" "What is his character?" And in reply, nine times out of ten, the witness gives the result of his own experience. Yet it is clearly settled that no such evidence can be given. "Character," said Lord Erskine in *R. v. Hardy*, 24 St. Tr., 1079, "is the slow spreading influence of opinion arising from the deportment of a man in society; as a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion. That general opinion is allowed to be given in evidence." So in *Reg. v. Turner*, 10 Cox, C. C., 31, Lord Cockburn says: "I find it uniformly laid down in the books of authority that the evidence to character must be evidence to general character in the sense of reputation." And in *Reg. v. Rowton*, 34 L. J., 57 M. C., the point came expressly to be decided under the following circumstances: A schoolmaster was charged with committing an indecent assault upon one of his scholars; evidence was called as to character on his behalf, and similar evidence was called against him by the prosecution in the person of a witness who had formerly attended the prisoner's school. In reply to the question as to the character of the accused the witness said: "I know nothing of the neighborhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinions of others who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality." Here, then, the issue between the reception of evidence of the second and third classes into which it has above been divided, was sharply raised. The witness distinctly disclaimed his ability to testify to the general estimate formed of the prisoner's character by the circle in which he moved, but volunteered the opinion which was the outcome of his own acquaintance with him. This evidence the court for Crown Cases Reserved held, by a majority of eleven to two (ERLE, C. J., and WILLES, J., being the dissentients), could not be received. In giving their judgments, however, the holders of the prevailing opinion emphasized the fact that they felt themselves coerced by the stream of authority,

and took care to guard against any expression of approval of the rule which they enunciated; indeed, the pains taken by them to plant their decision firmly behind the entrenchment of authority without any expressions of approval, lead strongly to the inference that they saw little to admire in a rule for which they, sitting as a court of ultimate appeal, could find no foundation in reason or equity. On the other hand, the two dissentient judges adduced weighty arguments for admitting a witness's testimony as to his estimate of the character of the accused derived from experience, and felt so convinced by the cogency of those arguments, that they were prepared to do away with the rule, and allow the impeached answer. There can be little doubt that, if the matter were a *res nota*, the rule would be made in conformity with their opinion.

The evidence of reputation which consists in a witness stating not what he himself knows of the prisoner's character, but what he has heard concerning it, is an authorization in that particular instance of that kind of testimony generally most abhorrent to our rules of evidence—namely, hearsay. The witness finds out what a certain number of gossips or tattlers say, or what he thinks they said, in idle moments, and retails this to the court. This hearsay is likely to be of the most partial kind, since, if the witness has been a known friend of the prisoner, he is very unlikely to have been made the repository for sinister rumors, and, if an enemy, he has in all probability been the confidant of every calumnious and slanderous whisper; so that in a small society, much given to cliqueism, two witnesses might well be brought forward, one whom might truly swear that he never heard anything against the accused, which in the opinion of Chief Justice Erle (10 Cox C. C. p. 33), is the best character a man can receive, and the other, with equal veracity, might swear that the reputation of the accused was very bad. It is, too, the most unsatisfactory kind of hearsay conceivable, because there is no rule as to the proportion of opinions from which general reputation is to be assumed. If the witness had heard two persons give their opinion that the accused was untrustworthy, he might swear that the prisoner bore a bad character, even though those two persons were engaged in an intent to traduce. Indeed, the cruel injustice which the rule is capable of working is, perhaps, most apparent from the consideration that it is only requisite for malice, before commencing a prosecution, to be sufficiently successful in spreading calumnies to rob its victim of the benefits he might derive from the most untarnished reputation. Again, the exclusion of direct and allowance of hearsay evidence of reputation has sometimes the effect of shutting out the most convincing support which a career of integrity can give to innocence, and possibly the still more extraordinary result of compelling a witness to depose to what he has the best reason for knowing not to be a fact. If, for instance, a servant is indicted by a

new master for dishonesty, in the absence of direct proof of guilt or innocence, the testimony of a former master that he had for many years served him with conspicuous probity would undoubtedly be the most satisfactory evidence to character producible; but the master may be quite unable to speak to general reputation, and so the servant is deprived of what would be the most conclusive testimony in his favor, for the very reason that it consists in experience and not in hearsay. On the other hand, suppose the witness to have an absolute knowledge that the prisoner has previously committed offenses similar to that charged, if the prisoner has been sufficiently adroit and hypocritical to keep up appearances among his neighbors and to hoodwink them into the belief that he is an upright man, he will receive the benefit of his duplicity, and the witness who knows to the contrary will have to deliberately deceive the court and judge, by deposing to his good character.

Surely, in the common sense conduct of affairs, there would not be a moment's hesitation whether, in investigating the character of a man, to place more independence on a deliberate opinion formed as the result of personal contact and experience, or on a recollection of the random utterances of an indefinite number of persons who may never have seen the object of their garrulity, nor have had the remotest opportunity of forming a judgment upon his merits. The reception of such evidence would not be open to the decisive objections urged against previous acts of the accused being adduced, because the only questions admissible would be as to the means of knowledge of the witness, and the deduction he drew from those means of knowledge concerning the disposition of the accused. Here there would be occasion neither for wrangling over disputed facts, nor for the prejudice inseparable from taking for granted that a previous similar offense has been committed by the accused.

We may, perhaps, be permitted to suggest that in a careful perusal of the judgments in *Reg. v. Rowton*, sufficient justification might be found for inserting in the forthcoming criminal code a section devoted to the subject of evidence to character, altering the rule relating thereto that, if such evidence is to be retained at all, we may have it for the future the best instead of the worst possible of its kind.—*London Law Times*.

ECCENTRIC BEQUESTS.

A Manchester lady bequeaths a surgeon £25,000, on condition that he should claim her body and embalm it, and "that he should once in every year look upon her face, two witnesses being present." Another lady of an economical turn of mind, desires that if she should die away from Branksome, her remains, after being placed in a coffin, should be inclosed in a plain deal box, and conveyed by goods train to Poole. "Let no mention," she states, "be made of the contents, as the conveyance will not be then charged

more for than an ordinary package." A French traveller recently deceased, desired to be buried in a large leather trunk, to which he was attached, as it "had gone round the world with him three times," and an English clergyman and justice of the peace, who, at the age of eighty-three had married a girl of thirteen, desired to be buried in an old chest he had selected for the purpose. Tastes differ in the matter of burial. One man wishes to be interred with the bed on which he has been lying; another desired to be buried far from the haunts of man, where nature may "smile upon his remains;" and a third bequeaths his corpse for dissection, after which it is to be put in a deal box and thrown into the Thames. One man does not wish to be buried at all, but gives his body to the Imperial Gas Company, to be consumed to ashes in one of their retorts; adding, that should the superstition of the times prevent the fulfillment of his bequest, his executors may place his remains in St. John's Wood Cemetery, "to assist in poisoning the living in that neighborhood." A person may approve in cremation himself, but it is a little hard when he requires his relatives to approve of it also.—*The Spectator*.

IOWA.

(Supreme Court.)

Negotiable Instruments—Maker leaving State—Demand.

Op. by Rothrock, J. Action on a note, indorsee against indorser. The indorsement waived notice but not demand. It was shown that the maker, before maturity, left the State, and that there was no one in the State on whom demand could have been made. *Held*, that demand was sufficiently excused; that a holder of a note is not bound to follow the maker out of the State. 1 Parsons on B. & N. 45. *Whitely v. Allen*. June 10, 1881.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Aug. 24, 1881.]

1145. *Otho Hardman et al. v. George W. Wilson, administrator*. Error to the District Court of Madison County. *McCloud & Son* and *Converse* and *J. M. Kennedy* for plaintiffs.

1146. *John J. Wagoner, executor et al. v. Sarah Cox*. Error to the District Court of Hamilton County. *I. J. Miller* and *F. Sample* for plaintiffs; *Hoadley, Johnson & Colston* for defendant.

1147. *James A. Culp v. George Troutman*. Error to the District Court of Allen County. *Richie & Richie* and *A. B. East* for plaintiff.

1148. *Calvin McCombs et al. v. John Stewart*. Error—Reserved in the District Court of Mahoning County. *Hutchins & Tuttle* for plaintiffs; *Sutliff & Stewart* for defendant.

1149. *Isabel A. Moore v. Harriet E. Ide*. Error to the District Court of Franklin County. *Charles Follett* for plaintiff; *Harrison, Olds & Marsh* for defendant.

1150. *Hester A. Pattenger v. Martha E. Bailey et al.* Error to the District Court of Perry County. *Butler & Hoffman* and *J. V. Campbell* for plaintiff.

Ohio Law Journal.

COLUMBUS, OHIO, : : : SEPT. 1, 1881.

PERSONAL.

—We call the attention of the profession to the card elsewhere of Mr. J. V. Cowdery, of Niles, O. Mr. C. is well recommended as a careful and honest lawyer, and as such, we commend him to the bar of the State.

—During a recent voyage of discovery, recreation, and business, "Ye editor" came in contact with a host of the members of the bar, whose friendship is an honor and whose kindness will long remain as a delightful memory. Nothing could give us greater pleasure than to make public acknowledgment of our obligation to each of these kind gentlemen, by separate personal indication, but their name is legion. We must, however, mention specially, Mr. Frank E. Dellenbaugh, Col. A. J. Sanford and L. A. Russell, Esq., of Cleveland, gentlemen all, and lawyers whose gentlemanly instincts, fine social qualities and excellent abilities, fully account for their present success and bright prospects in the profession. In the same category we with pleasure include, Messrs. Frazee & Welsh, law partners in Akron; C. A. Reed, Esq., of Ravenna—who by the way, will be the next Probate Judge of Portage County;—Gen. R. W. Ratliff and E. D. Kennedy, of Warren; Judge Thoman, S. D. L. Jackson, Willis W. Powers, of the law firm of McNabb and Powers and Mr. Wirt of Woodworth & Wirt, of Youngstown. To these gentlemen the LAW JOURNAL extends profound thanks.

THE AMERICAN BAR ASSOCIATION AND MR. IRVINGE BROWNE.

The recent meeting of the American Bar Association, at Saratoga, demonstrates the mutability of earthly hopes and the wondrous potency of a great man's smile or frown. It may be conceded that many of the best lawyers of the country were in attendance, and that some very able papers were publicly read; but that the prime object of the meeting was not fully accomplished, must be sorrowfully admitted. We refer to that full and complete success in winning the approval and commendation of Mr. IRVINGE BROWNE, the editor of the *Albany Law Journal*, which had been confidently hoped for. What would be insufferable egotism on the part of a less gifted and less God-like being than Mr.

Irvinge Browne, we accept from him, for the Association, as the condescension to a belief that the members thereof were a nice enough set of gentlemen—not wise and cultured as Mr. Irvinge Browne, it is true, yet as giving promise of some good things in the beautiful future sometime!

Of the address of the President, Mr. Phelps, of Vermont, IRVINGE BROWNE says: "We did not hear it, and have not read it," although published in his paper "at the cost of a large and valuable space; but with our natural scent for heresy, we have detected some utterances against codification to which we shall try to evolve some rejoinders by and by. Much can be pardoned Mr. Phelps, however," &c., &c., *ad nauseum*.

The promise to notice Mr. Phelps' address and to evolve rejoinders from his omniscient inner consciousness—although to matters he had never read—by the great Irvinge Browne, must be exquisitely gratifying to Phelps.

The paper by Judge Cooley, of Michigan, read by Mr. Hinckley, the Secretary, is approved in one part by Irvinge Browne, but, in the other half is annihilated—Irvine Browne sits down upon it!

Of the address by the new President, Hon. Clarkson Potter, Irvinge Browne says, "it was quite entertaining to all, and *probably instructive to most*." Of course, Mr. Potter could not produce anything that could be possibly instructive to Irvinge Browne; but, then, to cheer him up, Irvinge Browne concedes the charitable and condescending remark, that "he was very properly chosen President for the ensuing year."

Mr. Hunt, of Louisiana, as Chairman of the Committee on Legal Education, reported in favor of a three years' law-school course of education, and in favor of admission to practice on the diploma of a chartered law-school, granted after such a course. This was adopted. Irvinge Browne doubts Mr. Hunt's ability to understand the resolution adopted concerning such requirement, and charges "vagueness" upon the same; and apparently regrets that the august presence of Irvinge Browne deterred the Association from venturing upon a discussion. This is sad!

Irvinge Browne frowns down the foolish practice of endeavoring to solve abstruse problems in constitutional or other law, which has heretofore obtained in the Bar Association. He kindly, however, relieves that body from absolute despair—consequent upon that frown—by pointing

out a few things to which it may properly direct its attention hereafter.

Irvinge Browne's report and remarks upon the proceedings of the Association reminds one very forcibly of a chicken on a manure heap. There are occasional grains of corn to be found, no doubt, but the great mass is nauseating—very nauseating, indeed.

It is really disheartening to witness the antics of this same Irvinge Browne. He has been a profound student for so very long a time that he is unusually well informed in matters of law. With modesty, he would be really a great man; but his pedantry—his style of criticizing others fully as wise as he—his Lord Roscoe air of supercilious loftiness, and his palpable and offensive over-rating of his own ability, is only equalled by the air of the man who, at the circus, crawls through a nine-inch hoop, and, afterwards, feeds himself with a fork tied to his heel; or the man who jumps over sixteen horses, turning three summersaults in mid-air. It proclaims: "Who so limber or so great a leaper as I?"

PLEADINGS, PARTIES AND FORMS UNDER THE CODE.

BY CLEMENT BATES ESQ.

The immense book and printing establishment of Robert Clarke & Co., Cincinnati, Ohio, is rapidly coming to the front as one of the best publishing houses of the country. We are not sure but that this house is to the West what that of Baker, Voorhis & Co. is to the East—the principal caterer to the wants of book buying lawyers. One very certain thing is that they are publishing some very valuable books. The latest, especially of interest to lawyers of Ohio, is the first volume of the above mentioned work. Its table of contents shows, briefly: a General Treatise on Parties and pleadings; followed by the topics of Misnomer, Amendment, Variances and Failure of Proof, Joinder of Causes of Action, Revivor of Actions, Submission, Venue, Verifications, etc., and the head of Actions and Proceedings, which embraces Forms of Petitions, with Authorities, arranged alphabetically, thus: Account, Account Stated, Accounting, Agents, Animals, Arrests, etc., down to and including Municipal Corporations.

There can be but little doubt that this book will become immensely popular with the bar of Ohio, particularly, if the second volume follows the plan adhered to in the first, as tersely expressed in the preface which declares that "the book is

rather a digest than a treatise;" that, "from it, discussion has been as far as possible banished, the region of conjecture avoided and the author's personal opinions suppressed."

The scope of the work is strictly what its title states, *practice alone*. The alphabetical arrangement carries not only the matters under the usual heads of classification, but as well the authorities and forms, which, in many instances, must be very useful to the attorney, who finds before him, and at a glance, all he seeks as matter of attack or defense.

There is one feature in this book we especially admire. There is no useless multiplication of citations. Attorneys in citing authorities to the court, in argument, to make assurance doubly sure, pile up authorities in some instances, until hundreds are cited bearing upon the same point. We can therefore readily see why a lawyer, writing a book, will fall into the same habit. But this is certainly a mistake. The court invariably mentions the authorities upon which the decision is based and if the same doctrine is found in a great number, the latest one wherein reference is made to the current of such authority alone is cited; at least anything different is exceptional. Then, why fill reports or text books with so many citations? We heartily commend the good judgment manifested by the author of this book in that regard. Robert Clarke & Co., Cincinnati, O.—2 vols. \$12.

The *Kentucky Law Journal*, for August, has been received. The matter and make up of this new candidate, for the favor and five dollar bills of Kentucky lawyers, is really first class. In fact, there is not a better monthly legal publication extant, so far as general news and Kentucky law is concerned, than this same Kentucky Law Journal. But the editor, Mr. George Baber, will ascertain, as time rolls along, that the novelty of publishing a model law journal will be swallowed up in a desire to receive a better patronage, and the freshness of the new editor will droop before the ardent necessity of paying printers' bills, and of looking round for the wherewithal to do so. Then the contributors will weary of writing leaders for the novelty of the thing and many things will work together to make the editor wish he had never been born. Then he will settle down to the wise conclusion that when a law journal furnishes to the members of the profession all the decisions of the Supreme Court, which is mainly their inspiration, and gives the laws newly made and the

proceedings of the highest court as they transpire, it is fulfilling its mission, and, that anything further than this, is neither practicable nor profitable. We wish Mr. Baber all good luck and therefore give him these points free of charge.

THE *Colorado Law Reporter*, having finished its first year with less of loss than was expected, has concluded to press onward as one of the established law journals of the country. We are glad of this. It deserves to succeed, and will succeed. The bar of Colorado will certainly appreciate and patronize an enterprise that gives them promptly, and in full, the decisions of the supreme courts. A lawyer who does not try to keep up with the rulings of the highest court in his State, is not trustworthy. He cannot give reliable counsel, and cannot be considered safe or competent as an adviser. This is as true in Ohio as in Colorado, and there is no more certain means of distinguishing between lawyer and shyster, than to ascertain whether the person in question keeps pace with the law as interpreted and applied by the court of last resort in his own State. A shyster resorts to tricks and petty advantages—to accident or luck—in giving counsel and conducting cases; a good lawyer depends on the rulings of the Supreme Court of his State, as a good farmer depends on and procures the improved appliances of agriculture.

We therefore say to the enterprising publishers of the *Colorado Law Reporter*, that the patronage of their paper will depend on simply two things: Make a good paper and then confidently rely upon that which is bound to follow. Every lawyer in the State, worthy of the name, will buy it.

The *Indiana Law Journal* has been re-purchased by the Messrs. Wells, father and son, and will we hope have abundant success. The Hoosiers need a law journal and need it badly, as indeed do the lawyers of every State.

THE BEST LAW JOURNAL IN THE COUNTRY.

The Central Law Journal, of St. Louis, Mo., has entered upon its thirteenth volume and is rapidly approaching a time when it will be entitled to a patriarchal position among the journals of the west. Its well earned success, which has been steady and uniform from its first day of publication has been due to the careful and thorough manner in which it is edited, the energy and enterprise of its publisher in sparing neither pains nor expense in his efforts to procure the latest and freshest cases and the most able leading articles, and in some degree to the general nature of its contents, making it of equal interest to the profession in all the States.

We know of no paper which is of greater practical utility to the profession. WM. H. STEVENSON, Publisher, St. Louis, Mo.

SUPREME COURT OF OHIO.

CORWINE v. MACE.

D. executed a codicil to her last will and testament, as follows:

"Item 1st. I desire and do hereby change and modify Item 8th in said will, so as to read as follows: I give and bequeath unto Jacob Mace, of the county of Ross, state of Ohio, his heirs and assigns forever, the equal one-half of all those pieces of land purchased by me of Wesley Claypool, situate in Ross county, state of Ohio, and being described in Item 8th of said will. And the other one-half of said Claypool land, described in Item 8th, and by said 8th Item of said will devised to James W. Hays, Peter B. Hays and John Hays, I devise to Peter B. Hays and James D. Corwine, son of John W. Corwine, and their heirs and assigns forever. My wish and desire being to exclude John Hays and James W. Hays from any interest in said Claypool farm. The said Peter B. Hays and James D. Corwine to have their half of said Claypool farm on the upper side thereof and the said Mace on the lower side."

Item 8th of the will referred to in the codicil was as follows:

"Item 8th. I give and bequeath unto Jacob Mace, of the county of Ross, state of Ohio, and unto his heirs and assigns forever, the equal undivided one-half of all those pieces of land purchased by me of Wesley Claypool, situated in Ross county, state of Ohio, containing about eleven hundred and seventy-four acres, one rood and twenty-nine poles, which is particularly described in the deed made by Wesley Claypool and wife to me, bearing date April 29, A. D. 1856. And I hereby devise and bequeath unto James W. Hays, Peter B. Hays and John Hays the remaining one equal undivided half thereof, to be shared equally between them."

Held, 1. The devisees named in the codicil took the estates as tenants in common, subject, however, to be apportioned among them so that the interests of Hays and Corwine should be located on the upper side and that of Mace on the lower side of the farm. 2. In making partition between them the part on the upper side to be set off to Hays and Corwine should be of equal value with that part on the lower side set off to Mace. 3. Such partition may be enforced by a civil action under the code.

Appeal—Reserved in the District Court of Ross County.

The case is sufficiently stated in the opinion.

O. F. Moore and George D. Cole, for plaintiffs.

Harrison, Olds & Marsh, with whom were Van Meter & Throckmorton, for defendants:

We maintain that the testatrix divided the farm into two equal parts by an ideal east and west line, which gave an equal quantity of land to each part above and below the division line, and devised the upper part to Hays and Corwine, and the lower part to Mace.

The will did not specify the dividing line by metes and bounds, but it furnished the data and a rule by which that line was easily ascertainable. It only required a survey and a mathematical calculation. Each might precisely ascertain and know his own severalty, and what he had the exclusive right of possessing. A description of the several parts would have been but little, if any, more definite or certain. Under this construction there is surely no ground for an application to any court to fix the line. If either party takes possession of any land above or below his part, a remedy can be had against him by an action of ejectment or trespass.

The estates devised are legal, and not equitable estates.

As to ascertainment of boundaries, see 70 N. C. 706; 64 Pa. St. 275; 3 Washburn on Real Property, *635; 2 Dev. & Battle, Eq. 379.

A court of equity has no jurisdiction to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties. Story Eq. Jur. § 615, *et seq.*; 2 Leading Cases in Eq. *433. In the case at bar, no equity has been superinduced by the act of the parties.

The equity of partition attaches only to estates held by joint tenants, tenants in common and coparceners. Partition of an estate in severalty is a contradiction in terms. The purpose and effect of partition is to convert tenancies in common into estates in severalty.

If the testatrix had devised to the plaintiffs the upper half in value of said lands, and to the defendant the lower half in value, this would not have constituted a tenancy in common. The data from which the dividing line is to be ascertained, is attempted to be given; whether sufficiently so or not, is another question. The land is divided by an ideal line into the upper and lower halves. If the respective parts are to be halves in value, the line may come at one place, and if they are to be halves in quantity, the line may come at another. But wherever the dividing line is, the plaintiffs have, under the will, the land above it, and the defendant has the land below it. They have no part of it in common.

As to tenancies in common and in severalty, see 1 Wash. Real Prop. *407; 2 Cruise Dig. R. P. *344; 9 Pick. 34; 15 N. H. 546; 3 Ohio, 21.

We submit that the plaintiffs have no case for the interference of a court of equity, either because of confusion of boundaries, or for partition, or under any other head of equity jurisprudence.

As to construction of codicil, see 7 H. of L. Cas. 68; 1 Jarman on Wills, 315; 27 Vt. 739; 29 Ohio St. 150; 50 Me. 364; 30 Me. 28; 24 Conn. 219; 25 Ohio St. 115.

McILVAINE, C. J.

This is a civil action for the partition of certain premises held by the parties, James D. Corwine, Peter B. Hays and Jacob Mace, as devisees under the will of Kesiah Davis. The principal question arises on the construction of the will. The eighth item of the original will, executed May 19, 1863, was as follows:

"Item 8th. I give and bequeath unto Jacob Mace, of the county of Ross, state of Ohio, and unto his heirs and assigns forever, the equal undivided one-half of all those pieces of land purchased by me of Wesley Claypool, situated in Ross county, state of Ohio, containing about eleven hundred and seventy-four acres, one rood and twenty-nine poles, which is particularly described in the deed made by Wesley Claypool and wife to me, bearing date April 29th, A. D. 1856. And I hereby devise and bequeath unto James W. Hays, Peter B. Hays, and John Hays the remaining one equal undivided half thereof, to be shared equally between them."

Afterwards, on the 8th of June, 1871, the testatrix executed a codicil, the first item of which reads as follows:

"Item 1st. I desire and do hereby change and modify item 8th in said will so as to read as follows: I give and bequeath unto Jacob Mace, of the county of Ross, state of Ohio, his heirs and assigns forever, the equal one-half of all those pieces of land purchased by me of Wesley Claypool, situate in Ross County, state of Ohio, and being described in Item 8th of said will. And the other one-half of said Claypool land, described in Item 8th,, and by said 8th Item of said will devised to James W. Hays, Peter B. Hays, and John Hays, I devise to Peter B. Hays and James D. Corwine, son of John W. Corwine, and their heirs and assigns forever. My wish and desire being to exclude John Hays and James W. Hays from any interest in said Claypool farm. The said Peter B. Hays and James D. Corwine to have their half of said Claypool farm on the upper side thereof and the said Mace on the lower side."

The title of the parties to this suit is held under this item of the codicil, and the controversy is in relation to the nature and extent of the estate of the respective devisees. The plaintiffs, Corwine and Hays, claim that the estate devised is held by the devisees as tenants in common, that is to say, that defendant Mace owns an undivided half, and each of the plaintiffs an undivided fourth part of the whole tract, subject, however, under the direction of the will, to be apportioned according to value, so that the interest of the plaintiffs shall be apportioned to them on the upper side, and that of the defendant on the lower side of the tract. While the defendant contends that the lower half of the tract, according to acreage, was devised to him in severalty, and that plaintiffs took, under the will, the upper half, as tenants in common.

The contention of the defendant is based chiefly on the last clause in the first item of the codicil, and on the fact that in describing the interests devised, the testatrix omitted the qualifying word, "undivided," which had been used in the original 8th Item of the will. That there is much plausibility in the claim thus made cannot be denied; but upon a careful consideration of the language used by the testatrix in the 1st Item of the codicil, a majority of the court are of opinion that a tenancy in common between the devisees was created, although the testatrix contemplated a separation of the interests, and directed the location of the respective interests when partition should be made.

The last clause in the item does not give to Hays and Corwine the upper half of the farm, and to Mace the lower half; but directs that Hays and Corwine are to have their half on the upper side and Mace on the lower side thereof. Although the interest of Hays and Corwine is here designed as "their half of said Claypool farm," we must look to other parts of the item to determine the true meaning of the phrase here used, namely, what was meant by "their

half," which they were to have on the upper side of the farm, and the same as to Mace on the lower side? The devise to Mace was "the equal one-half" of the land described in the 8th Item of the will. The title of Mace rests in this clause, and by its terms the interest devised to him was as clearly an *undivided* "equal half" as if the language of Item 8 of the will had been repeated. And in disposing of the "other one-half" the language is still more emphatic. The "other one-half," which is here devised to Hays and Corwine, is described as the same which was "described in Item 8th, and by said 8th Item of said will devised to James W. Hays, Peter B. Hays and John Hays." What was devised to James W. Hays, Peter B. Hays and John Hays by the 8th Item? After giving to Jacob Mace "the equal undivided one-half" of the Claypool land, the 8th Item devised to James, Peter and John Hays "the remaining one equal undivided half thereof." And this is the exact interest, in terms, which is devised to Hays and Corwine by the codicil, and which is also the exact complement of the interest devised to Mace. Such being the clear meaning and intent of the testatrix, as manifested by the language employed in the only dispositive clauses of the codicil, when taken in either its ordinary or technical sense, we entertain no doubt that the half of the farm which Hays & Corwine were to have on the upper side and the half which Mace was to have on the lower side of the farm, are to be ascertained and measured, not according to acreage, but according to the value of the interests described in the dispositive clauses of the codicil.

An objection is made to the jurisdiction of the appellate court. We are of opinion that the nature of the title and the relief sought, bring the case clearly within the cognizance of a court of equity, and that, therefore, an appeal from the common pleas to the district court was properly taken. The statute concerning the partition of legal estates does not afford the remedy to which the parties in this case are entitled under the will of Mrs. Davis.

Decree for plaintiffs.

[This case will appear in 36 O. S.]

SUPREME COURT OF OHIO.

ANDREWS v. CAMPBELL.

While the statute allowing parties to contract for ten per cent. interest was in force, C. executed to B. his promissory note, payable on time, without interest.

Before maturity, B. negotiated the note to W., who brought an action to recover a balance due thereon, with ten per cent. interest, alleging for that purpose a promise writing by C. to that effect, made after maturity, in consideration of an agreement by W. for further time, which had been granted. *Held:*

1. The burden of proving a valid modification of the terms of the note, by which the debtor became liable to the higher rate of interest under the statute, was upon the plaintiff.

2. The new promise of C. to pay interest at ten per cent. until the note was paid, must be supported by a sufficient consideration; and where it is alleged that the promise was made in consideration of a mutual promise

by W. to give time, it must appear that his promise to give time was so definite in its terms as to be enforceable by C.

3. The mere fact that in pursuance of his promise, C. had for several years annually paid interest at ten per cent., and had not been pressed for payment of the principal, does not raise the presumption of such a pre-existing modification of the original contract, as the statute requires.

4. Payments of interest, made in pursuance of said promise, while the ten per cent. statute was in force, are binding upon C., but payments made afterward, in excess of six per cent. are to be applied to the principal.

5. The written statements of B., made after he had parted with the note, and contained in a contract with W. concerning the same, tending to show the alleged consideration for C.'s promise, are not admissible in this action against C., though B. was dead, it not appearing that C. was a party to, or had notice of, said contract between B. and W.

Error to the District court of Butler County.

The plaintiff in error brought an action to recover a balance due on the following note:

"\$1,000. HAMILTON, April 16, 1861.

"Nine months after date I promise to pay to the order of Wm. Bebb, one thousand dollars, value received, at the Ohio Life Insurance and Trust Co., Cincinnati.

"L. D. CAMPBELL."

Which was indorsed and transferred to plaintiff's intestate, Wm. E. White, before due.

He avers that on the 27th of November, 1852, at defendant's request, White agreed to let him have further time to pay said note, in consideration whereof the defendant executed the following agreement:

"I hereby agree to allow Wm. E. White ten per cent. interest on a note signed by myself and payable to and indorsed by Wm. Bebb, for one thousand dollars, dated April 16, 1851, payable nine months after date, the said ten per cent. to be allowed until the same is paid.

"L. D. CAMPBELL."

"HAMILTON, Nov. 27, 1852."

It is alleged that by virtue of said agreement, which became part of said note, it bore interest at the rate of *ten per cent.* from and after November 27, 1852.

By an amendment to his petition, the plaintiff alleges that White did, in pursuance of said promise by Campbell to pay ten per cent., give and extend time to him, in consideration of which he paid said interest.

Sundry credits are indorsed on the note, beginning with January 6, 1853, and ending March 31, 1870.

The answer claims that these payments, indorsed, were paid as interest at ten per cent., denies the validity of the contract to pay that rate for want of any consideration to support the defendant's promise, and denies generally all plaintiff's allegations touching the agreement to give time for the payment of the note.

Upon this issue the case was submitted to the court. The plaintiff testified that he was the executor of White, and that he found among his papers a writing signed by Bebb, the payee and indorser of the note. This paper was offered in evidence by the plaintiff, in support of his case, made by the pleadings, but was ruled out, and

to this ruling plaintiff excepted. It reads as follows:

"CINCINNATI, March 16, 1852.

"Whereas, I negotiated to Wm. E. White the note of Hon. L. D. Campbell, dated April 16, 1851, for \$1,000, payable nine months after date, at the Ohio Life and Trust Co., Cincinnati. And whereas, by reason of fires, &c., Mr. Campbell has not been able to meet said note at its maturity, and asks further time, *which Mr. White has consented, with my consent, to grant:*

"Now, I agree that in consideration of said forbearance, that if the said Campbell will not pay to the said White ten per cent. per annum interest on said note, from and after its maturity, I will; and I agree that the mortgage lien shall remain unaffected by said forbearance, and that I will remain surety, as heretofore, until I give written notice to the contrary, and sixty days thereafter.

"Witness my hand: Wm. BEBB."

Without further testimony by either party, the case was submitted, and the court computed interest on said note at ten per cent. until the repeal of the ten per cent. statute, and after that at six, applying the excess of interest paid after that date, to the payment of principal.

This judgment was affirmed in the district court. To reverse so much of the same as allows six per cent. interest only after the repeal of the ten per cent. statute, is the object of the present proceeding.

Harmon & Maxwell and H. L. Morey, for plaintiff in error,

James E. Campbell and Thomas Millikin, for defendant in error.

JOHNSON, J.

By the act of March 14, 1850, which took effect May 1, 1860 (48 O. L. 87), "the parties to any bond, bill, promissory note or other instrument of writing, for the payment or forbearance of money, may stipulate therein * * * at any rate not exceeding ten per centum yearly."

This statute was repealed February 25, 1859, and the repeal took effect April 1, 1859, but by an act of March 31, 1859 (1 S. & C. 745) the repeal did not affect existing ten per cent. contracts, nor such as should be made before the repeal took effect.

By the act of 1848 (1 S. & C. 744), all payments of interest above the legal rate were to be treated as payments on the principal, when the note was not in the hands of a *bona fide* holder, purchased before due.

This note was without interest, and upon its face bore six per cent. after maturity.

The burden of allegation and proof that the contract, as expressed by the note, had been converted to a ten per cent. contract rested upon the plaintiff.

The court having no other evidence before it, upon the issue made, than the pleadings, found that the contract to pay interest at six per cent. had not been converted into one to pay ten, but following the decision in *Samyn v. Phillips*, 15 Ohio St. 218, allowed all payments of interest at

the rate of ten per cent. made during the existence of the ten per cent. statute to stand as such, and treated all subsequent payments in excess of six per cent. as credits on the principal.

To reverse this judgment two errors are assigned.

1st. That the court erred in ruling out the written agreement of Bebb, found among White's papers, giving his consent to an extension to Campbell, which it is therein stated White had agreed to give, and reciting that White had, with his consent, agreed to give time to Campbell.

2d. That the court erred in holding that there was no valid contract changing the rate of interest from six to ten per cent.

1st. As to the objection of the written statement and agreement of Bebb.

It is dated March 16, 1852, two months after the note was due, and more than eight months before Campbell's promise to pay ten per cent., and after B. had parted with his interest in the note.

It appears from the record that Bebb had waived demand, notice and protest, so that, at the time he signed this paper, he was liable on the note as an indorser.

One of the objects of this instrument was to waive any right he might have to be discharged if White should give time on the note.

Another object seems to have been to induce White to grant further time to Campbell, who it seems was unable to pay, by reason of losses by fire, &c.; hence he agrees that if Campbell does not pay the ten per cent., he will. This agreement was signed by Bebb, and was made for the benefit of White.

Bebb is not a party to this action. This paper was one executed to White; Campbell was not a party to it, nor does it appear that he ever knew of its existence until it were offered in evidence. White's title and ownership of the note was not in issue on the trial, and hence the declarations of Bebb that he had negotiated the note to White, or his statements in favor of White, were not material except to prove the allegation that White had agreed to give time on the note.

The issue to be tried was, whether there was a consideration to support Campbell's promise of November 27th, that is, whether White's promise of delay was a consideration for Campbell's promise to pay ten per cent.

The statement made by Bebb to White, that he, White, had consented, with his consent, to give time, is but the declaration of a third party, a stranger to Campbell's agreement, of what White had agreed to do.

It was no part of the *res geste*, and was inadmissible in favor of White for the purpose for which it was offered, namely, to prove a mutual promise by White, in consideration of the promise made by Campbell. In the absence of anything tending to show that Campbell knew of the existence of this agreement of Bebb with White, or that he had acted upon the faith of it,

it was clearly inadmissible to prove that White had promised to delay or give time.

2d. Did the court err in treating the payments made after April 1, 1859 (the date of the repeal of the ten per cent. law), in excess of six per cent., as payments on the principal of the note?

This depends on the validity of Campbell's promise to pay ten per cent.

In this promise he says: "I hereby agree to allow William E. White ten per cent. interest on a note (describing the same) * * * to be allowed until the same is paid."

The plaintiff alleges that the consideration that made this promise binding was the promise of White to give time. No proof of this is offered, and we are asked to presume or imply that such a valid contract was in fact made, from the fact that annual payments of interest were made for several years by Campbell, who enjoyed the benefit of actual delay during the time of these payments.

The statute requires that the contract to pay the increased rate must be in writing, and while it may not be necessary to express the consideration for the promise in the contract, yet to make it valid as a change of the terms expressed by the note, it should be supported by a valid consideration. The fact of giving time indefinitely, and the payment annually of ten per cent., do not warrant the inference that there ever was any binding obligation pre-existing on the part of White, which was enforceable by Campbell.

Without a definite obligation by White to support Campbell's promise, the terms of the note are not modified. If he was at liberty at any time to collect the note, as he seems to have been, there was no statutory change of its terms.

But it is urged that, as the delay was actually granted for a series of years, the contract became, on the part of White, an executed one, which made Campbell's promise binding; and reference has been made to a numerous class of contracts, where the rule that the promise of one is void for want of mutuality, is confined to cases where want of such mutuality would leave the promisor without a valid consideration *at the time he is to perform his promise*. *L'Amoureux v. Gould*, 7 N. Y. 349.

In other words, that Campbell's promise to pay ten per cent. until the note is paid, though void for want of mutuality, became binding, because time was actually given, as desired by Campbell.

It is undoubtedly true that when the promise is made on certain and definite terms or conditions, open to acceptance, or to be acted upon by the promisee, it becomes a binding promise upon such acceptance or performance, though void for want of mutuality before such acceptance or performance.

Instances of this class of contracts may be found in cases of conditional, optional and gratuitous promises, and also in some forms of guaranty.

In all such cases it is an essential element of

the promise that it is based upon terms or conditions, express or implied, which can be accepted and performed. In such cases the execution of these terms or conditions by the promisee constitutes a valid consideration, and from the time of such execution the promise becomes binding.

If Campbell's promise be examined, it will appear that it is not such as comes within the above rule. He stipulated for no definite time of delay, and none was in fact given. The delay that did occur may have been, and probably was, the result of the voluntary act of White, and not because he was under any legal and valid obligation to grant it. Again, it does not appear that the act of giving time by White *was in execution* of any contract with Campbell, or of any terms or conditions, express or implied, as the consideration of his promise.

To constitute a valid modification of the terms of the promissory note, there must be a new and valuable consideration moving to Campbell to support his promise. None is shown in this case, and none can be presumed to have existed, from the mere fact that he paid the higher rate from year to year, and that indulgence was granted.

The statute requires that the stipulation to pay ten per cent. must be *in the contract* for the payment or forbearance of money. A strict construction of this statute would exclude this subsequent contract or promise of Campbell, made on a separate paper. It does not purport to be a contract for the payment or forbearance of the principal debt, but a supplemental promise to pay a higher rate of interest on the note.

Such a contract was, however, sustained in *Mueller v. McGregor*, 28 Ohio St. 265, where the promise to pay ten per cent. was in a supplemental contract, in which there was a promise by the creditor to delay for a definite time in consideration of the promise to pay ten per cent. In that case, it was held, that the original contract was modified as to rate of interest for the time named, but that after the expiration of that time, the original rate of interest governed, except as to payments made at a higher rate before the repeal of the ten per cent. law.

We hold, therefore, that to constitute such a modification of the promissory note as to change it from a six to a ten per cent. note, there must have been a valid contract to that effect; that the burden of proving such contract rested upon the plaintiff, that such a pre-existing contract cannot be implied from the payment of ten per cent. for a series of years in pursuance of a voluntary promise to do so, in the absence of any consideration to support such promise, and that, as the promise by Campbell was not coupled with any definite terms or conditions to be accepted or performed by White, the fact that delay was granted by him for a series of years, does not constitute such a performance or execution of a contract as will make the promise by

Campbell, which was void for want of mutuality, binding upon him under the statute.

Judgment affirmed.

[This case will appear in 66 O. S.]

SUPREME COURT OF OHIO.

THE CLEVELAND LIBRARY ASSOCIATION

v.

FREDERICK W. PELTON, TREASURER, ET AL.

1. A library association, incorporated under the laws of this state, whose objects and purposes are, "The diffusion of useful knowledge, and the acquirement of the arts and sciences, by the establishment of a library of scientific and miscellaneous books for general circulation, and a reading-room, lectures and cabinets;" open to all persons, without distinction, upon equal terms, and the income and revenues of which are devoted exclusively to such objects and purposes, is "an institution of purely public charity," within the meaning of the 6th clause of the act of March 21, 1864. S. & S. 781.

2. Where such association owns a lot of ground, with a block of buildings thereon, constructed as an entirety, and the buildings having a basement and three stories over the same, each divided into rooms adapted to its use, and for renting, some of which, on each floor, are used by it for its purposes; some are rented out, and the rents received are applied exclusively to keeping the property in good repair, and to the purposes of the association, and some are vacant, *Held*, that such parts of said building and appurtenances as are rented, or otherwise used with a view to profit, are not exempt from taxation.

3. The fact that the building is so constructed, that the parts leased or otherwise used with a view to profit cannot be separated from the residue by definite lines, is no obstacle to a valuation of such parts for purposes of taxation, having due reference to the taxable value of the entire property.

Appeal—Reserved in the District Court of Cuyahoga County.

The action below was brought by plaintiff, to enjoin the auditor and treasurer of Cuyahoga county, from collecting the taxes and assessing penalties thereon, for the year 1877, on its property, known as Case Block, in the city of Cleveland.

It was reserved for decision here, on the following finding of facts:

"This cause came on to be heard upon the pleadings and evidence, and the court finds that the plaintiff is a corporation, duly organized under section 66 of the corporation act of May 1st, 1852, as amended May 14th, 1859, and that the objects and purposes of said corporation are set forth in the constitution and by-laws, which are made part of this finding and hereto annexed, marked 'Exhibit A'; that said plaintiff is possessed of a large collection of scientific and miscellaneous books, about 14,000 volumes; that besides its library proper, it has a large collection of natural history, also a large historical collection, and keeps up and maintains a reading-room in connection with its library; that any person, without distinction of color, sex or faith, can become a member, and that at the commencement of this action the annual fee is, and ever since has been, one dollar, and there are about one thousand members; that if a member withdraws more than one book at a time a further charge of ten cents per week is added;

that its library and reading-room are open to the members daily, and its natural history and historical collections are open free during two days a week to the public; the association has no stockholders, and no member or officer of the plaintiff has any pecuniary benefit from the plaintiff, or is entitled to any; that it employs and pays a librarian and a few necessary assistants to take charge of the books and their distribution, and to attend to the exhibiton of its collections aforesaid; that on the first day of July, 1876, Leonard Case, by his deed duly executed and delivered, conveyed to the plaintiff the premises situate in the city of Cleveland, and described in his said deed, a copy of which is hereunto annexed and made part of this finding, and marked 'Exhibit B'; said Case died in January, 1880, without exercising his right of revocation mentioned in said deed; that said plaintiff has been in occupation of said premises ever since the execution of said deed; that the whole land is covered by a building, and a diagram of the rooms of said building is hereto annexed, marked 'Exhibit C,' and made part of this finding; that the rooms marked 'R,' in the basement, are used for storage by the tenants of the rooms above; that on the principal floor the rooms are all stores and are all rented, and the rooms on the floors above marked 'R,' are rented, and the hall is rented for musical concerts, lectures, and art and scientific exhibitions; the rooms marked 'L,' are actually occupied by the library for its books, collections, reading-rooms and storage, and the other rooms are not rented; the entire net income derived from the rents is devoted as fast as it is collected to the purchase of books and enlarging the facilities of the library, and no member or officer of the plaintiff derives or receives any pecuniary benefit from said income; during 1879 the gross income from renting rooms and hall amounted to \$10,000, of which amount \$3,000 was used in purchasing books for the library, and after retaining sufficient to pay the taxes on premises, the remainder thereof was used for necessary repairs of the building and for enlarging the library rooms.

"That the land included in said deed stands on the county duplicate at a valuation of \$24,552.50, and the building at a valuation of \$74,657.50, on which total valuation of \$99,210, the general state, county and city taxes were assessed for the year 1877, and in the hands of the treasurer for collection. And difficult and important questions of law arising on these facts, on motion of the plaintiff, this cause is reserved to the supreme court for final determination."

Grannis & Griswold, for plaintiff.

Heisley, Weh & Wallace, for defendants.

JOHNSON, J.

The plaintiff is a corporation organized under the act of 1852, as amended March 14, 1859. 1 S. & C. 305.

Section 73 of said act provides that: "The trustees or directors who may be appointed under the provisions of this act, and their succe-

sors in office, shall have perpetual succession of such name as may be designated, and by such name shall be legally capable of contracting, and of prosecuting and defending suits, and shall have capacity to acquire, hold, enjoy, dispose of and convey all property, real or personal, they may acquire by purchase, donation, or otherwise, for the purpose of carrying out the intention of such society or association, but they shall not acquire or hold property for any other purpose."

The purposes of this association, and for which it may acquire, hold and use property, are, as as found by the district court, and set forth in "Exhibit A," "The diffusion of useful knowledge and the acquirement of the arts and sciences by the establishment of a library of scientific and miscellaneous books for general circulation, and a reading room, lectures and cabinets."

It is open to all without distinction, and all its income is devoted exclusively to said purposes.

That this association, in its objects and purposes, is, "an institution of purely public charity," within the meaning of the statute of 1864, is, we think settled by the cases of *Gerke v. Purcell*, 25 Ohio St. 229; *Cincinnati College v. State*, 19 Ohio, 111; and *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201.

As it appears, by the findings of the court, that some of the rooms in the basement and in the different stories are used by the association for its objects, some are vacant and some are rented, the only remaining question is, whether the part of the property that is rented should be assessed for taxation?

This requires a construction of the sixth clause of section 1 of the act of March 21, 1864, providing for exemptions, which reads as follows:

"All buildings belonging to institutions of purely public charity, together with the land actually occupied by such institution, not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustaining, and belonging exclusively to such institutions."

In considering this question, we may premise:

1st. That all exemptions by statute, from the equal burdens of taxation, should be strictly construed.

2d. That the fact that the income derived from rents of parts of the building not used is devoted exclusively to the objects and purposes of the association, and not used for the benefit or profit of its members, can make no difference.

The law looks to the property, as it finds it in use, and not to what is done with its accumulations. *Cincinnati College v. State*, 19 Ohio, 110; *Humphries v. Little Sisters*, 29 Ohio St. 201; *Gerke v. Purcell*, 25 Ohio St. 229.

3d. The circumstance, that the rooms in the building, actually used by the association, are on the different floors, from the basement to the third story, and are not severable by any verti-

cal or horizontal lines through the building, presents no obstacle to a separation in valuation for purposes of taxation. This was settled in *Cincinnati College v. Yeatman*, 30 Ohio St. 276.

The case of *Cincinnati College v. State* (*supra*), would seem to be decisive of the one at bar, and is so, unless, as is claimed, the exemption clause under consideration requires a different construction from the corresponding clause in the former statutes under which that case arose.

The words of the act of 1864 are: "All buildings belonging to institutions of purely public charity, together with the land actually occupied by such institution, not leased or otherwise used with a view to profit," &c., while those of the act of 1846 are: "All buildings belonging to scientific, literary, or benevolent societies, used exclusively for scientific, literary or benevolent societies, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit," &c.

The argument is, that as the word *exclusively* is omitted from the act of 1864, it was intended to change the law as construed in *Cincinnati College v. State*, and that now, if part only of the building is so used, and the residue is rented, the whole is exempt. This construction would defeat the limitation found in these words "not leased or otherwise used with a view to profit."

The words "institutions of purely public charity," are substituted in the act of 1864, for the societies specifically named in the act of 1846, and embrace all societies without enumeration, where the object is a *purely* public charity. If such an institution embraces other objects, and uses its buildings for other purposes, as for instance, renting with a view to profit, it is not an institution of purely public charity. In short, its buildings must, under the act of 1864, as well as under that of 1846, be used *exclusively* for that object, in order to be exempt.

Any other construction would defeat the manifest intention of the tax laws, and allow such institutions to become landlords of all species of property, provided the income derived therefrom is used to promote their objects.

Again, in view of the principle that exemptions from taxation should be strictly construed, it has been held, in many well-considered cases, that an exemption in general terms of all the property of a college or other institution extends only to the property actually used for its legitimate purposes, as fully as if the exemption was expressly limited to such property.

Thus, when a library association was incorporated, to establish a library, and by its charter its property, in general terms, was exempt from taxation, it was held that the use must be direct and exclusive, and that where the building of the association consisted of a large number of rooms, a small portion of which only were used, and the others were rented out for business purposes, the part so used was not exempt from taxation. *State v. Elizabeth*, 4 Dutcher, 103. To the same effect is the case of *State v. Flavell* (4 Zab. 382), where the lands of a corporation

were, by its charter, in general terms, exempted from taxation; it was held, that this exemption only extended to such real estate as was held for the purposes of the corporation, and did not include other lands or property. See also, *State v. Mansfield*, 3 Zab. 512; *Burrows on Taxation*, 180-186; *Trustees of Good Shepherd v. Boston*, 120 Mass. 212; *Detroit v. Mayor*, 3 Mich. 172. Indeed, such must necessarily be the case.

The statute under which the plaintiff holds its charter, as already cited, gives it capacity "to acquire, hold, enjoy, dispose of and convey all property, real or personal, they may acquire by purchase, donation or otherwise, for the purpose of carrying out the intention of such society or association, but they shall not acquire or hold property for any other purpose."

While we do not intend to suggest a doubt of the right of this corporation to accept this munificent donation of Mr. Case, the property being an entirety and suitable for its purpose, yet we think it clear, that as to so much of this building and grounds, not necessary for its use, which is rented out, should not be exempted from its equal share of taxation.

It may be said, that the entire building may become necessary for the objects of the association. When this shall become the case, and the entire building or any additional parts are so used, the parts thus withdrawn from renting, cease to be leased or otherwise used with a view to profit, and fall within the exemption.

The fact that the building is so constructed that the parts leased or otherwise used with a view to profit cannot be separated from the residue by definite lines, is no obstacle to a valuation of such parts for purposes of taxation, having due reference to the taxable value of the entire property.

Remanded for further proceedings in accordance with this decision.

[This case will appear in 86 Ohio St.]

SUPREME COURT OF OHIO.

CYRUS S. KOONS,

v.

THE STATE OF OHIO.

1. The genuineness of a writing was in controversy in a cause, and an expert, called as a witness, stated, in connection with his opinion, which opinion was material upon the matters so in controversy, certain facts upon which the opinion was founded, and the court afterward excluded from the consideration of the jury such facts, but refused to exclude the opinion. *Held*, that this was error.

2. On the trial of a party charged with uttering and publishing a check as true and genuine, an expert was called for the State, who had seen the alleged forged check several months previously, and to whom a genuine signature of the accused was shown on such trial. *Held*, that the State being unable to produce such check, the presence of such check on the trial was not indispensable to the competency of the witness to testify to the fact that the check and signature were in the same handwriting.

3. Where, on the trial of one charged with uttering a forged check, signed "John B. Brown," an expert in handwriting who had seen the check several months previously, but had never seen the accused write, and was not acquainted with his handwriting, was called as witness, and a genuine signature of the accused, "C. S.

Koons," was exhibited to him, which furnished the only knowledge he had of the handwriting of the accused, *Held*, that before the witness should be allowed to give his opinion to the jury as to whether the check and signature were written by the same person, it ought to appear to the court, from an examination of the witness, that the signature of the accused constituted a sufficient basis upon which the witness could form an opinion whether the check was in the handwriting of the accused.

Error to the Court of Common Pleas of Athens County.

At the June term, 1880, of the Court of Common Pleas of Athens County, the grand jury returned into court an indictment, which they found against Cyrus S. Koons, charging him, in the first count, with having forged a check in the preceding March, and in the second count, with uttering and publishing, as true and genuine, a check, knowing the same to have been forged, the latter offense also being alleged to have been committed in the preceding March. The defendant pleaded not guilty, and, at the same term, was placed on trial. The verdict was that Koons was not guilty as charged in the first count, but that he was guilty as charged in the second count of the indictment. A motion for a new trial having been overruled, Koons was sentenced to the penitentiary for the term of five years.

The forged check as set forth in the indictment was in these words and figures:

"ATHENS, OHIO, March 15, 1880.

"Bank of Athens, pay to J. B. Ellis or bearer. Five hundred and forty dollars.

JOHN B. BROWN."

On the trial several bills of exception were taken. In one of these it is stated that the State called James D. Brown as a witness, who testified that he was a banker, skilled in the comparison and examination of handwritings; that he was then cashier and manager of the Bank of Athens; that he was present in the bank on March 31, 1880, when Koons presented the above mentioned check for payment; that he was familiar with the genuine signature of John B. Brown, and that, in his opinion, the signature on said check was not the genuine signature of John B. Brown. The check was handed back to Koons and the witness had not seen it since. The check was not produced in court. The witness further stated that he had no knowledge or acquaintance with the handwriting in the alleged forged check, and that he never saw the defendant write, nor was he familiar with his handwriting. Thereupon a promissory note in the following words and figures was shown to the witness:

"\$43.50.

June 20, 1874.

"One day after date I promise to pay Patterson & Curfman, or bearer, the sum of forty-three dollars and 50 cts. with eight per cent., for value received.

C. S. KOONS."

The defendant admitted that the signature "C. S. Koons" was written by him, and the prosecuting attorney admitted that the filling up of said note was not written by said Koons. The witness said he had never seen said signature of said Koons, nor any other signature of his until that day. The prosecuting attorney then said to the witness: "Look at the signature 'C. S. Koons,' in this note, and say if the handwriting of the check signed John B. Brown, and presented to you March 31, was the same as this signature." The defendant objected to the question, the court overruled the objection, and the witness answered: "The signature to this note, 'C. S. Koons,' has a similarity to the handwriting of the check." The defendant moved the court to rule out the answer, but the court refused to do so, and permitted the same to go to the jury. And the defendant excepted to

the ruling of the court both in permitting the question to be answered and in refusing to rule out the answer. The prosecuting attorney further asked the witness: "State whether or not, in your opinion, the signature to the note, and handwriting and signature to the check are in the same handwriting?" To this question the defendant objected, but the court overruled the objection and the defendant excepted. The witness answered: "I should think they probably were." And the witness further said, "My remembrance of the check, and my examination of certain other papers brought to me by Mr. Wolf since the check was presented, makes me think so." The defendant objecting, the court ruled out the following: "My remembrance of the check, and my examination of certain other papers brought to me by Mr. Wolf since the check was presented, makes me think so." The defendant objected to the ruling out of those words, unless the whole answer of the witness should be ruled out, but the court overruled the objection and the defendant excepted.

Further, to maintain the issue the State called R. H. Stewart, who testified that he was an expert in the examination of handwriting, and was a clerk in the Bank of Athens when the alleged forged check was presented, and examined it; that he did not recognize the handwriting, but was sure the signature, John B. Brown, was not genuine; that he had never seen the defendant write, nor had he seen the signature of C. S. Koons until then, nor had he seen the alleged forged check since March 31. And thereupon the above-mentioned note to Patterson & Curfman was shown to the witness, and, against the objection of the defendant, the court permitted the witness to state that there was a similarity between the handwriting in said check, and the signature "C. S. Koons," to the note; and, over like objection of the defendant, the witness was allowed to state that in his opinion the forged check and the signature "C. S. Koons," "were probably in the same handwriting." The defendant asked the court to rule out and exclude said testimony of Stewart, but the court refused, and permitted the same to go to the jury, and the defendant excepted.

In the motion for a new trial, which was overruled, the admission of the testimony of Brown and Stewart were assigned as ground for the motion, and it was further assigned as ground for such new trial, in the same motion, and the truth of which was shown, that the sheriff of the county and his deputy had given evidence material for the State on the trial of the cause, and that during the deliberations of the jury, in the room where they were considering of their verdict, the sheriff was present a considerable portion, and the deputy the remaining portion of the time. It appeared that the room was a hall, sixty by eighty feet, but it does not appear whether the sheriff or his deputy heard the deliberations of the jury, nor does it appear that the jury were under any restraint in their deliberations, by reason of the presence of those witnesses.

On motion, leave was given to file, in this court, a petition in error to reverse the aforesaid judgment.

Grosvenor & Jones, for plaintiff in error.

Emmet Thompson, prosecuting attorney, for the State.

OKEY, J.

Whatever uncertainty there was in the law of England as to the proof of handwriting by comparison, was removed by the statute 17 and 18 Vict. c. 125, s. 27; 28 Vict. c. 18, s. 8. The only question there is as to the proper construction of those statutes. They provide, in substance, that comparison of a disputed handwriting with

any writing proved to the satisfaction of the judge to be genuine, is permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to any court and jury, as evidence of the genuineness or otherwise of the writing in dispute. In this State, independently of statute, it has been settled that standards of comparison may be used by experts called as witnesses upon the trial of an issue as to the genuineness of a signature, yet the standard of comparison, when not already a paper in the case, or admitted to be genuine, must be clearly proved by persons who testify directly to its having been written by the party. *Bragg v. Colwell*, 19 Ohio St. 407; *Pavey v. Pavey*, 30 Ohio St. 600. Evidence of this character is received with caution, and there is a very general disposition in the courts to regard such testimony, as a general rule, of a weak and unsatisfactory character. Still the admissibility of such evidence is for the court, its weight for the jury. Nevertheless, to render it admissible it is quite clear that all the facts upon which the expert forms his opinion should be before the court and jury, to the end that they should determine, as far as they may be able to do so, whether the opinion given is well founded, and so that the opposing counsel may have an opportunity to cross-examine as to such facts. Here, after the witness Brown had been inquired of, whether the signature to a certain note and the writing in the check alleged to have been forged were in the same handwriting, and he had answered, "I should think they probably were," and had added, in answer to the same question, "My remembrance of the check and my examination of certain other papers brought to me by Mr. Wolf since the check was presented makes me think so;" the court excluded the latter part of the answer, which was the predicate of his opinion, but refused to exclude the first portion of the answer, in which he states his conclusion. We are all of opinion that in so holding, the court below erred. The court and jury were, as I have said, entitled to consider the grounds of the opinion, and the defendant's counsel clearly had a right to cross-examine the witness as to such ground of belief.

In so holding, however, we do not hold the witness was precluded from giving an opinion, on the ground that the check was not produced at the trial. Where the counsel for the State have endeavored to obtain the alleged forged instrument, and failed, its absence can have no other effect on the trial than to render a conviction more difficult.

The court also erred in admitting the testimony of Stewart. That witness testified that he was an expert in the examination of handwriting and had examined the alleged forged check when it was presented at the bank; that he did not recognize the handwriting, but was sure that the signature to it was not that of John B. Brown; that he had never seen the defendant write, nor had he seen the signature of C. S. Koons until now, nor had he seen the alleged forged check since March 31. The note to Patterson & Curfman, mentioned in the statement of the case, was then shown to the witness, and he was permitted to state that the forged check and the signature to the note "were probably in the same handwriting." Now, in the opinion of a majority of the court, the witness had not qualified to express the opinion so given. It must appear, before such opinion is called for, that the witness has formed, or is then able to form, an opinion upon the matter in question. No such qualification appears anywhere in this record, and in the absence of it we hold that the opinion given was improperly received.

In view of the fact that the judgment must be reversed, and the cause remanded for a new trial, for the reasons stated, it is unnecessary to determine whether the act of the sheriff and his deputy, who had testified in the cause on behalf of the State, in remaining in the room where the jury was deliberating, affords of itself ground for reversal. But we all unite in condemning such acts. The jury should be left free to consider the case and find their verdict unrestrained by the presence of any person, and especially the presence of those who testified as witnesses in the cause, and upon whose testimony the jury might desire to comment.

Judgment reversed.

[This case will appear in 36 O. S.]

SUPREME COURT OF OHIO.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

v.

PETER LAVALLEY.

1. In an action brought by an employee of a railroad company against it, to recover for injury sustained while in the discharge of his duty, the negligence charged was the moving of a car under which the plaintiff was working, without notice or warning. The proof showed that the negligence in not giving notice or warning of the moving of the car was attributable to the foreman under whose control the plaintiff was working and not to those engaged in moving the car.

Held, that the case was not one of a failure of proof under section 133 of the Code; but, at most, of variance under sections 131 and 132.

2. It is the duty of a railroad company to make such regulations or provisions for the safety of its employees as will afford them reasonable protection against the dangers incident to the performance of their respective duties.

3. A foreman was put in charge of a set of hands, whose business it was to repair freight cars while standing on the track, in the yard of the company in which trains were accustomed to be made up; it was also the duty of the foreman to participate with the hands in doing the work. While the foreman and a hand were engaged in repairing a car, and the latter was at work under the car by the order of the foreman, he was injured by the striking of the car on which he was working by another car moving on the same track. *Held*:

1. That the hand was the subordinate of the foreman, in respect to the work in which he was engaged at the time he was injured.

2. That it was the duty of the foreman, in putting the hand to work under the car, to use reasonable care to protect him, while thus engaged, from the danger arising from the switching of cars and the making up of trains on the same track; and for an injury resulting from the want of such care, the company is liable.

Error to the District Court of Lucas County.

The cause of action against the defendant below, as alleged by the plaintiff below in his petition, is in substance this:

That the plaintiff, an employee of the defendant, in the performance of his duty and in the pursuance of the order of his superiors in such service, was under a car making certain repairs; that it was the duty of defendant, by its agents, to prevent a starting or moving of said car and otherwise to protect plaintiff from danger while so working under said car; and that defendant negligently and wrongfully, by its agents and servants, without any notice or warning to plaintiff, put and continued said car in motion, whereby plaintiff received the injuries complained of.

The answer in substance denies each of these allegations.

The facts of the case, as shown by the testimony set

out, in the bill of exceptions, are, in substance, as follows:

Lavalley had been employed for nearly three years as a repairer, on the track, of crippled freight cars, at the stock yards of the Lake Shore & Michigan Southern Railway Company, on the east side of the Maumee river, and about three weeks before he was hurt was transferred to the freight yards at the Air Line Junction, on the west side of the river, to do the same kind of work there. This work consisted of an examination of all freight cars on their arrival, and to repair those he found needing such repairs as could be made on the tracks in the yard. The repair gang consisted of Fox, the foreman, Lavalley and Clark, repairers, and two other men called oilers. It was customary for these men, including Fox, to go out separately and examine the cars in the trains on their arrival. If they found a car needing such repairs as they could make alone, they repaired it; but if they could not make the repairs alone any two of them would go and do the work together. Engines and train men were at work about these yards at all times, engaged in switching cars and making up trains; and in the prosecution of their work it was also customary for these repair men, when alone, and they had to be under a car, to look out for themselves that the car would not be moved; but when two were together it was expected that the one not under the car would watch for the other, and this would be the case whether Fox and one of his men, or two of the men, worked together. At this time the only means the men engaged in switching about the yards had of knowing that a car repairer was at work in any particular locality was by these men telling them when and where they were going to repair a car.

Afterwards signal flags were used to designate cars that were being repaired.

On the day Lavalley was injured, Fox directed Lavalley to pick out a bolt and go with him to repair a car he had found there needing a bolt which would require two men to put in. Fox also picked up another bolt and went with Lavalley to a crippled box freight car. The two worked together in taking out a broken bolt and replacing a new bolt through the floor and in the draw part of the car. While Fox was under the car screwing on the nut he directed Lavalley to take the other bolt and go to another box car, which he pointed out near by, and commence the work of driving out a similar broken bolt and putting in the new one. Lavalley did so, and went under the car for the purpose of driving the old bolt but through the sill and floor of the car. Fox then came over and jumped into this car to assist in completing the work, but not finding the new bolt to be put back, asked Lavalley to hand it to him. Lavalley came out from under the car, picked up the new bolt, took off the nut, handed the bolt to Fox, and then returned to his place under the car to screw on the nut after Fox had driven the new bolt down. While Fox was driving the bolt down and Lavalley was putting on the nut, a pony engine, engaged in making up a train, set some cars in motion on this track in such a manner as to cause this car to be moved about half its length, and thereby inflict upon Lavalley the injury complained of.

Neither Fox nor any of his men had any control over the men engaged in making up trains; nor was there any negligence chargeable to the latter in respect to causing the injury in question.

The trial resulted in a verdict and judgment for the plaintiff below.

On error, the judgment was affirmed by the district court; and the present proceeding in error is prosecuted

by the company, to obtain a reversal of the judgment.

R. & E. T. White and James Mason, for plaintiff in error:

We insist that the allegation of the claim, to which the proof was directed, being unproven, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within sections 5294 and 5295 of the revised statutes, but a failure of proof. Section 5296 of revised statutes (§ 133, also §§ 131 and 132 of code; S. & C. 869). *Dean v. Yates*, 22 Ohio St. 398, par. 2 page 396; also, *Hill v. Supervisor, &c.*, 10 Ohio St. 621, and *Thatcher v. Helsey*, 21 Ohio St. 698.

It is a rule of law now well established in Ohio, that where one servant of a railway company is injured in consequence of the neglect of another servant, between, whom, for the time being, no relation of subordinate and superior, in connection with the particular act of negligence complained of exists, the injured party has no right of action against the company. *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415; *C. C. & C. R. R. Co. v. Keary*, 3 Ohio St. 201; *Mad River & L. E. R. R. Co. v. Barber*, 5 Ohio St. 541; *Whaalan v. Mad River & L. E. R. R. Co.*, 8 Ohio St. 249; *Manville v. C. & T. R. R. Co.*, 11 Ohio St. 417; *Pittsburg, F. W. & C. R'y Co. v. Deviney*, 17 Ohio St. 197.

And the question in this issue is whether there existed, at the time this injury was received, such a relation of subordinate and superior between the laborer, Lavalley, and the foreman, Fox, as would render the company liable to Lavalley for the consequences of the asserted negligence of Fox in not keeping a more strict lookout, and warning Lavalley in time of the approaching danger.

In this case the testimony shows that Fox was the superior of Lavalley in all matters connected with the order and manner in which the work upon the car should be conducted, but in the matter of keeping watch and lookout for danger that no relation of superior and subordinate existed. Lavalley did not depend upon Fox to look out because he was the foreman, but simply because he was his fellow-laborer in the prosecution of the work about which they were both engaged. It was not the duty of Fox to keep this lookout because he was the foreman, but simply because of that duty which one fellow-laborer owes to another. It is unquestioned but that it would have been just as much the duty of Lavalley to have kept watch while Fox was under the car as for Fox to have done so while Lavalley was there. This was a reciprocal duty the one owed to the other as co-laborers, and not because of any superior relation of the one over the other.

Lee & Brown, for defendant in error:

The negligence of Fox produced the injury. *Shearman & Redfield on Negligence*, § 10; 8 Bosw. 345; 2 E. D. Smith, 413.

The superior cannot, at one and the same time, be the superior and the common fellow-servant. *Railroad v. Stevens*, 20 Ohio, 415; *Railroad v. Deviney*, 17 Ohio St. 210; *Berea Stone Co. v. Kraft*, 31 Ohio St. 293; *Railway Co. v. Lewis*, 33 Ohio St. 200; 53 N. Y. 549.

WHITE, J.

The first ground of error relied on is that there was a failure of proof on the part of the plaintiff, under section 133 of the code, and not a variance between the allegations in the petition and the proof, as defined by sections 131 and 132. We regard the case as raising a question of variance merely, within the meaning of the last two sections.

The petition charged that the plaintiff, by the order of

his superior, was under a car making repairs; that it was the duty of the defendant, by its agents, to prevent the moving of the car, and otherwise to protect the plaintiff from danger while so working under said car; and that the defendant negligently and wrongfully, by its agents, without any notice to the plaintiff, put the car in motion, whereby the plaintiff was injured.

The negligence charged consisted in the failure to notify the plaintiff of the approaching danger, and in the moving of the car without such notice. Both are alleged to have been operative in causing the injury. It is not definitely stated on what servant the duty rested of giving the plaintiff notice; but, if the purposes of the defense required this to be more specifically stated, application should have been made to the court to compel the plaintiff to make the petition definite and certain in this respect. As the case is presented, we think it comes within the principle laid down on the subject of variance, in *Huffman v. Gordon*, 15 Ohio St. 212, 216.

The next ground of error is that the relation of superior and subordinate existing between the foreman, Fox, and the plaintiff below, Lavalley, was not such as would make the company liable for the negligence of Fox in causing the injury in question.

The claim on behalf of the company is that Fox was the superior of Lavalley in all matters connected with the order and manner in which the work upon the cars should be conducted, but in the matter of keeping watch and lookout for danger that no relation of superior and subordinate existed; that in this respect they were merely fellow-servants engaged in a common service, neither having any control or authority over the other.

We do not concur in this view. It was the duty of the company to make such provision or regulations for the safety of its employees as would afford them reasonable protection from the dangers incident to the performance of their respective duties.

In the present case Lavalley, the plaintiff below, was one of a set of hands whose business it was to repair freight cars while standing on the track. The place in which the repairing was required to be done was in the freight yard of the company, in which the freight trains were accustomed to be made up, and where there was a constant switching of cars from one track to another. The services, therefore, required of these hands were peculiarly dangerous; and it was the duty of the company to make reasonable regulations or provisions to protect them from the dangers to which they were exposed from moving trains and cars, while engaged in the discharge of their duties.

The hands, under the regulations of the company, were put in the charge of Fox, who, in directing their operations, was the representative of the company. No other provision or regulation seems to have been made for their government or protection. By setting Lavalley to work under the car, where, by the exercise of reasonable care, he could not discover an approaching train or car in time to save himself from injury, it was the duty of Fox to see that reasonable precautions were taken to guard him against such danger; and for the injury resulting from such neglect the company is liable. He might have watched, himself, or, if his services were required in the car, he might have required one of the other hands to watch; but he did neither, nor did he adopt any other precautions.

It is said by counsel that if the company is liable to Lavalley, it would likewise have been liable to Fox, if he had been injured under like circumstances. Such con-

clusion is not warranted. Fox had authority to direct what precautions should be taken to guard against danger. He could have required one of the hands to watch while he was engaged in the work. Lavalley had no such authority. If Fox had chosen to expose himself to the danger, and had neglected to exercise the authority with which he was invested to protect himself from injury, the fault would have been his own.

Judgment affirmed.

SUPREME COURT OF PENNSYLVANIA.

COMMONWEALTH MUTUAL FIRE INSURANCE COMPANY, DEFENDANT BELOW,

vs.

FRANK HUNTZINGER, FOR USE.

JUNE, 20, 1881.

The difference between a representation and a warranty is well defined. For an injury resulting from the former the remedy is an action on the case for the deceit; for an injury by a breach of warranty the action is on the contract.

Mere mutual knowledge by the assured and the agent of the insurer of the falsity of a fact warranted, is inadequate to induce a reformation of the policy so as to make it conform with the truth.

Knowledge by the underwriter, or by him and the assured, of the breach of a warranty, at the time it is made, does not relieve the assured from the consequences of the breach, and is no basis for reforming the policy, though equity will reform it in case of a mutual mistake of facts.

Warranties in insurance policies differ from those in relation to the sale of personal chattels.

Knowledge that the answer was untrue might relieve against a false or imperfect representation, but not against a warranty. That which is a warranty in a policy of insurance by its terms, cannot be shown by parol evidence to have been inserted by mistake.

A contract based upon guarantees of facts which do not exist cannot be enforced by the party making the guaranty.

If an agent of an insurance company, intending to write an answer to his question as made by the applicant, writes something else, and the paper is signed, both believing the answer correctly written, there is a mutual mistake and the policy may be reformed. Where the answer is written as made, there is no mutual mistake, and no relief for him who warranted it, unless the agent deceived him into the making.

Error to the Court of Common Pleas of Lancaster County.

TRUNKY, J.

The application and policy evidence the contract between the parties, and it is stipulated that "this application shall form a part of this policy of insurance, and all the statements herein shall constitute warranties on the part of the insured." One of the statements is, that the amount insured on the property is \$1,500 in Pennsylvania Mutual of Columbia. In fact the amount of insurance was \$2,000. To avoid the consequences of a breach of his warranty, Huntzinger called James W. Ziebach, who testified that he was agent for the company, defendant, and also for the Pennsylvania Mutual of Columbia; that the defendant did not furnish him blank policies to write and issue; that he received the application, sent it to the company, and if it accepted the risk, the policy was forwarded to him and he delivered it to the insured. When he took this application he read the question: "What amount is there insured on the property, in what company and in whose

name?" Huntzinger said "he had \$1,500 or \$2,000 insurance in the Pennsylvania Mutual, he didn't know which. He thought it was \$1,500; I said we ought to know for sure. He said, my policy is at the house. He didn't have it in the store and he was not sure about it. He was under the impression it was \$1,500 and put it down \$1,500. I said, we would put it down \$1,500 because I thought it was that. And he signed the application."

It is clear beyond question that the plaintiff intended to make the statement as written when he signed the paper and he knew just what he was doing. There was no mistake or fraud by the agent in writing one thing when the answer was another. The oral and written testimony entirely accord. Each kind shows that Huntzinger stated the amount of insurance was \$1,500, and that the true amount was \$2,000. The plaintiff must have known that the policy was not issued by the agent, but by the company, after its acceptance of the risk. There is not the slightest evidence that he was induced to sign the application by the agent's deceit. If honest, neither remembered the amount of insurance, but the policy was in the applicant's house. If a fraud was perpetrated, it was participated in by both the agent and insured, for they agreed upon the same thing. However, under the charge of the court, it may be taken as settled by the verdict that the plaintiff committed no fraud, but on the contrary acted in good faith when he warranted a statement which he did not know to be true and could have ascertained it was false by looking at his policy. The court charged that if Huntzinger and Ziebach had forgotten "the exact amount insured prior in the Pennsylvania Mutual Company, then the mistake was mutual—both dealt under mutual mistake in respect to that matter of fact—it will not vitiate in itself this policy in the absence of fraud; and the defendant has no defense in this suit, but the proof of fraud." If this ruling be correct, nothing can be of less value than the warranty of a representation; the representation would be just as good without its warranty.

The distinction between a representation and a warranty is too broad and well defined to require remark. For an injury arising from a false representation, the remedy is on the case for the deceit, bad faith lying at its foundation; for an injury by a breach of warranty, the action is upon the contract, and it is immaterial whether the defendant did or did not believe the fact he warranted. Precisely the same principles apply in making a defense on the ground of the plaintiff's false representation, or breach of warranty, as would in sustaining an action on such grounds. Here no question was raised as to false representation of Huntzinger which involved fraud or bad faith on his part. The testimony adduced by himself plainly revealed his broken warranty, and the chief question was as to the effect of that upon his claim under the policy. It is not material whether the agent

knew of the breach. "Mere mutual knowledge by the assured and the agents of the insurer of the falsity of the fact warranted, is entirely inadequate to induce a reformation of the policy so as to make it conform with the truth. It is rather evidence of guilt collusion between the agents and the assured, from which the latter can derive no advantage." Knowledge by the underwriter, or by him and the assured, of the breach of a warranty, at the time it is made, does not relieve the assured from the consequences of the breach, and is no basis for reforming the policy, though equity will reform it, in the case of mutual mistake of facts. It is not true that the rule which prevails in sales of personal property, namely, that a warranty does not embrace defects known to the purchaser, is also extended to warranties contained in policies of insurance. The purpose in requiring a warranty is to dispense with inquiry and cast upon the assured the obligation that the facts shall be as represented. A representation and a warranty are essentially different things and call for the application of different rules of law. Knowledge that the answer was untrue might relieve against a false or imperfect representation: *State Mutual Fire Insurance Co. v. Arthur*, 6 Casey, 315. This doctrine, enunciated in that case, has not since been doubted in Pennsylvania.

In *Cooper v. Farmers' Mutual Insurance Co.*, 14 Wright, 209, it was held that that which is a warranty in a policy of insurance by its terms, cannot be shown by parol evidence to have been inserted by mistake. This certainly is sound, if understood with reference to such mistakes of the assured as where he makes a false statement believing it to be true, without having been deceived and misled by the other party. No principle of law will enable a party, who guarantees a fact upon which a contract for insurance is based, which fact is afterwards found not to exist, to enforce the contract. He agrees to answer for the truth of the fact, and cannot escape on the ground of his mistake as to its existence. But if a fraud or mistake of the other party, or of the agent of the other party while acting within his authority, he be induced to sign a statement which he did not make and did not intend to make, such statement is not only void as to himself, but he shall not lose the benefit of a contract for which he paid the stipulated consideration, and held without knowledge of the mistake or fraud. If an agent for an insurance company intending to write an answer to his question as made by the applicant, write something else, and the paper is signed, both believing the answer correctly written, there is a mutual mistake and the policy may be reformed. Where the answer is written as made, there is no mutual mistake, and no relief for him who warranted it, unless the agent deceived him into the making of it.

The case of *Smith v. Farmers' and Mechanics' Mutual Fire Insurance Co.*, 8 Nor. 287, and *Eilenberger v. Protective Mutual Fire Insurance Co.*, Id., 484, are not all in conflict with prior decisions as to the effect of a warranty actually

made; they relate to the admissibility of evidence to show fraud or mistake by an agent of the company of which the assured had no knowledge till after his loss, and his right to recover upon his policy, notwithstanding such fraud or mistake. Of like purport is the decision in *insurance Co. v. Wilkinson*, 11 *Amer. L. Register*, 485, where it said in the opinion, that the insured did not intend to make the representation when he signed the paper, did not know he was doing so, and had refused to make any representation on the subject; it was held that the answer written by the agent was his, not the applicant's, and his principal, the company was bound by it.

We are of the opinion that the plaintiff's fifth point should have been refused, and the defendant's point affirmed. If the jury believed the evidence of Ziebach, the plaintiff was not entitled to recover. The facts assumed in the defendant's point were shown by written evidence, and were not disputed.

The conditions of insurance provided that notice of additional insurance, or of any change in existing insurance shall be given to the company by the insured in writing, and shall be acknowledged in writing by the secretary; and no other notice shall be binding or any force against the company. In the absence of evidence of waiver of the notice required in this stipulation, we do not think "the jury would be justified in inferring that knowledge of the agent will bind the principal of notice of subsequent insurance or surrender of previous insurance." The parties agreed that written notice should be given, and in like manner acknowledged by the secretary; mere knowledge of an agent is not equivalent of that.

Judgment reversed.

SUPREME COURT OF PENNSYLVANIA.

COMMONWEALTH, TO USE OF PRICE,

v.

HAINES ET AL.

MAY 2, 1881.

The certificate of a notary public of the acknowledgment of a deed or mortgage is a judicial act.

The notary, who has been imposed upon by a personation, is liable only for a clear and intentional dereliction of duty; and in the absence of such evidence he is protected by the legal presumption that he did his full duty.

A mere mistaken conclusion imposes no liability on him.

Error to the Court of Common Pleas, No. 2, of Philadelphia County.

MERCUR, J.

This action was against a notary public and his sureties on his official bond. The complaint is that he certified to one Abram P. Beecher having personally appeared before him, and, in due form of law, acknowledged a certain indenture of mortgage to be his act and deed, when in fact the person who appeared before him and made the acknowledgment was not Abram P. Beecher, whereby said plaintiff was injured.

The plaintiff called Abram P. Beecher, who owned the lot described in the mortgage on which the notary made

the certificate. He testified that this mortgage was not executed by him, nor by his authority, and that he never made any acknowledgment thereof, or of any mortgage on that property before the notary, or before any person.

The plaintiff testified that, relying on the supposed validity of the mortgage and the record thereof, he bought and paid for the mortgage.

The question to be considered is, what proof is necessary to make the notary legally liable to one injured by the making of such certificate untrue in fact.

It is well settled that the certificate of a judge, or of a justice of the peace, of the acknowledgment of a deed or mortgage is a judicial act: *Withers v. Baird*, 7 Watts, 227; *Jamison v. Jamison*, 3 Whar., 457; *Heeler v. Glasgow*, 29 P. F. Smith, 79; *Singer Manufacturing Co. v. Rook*, 3 Norris, 442.

Conceding such to be the effect of a certificate of a judge or justice, yet it was contended, on the argument, that like effect should not be given to the certificate of a notary. Why not? He is a public officer, commissioned by the Governor. He is acting under oath, like other officials in the performance of judicial duties, to "well and faithfully perform the duties of his office." The second section of the Act of 10th of August, 1804, Pur. Dig., 1097, expressly gives power to "each notary public of this Commonwealth," *inter alia*, "to take and receive the acknowledgment or proof of all deeds, conveyances, mortgages, or other instruments of writing, touching or concerning any lands, tenements or hereditaments situate, lying and being in any part of this State, * * * as fully to all intents and purposes whatsoever as any judge of the Supreme Court, or president or associate judge of any of the Courts of Common Pleas, or any alderman or justice of the peace within this Commonwealth." As then the notary is authorized to take the acknowledgment as fully, to all intents and purposes, as a magistrate can do, it follows the same effect should be given to his certificate of acknowledgment. It was so held in *Hornbeck v. Building Association*, decided in this court. Whatever officer is authorized to take the acknowledgment, to him is given a judicial duty, and when he performs it, it becomes a judicial act, and has the effect of a record.

This action, then, is to recover damages flowing from the incorrect manner in which the defendant performed a judicial act. The rule as to the liability of an officer performing a ministerial duty does not apply.

The plaintiff also called and examined the defendant notary. He testified that at the time of putting his hand and seal to the acknowledgment he did not know Abram P. Beecher; did not remember that he had ever seen or heard of him before; had no knowledge of the matter, except what appears on the acknowledgment; frequently some whom he knew brought in the person and introduced him; he was satisfied at the time it was all right; but does not remember what took place. He added, "the paper was undoubtedly signed before me; I don't remember that I did or did not take any precaution to identify the person making the acknowledgment; but I know I must have been satisfied at the time." The substance of his evidence, therefore, is that, while he does not recollect what inquiries or statements were made, yet he knows he must have been satisfied as to the identity of the person, and that it was all right at the time the acknowledgment was taken. No evidence was given conflicting with or impairing this evidence of the defendant. The legal presumption is, he acted on reasonable information, and did his full duty. His absence of mem-

ory as to the details of what occurred does not destroy that presumption. The burden of proof is on the plaintiff to prove a clear and intentional dereliction of duty; this is neither proved nor averred. A mere mistaken conclusion imposes no legal liability on the defendant.

The learned judge was clearly right in ordering a compulsory non suit and in refusing to take it off.

Judgment affirmed

Agreement between Father and Son for Conveyance in Consideration of Service and Support—Specific Performance.—A father and son agreed together that if the son would remain with and support the father and his wife (the son's step-mother) during their lives, and work the farm under the father's directions, the farm should, at his death, belong to the son. The son, on his part, carried out the agreement during a period of seventeen years, and until both the father and step-mother were dead. The father, for the purpose of carrying out the agreement on his part, made and delivered to the son a will devising the farm to him. The will made no mention of the testator's other children, and for that reason was void. Held, that the son was entitled to have the agreement enforced against the other children. The failure of the attempt, to carry it out by will could not be allowed to prejudice his rights. *Hiatt v. Williams*, 72 Mo.

Evidence of one Offense on Trial for another.—Upon the trial of one offense, evidence of an entirely distinct offense is inadmissible; but if the evidence tends to prove the commission of the offense for which the prisoner stands indicted, it is no valid objection to it that it also tends to prove another and distinct offense. Thus, where the two offenses are committed at the same place and within a few minutes of each other, under such circumstances as together to constitute a single and continuous accomplishment of a fixed and common design, evidence of both is admissible upon a trial for one. *State v. Greenwade*, 72 Mo.

Maintenance of Child—Step-Child.—While in general a parent is bound to maintain and educate his children at his own expense, yet, where the circumstances of the parties are such as to render it necessary or proper, the courts may make an allowance to the parent from the child's property to defray in whole or in part the expense of his maintenance. *Gerdes v. Weiser*, 54 Iowa.

Where a man receives into his family, as a member thereof, the child of his wife by a former marriage, he stands in *loco parentis* to such child, and is bound for its support the same as though it were his own.—*Ibid.*

Evidence—Privilege of Witness.—The refusal of a witness in a criminal trial to answer a question, upon the ground that he may thereby criminate himself, cannot be shown as a circumstance against him in a subsequent trial of the witness for the same offense. *State v. Bailey*, 54 Iowa.

Ohio Law Journal.

COLUMBUS, OHIO, : : : SEPT. 8, 1881.

PERSONAL.

—James McKirchner, Esq., of Sidney, a member of the Shelby County Bar, was in the city on professional business, last week.

—A. J. Green, Esq., of Gallipolis, paid the LAW JOURNAL a short, but pleasant visit last week. Mr. Green visited the Capital on business with the Governor's office.

—A. J. Woolf and J. P. Wilson, two of the young Democratic lawyers of Youngstown, have been nominated for the offices of Probate Judge and Prosecuting Attorney respectively. Should both or either be elected the people of Mahoning County will be well served, as both are good lawyers and reputable young men.

—C. M. Lotze, Esq., of the Hamilton County Bar, at Cincinnati, while in the city on business in the Supreme Court, this week, made the LAW JOURNAL office a pleasant call and received the warm welcome that awaits all such genial members of the profession throughout the State. We are always glad to meet our friends.

—Hon. Chauncey N. Olds, of this city, attended District Court in Perry County, last week, where the OHIO LAW JOURNAL was called into requisition by the presiding judge, in setting forth the latest construction of the law by the Supreme Court. We are glad to hear, as we do continually, of the just appreciation of the LAW JOURNAL throughout the State.

—Hon. William Lawrence, First Comptroller of the U. S. Treasury Department, has rendered an important decision relative to the fees of U. S. Marshals, Clerks of the Circuit and District Courts, and Commissioners of the Circuit courts for issue and service of subpoenas. The act of February 22, 1875, is interpreted to protect litigants in United States Courts, from the enormous costs, and especially in the service of writs and subpoenas. It was long the practice of the Marshals to send these subpoenas by mail long distances, have them served, then charge *mileage* and service on each process therein as though the distance had been really traveled. The Clerks too, included but one name in each subpoena, and charged likewise for each one separately.

By this decision all this is rendered impossible and the comptroller is entitled to the thanks of long suffering litigants for his just and manly disposition of the case.

Judge Lawrence, through the LAW JOURNAL this week, addresses an open letter to the Commissioner of the Land Department upon the subject of the Virginia Military Lands in Ohio, which is valuable and will prove interesting to persons residing in that district; as well as to the profession generally.

CORRECTIONS.

In the case of *Melvin v. Weiant*, printed in the LAW JOURNAL of August 25, page 24, the compositor has made the Court say, in referring to the case of *Davis v. Brown*. 27 Ohio State, that "We are all agreed, however, that that case ought to be overruled." It should read, "We are all agreed, however, that that case ought not to be overruled." The absence of the little word *not* in our is-

sue above given, makes the Supreme Court say the reverse of what was intended.

In the case of *Andrews v. Campbell*, published in OHIO LAW JOURNAL, last week, the advance sheets—page 364—Ohio State Reports, in the statement of the case, read: "This judgment was affirmed in the district court. To secure so much of the same as allows six per cent., &c., &c., is the object of the present proceeding." The word "secure" should be "reverse." It is correctly printed in the LAW JOURNAL, on page 38 of the present volume. The pages of the State Reports, being electrotyped, all the edition will read as above quoted. This correction will give a proper understanding of the case.

THE VIRGINIA MILITARY LANDS IN OHIO.

AN OPEN LETTER TO COMMISSIONER MCFARLAND.

BELLEFONTAINE, OHIO, August 23, 1881.

HON. N. C. MCFARLAND,

Commissioner of the General Land Office.

SIR:

I know how earnestly you desire to perform every duty aright, and that you will be ready to hear any suggestions that are proper for your consideration.

My long residence in Ohio, and particularly in the Virginia Military district has made me somewhat familiar with land titles in that district; I have, perhaps, as good means of knowing the law upon the subject of military titles and what justice requires for the people who live in that district, as lawyers generally, possibly more than many others who only recently commenced the law practice.

The act of Congress, approved May 27, 1880, (21 Statutes p. 142), authorizes the issue of patents in certain cases.

From what I have learned I feel confident that on examination of this statute and others bearing upon the subject, that you will not issue patents in a class of cases in which I understand patents have been asked for since that act was passed. Let me call your attention, therefore, briefly to some considerations and statutes upon this subject.

During the Revolutionary war the State of Virginia, then claiming to own the Northwestern Territory, provided by law that her soldiers in the Virginia line on continental establishments, should have warrants with which they should be entitled to locate lands. A Land Office was established at Richmond, Va., to issue land warrants. These warrants authorized the soldiers to make a location of land which should be subsequently surveyed and upon the

production of the original warrant and the original survey, a patent was to issue.

When the State of Virginia ceded the Northwestern Territory to the United States, the land between the Little Miami and Scioto rivers, in the State of Ohio, was reserved to satisfy these warrants.

An office was located at Chillicothe, at which entries were to be made, and to which surveys were to be returned, and recorded. Entries were sometimes made and many years would elapse before surveys were made, and in some cases very many years would still further elapse before the warrant and survey would be returned to the General Land Office to procure a patent.

As soon as the lands were entered they became taxable in Ohio, and were sold without regard to the issuing of a patent; judicial sales were made, they were sold by order of probate courts, sold for taxes, &c.

The supreme court held that the statute of limitations did not run in favor of a party in possession of these lands until a patent was issued, and many years after the owner of an entry and survey had sold it, and, especially when the evidence of the sale had been lost, some person claiming to be heir, or some lawyer fishing for old claims would, in some cases, get out a patent to the heirs of the deceased locators of surveys, and bring ejectment suits to turn out parties who had been long in possession. This was regarded as a great evil, and Congress consequently limited the time within which warrants and surveys were to be returned to the General Land Office to procure patents.

The act of March 3, 1853, (10 Statutes 701), was the last act until that of 1880, to authorize the return of warrants and surveys and the issue of patents. The act of 1853 "allowed the further time of two years to make and return surveys and warrants to the General Land Office." Its title declared that it was "an act allowing the further time of two years to those holding lands by entries in the Virginia military district of Ohio, made prior to January 1, 1852, to have the same surveyed and patented." The effect of this act was, that if surveys were not returned to the General Land Office by March 3, 1857, no patent could issue for lands, even if the survey was afterwards returned. Some patents were issued, however, on surveys returned after that time, but on the 8d of April, 1880, the commissioner of the General Land Office decided that there was no authority to issue patents unless the sur-

veys and warrants were returned prior to March 3, 1857. See Copp's Land Owner, Vol. 7, p. 69, for August, 1880.

In a case in which I was counsel in the Circuit Court of the United States, for the northern district of Ohio, Mr. Justice Stanley Matthews, as I understand, has just decided that patents issued upon warrants and surveys returned to the General Land Office after March 3, 1857, are void.

Repeated efforts were made in Congress between March 3, 1857, and May, 1880, to obtain further time for the return of warrants and surveys, and to obtain patents, but Congress uniformly refused to extend the time.

An effort was made while I was in Congress, which, I suppose, I may say I had the honor of defeating.

My predecessor in Congress, Hon. Benjamin Stanton, defeated a similar attempt.

The act of May 27, 1880, seems to have been passed, possibly, without much consideration, and I doubt if it would have passed, in its present form, if it had been understood in Congress.

I invite your attention particularly to its provisions. Before doing this, let me state that the act of February 18, 1871, ceded to the State of Ohio, as its title says, "the unsurveyed and unsold lands in the Virginia military district in said State." The State then ceded these lands to the Ohio Agricultural College.

The act of February 18, 1871, was not carefully worded, and the Ohio Agricultural College claimed that it was entitled to all the *unsurveyed* lands, that is, if lands had been *entered* but never surveyed, the college claimed such lands. It was found that this would disturb so many titles, even of lands which had been occupied for half a century, or more, but for which no survey had been made or patent issued, that public indignation became so great that the college was compelled to abandon this claim.

The act of May 27, 1880, was passed in part to give construction to the act of February 18, 1871, and declared that in ceding the lands to the State, it was not the purpose of Congress to include any land which had been *surveyed*. The courts would undoubtedly have held this, but Congress very properly gave this construction to the act. In this respect the act of May 27, 1880, was all right. It then goes on to provide.

"Section 2. That all legal surveys *returned to the Land Office on or before March 3, 1857, on entries made on or before January 1, 1852, and founded on*

unsatisfied Virginia military continental warrants are hereby declared valid."

It will be observed that this only applies to *legal surveys* returned to the Land Office *before March 3, 1857*.

This assumes that the decision of the commissioner of the General Land Office of April, 1880, holding that patents could not be issued on surveys *returned after March 3, 1857*, is correct. It does not authorize a survey to be *returned* which had been made *prior to March 3, 1857*.

It left those exactly where it found them with the parties in possession of the lands entitled to hold them, and with *no provisions for the issue of a patent* to the original holder of the survey which might disturb them and give rise to litigation.

It is then provided in section 3 of the act,

"That the officers and soldiers of the Virginia Line on continental establishments, their heirs and assigns entitled to bounty lands, *which have, on or before January 1, 1852, been entered* within the tract reserved by Virginia, between the Little Miami and Scioto rivers, for satisfying the legal bounties to her officers and soldiers upon continental establishment, shall be allowed three years from and after the passage of this act to *make and return their surveys* for record to the office of the principal surveyor of said district and may file their plats and certificates, warrants, or certified copies of warrants, at the General Land Office, and *receive patents for the same*."

It is to be observed that this gives three years from May 27, 1880, to *make and return surveys*. This can only apply to those lands which had been entered *but never had been surveyed*. This is rendered clear by section one, of the act which declares a purpose not to disturb lands which had been previously surveyed. "It does not authorize a *new survey to be made* upon lands which *had been previously surveyed*. It does not authorize a patent to be issued on lands which had been previously surveyed.

The act is to be strictly construed because it is a special statutory proceeding in favor of those who had entries which had never been surveyed, and all such statutes are, by a well-known rule, to be strictly construed.

Besides, as it endangers many homes, it should, for that reason, be strictly construed. It would be very unjust and absurd to say that it authorizes the issue of a patent on lands which had been previously surveyed.

Their status and all rights relating to them are elsewhere determined, as already shown.

Let me say to you that there are 130,000 acres

of land in the Virginia military district of Ohio now occupied by a vast number of people who have resided thereon, probably from ten to fifty years without any knowledge that there was any difficulty about their titles.

In some instances the lands have been entered only without a survey; in others they have been surveyed prior to March 3, 1857. They have been sold and conveyed through many years. If you shall now by virtue of this act of May 27, 1880, continue to issue patents, you will give to the parties to whom patents are issued an opportunity to commence law suits and harass and disturb hundreds of homes. I invite your personal study to this, and respectfully urge you to suspend the issue of patents as to the cases to which I refer, until you can fully consider the subject, or if necessary, until Congress can act.

I may say that, although I own some land in the Virginia military district, I have none to be affected by any decision you may make on this subject.

My purpose is to contribute if I can, to the protection of hundreds of people, some of whom are being harassed by vexatious, and, I think I may properly say, outrageous litigations, commenced and being prosecuted against them, to recover lands they have occupied for many long years.

If patents shall issue indiscriminately under the act of May 27, 1880, it seems to me it will give rise to a vast number of law suits that will work great injustice to hundreds of people who have been occupying their homes in fancied security, and who upon every principle of justice, reason, and sound law ought not to be disturbed; and in this connection I should state that as a matter of fact and of strict law, no patent can issue in any case unless the entry has been made prior to January 1, 1852. You will see this in the perusal of the statutes.

I have the honor to be Very Respectfully,
WM. LAWRENCE.

CONTRIBUTORY NEGLIGENCE BY PERSONS WITH DEFECTIVE SENSES.

The frequency of cases where suits are brought for damages arising from the negligence of the defendant, brings into unusual prominence the doctrine of contributory negligence. The general doctrine of contributory negligence is well settled, but its application in many cases seems difficult, and the dicta of judges in adjudicating upon cases where this defense is introduced, present contradictions which are apparently

irreconcilable. Especially is the extent of this doctrine difficult when we come to that class of persons whose senses are defective either by nature or disease. It is the object of this article to treat especially of this class of cases.

The law of contributory negligence is stated by Wharton thus: "That a person who, by negligence, has exposed himself to injury, cannot recover damages for the injury thus received, is a principle affirmed by the Roman law and is thus stated by Pomponius: *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire*. The same view is taken correctly in the Digest and is repeatedly affirmed in our own jurisprudence." Wharton on Neg., sect. 300.

This rule was first distinctly announced by Lord Ellenborough in *Butterfield v. Forrester*, 11 East 60. That was an action on the case for obstructing a highway. The evidence showed that the plaintiff was riding violently when he met with the accident. "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary care to be in the right. * * * One party being in fault will not dispense with another's using ordinary care for himself." No exception can be taken to the rule as stated by the learned and able Chief Justice in this case. The inference that has been drawn from it, however, in some cases, has, we submit, been unwarrantable, and the rule as announced in consequence has been erroneous. In *Tuff v. Warman*, 5 C. B. N. S. 585, Wightman, J., made these remarks, saying the question for the jury was "whether the damage was occasioned *entirely* by the negligence or improper conduct, or whether the plaintiff so far contributed to the misfortune by his own want of ordinary care, that but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened." See also *Witherley v. Reg. Canal Co.*, 12 C. B. N. S. 2; *Ellis v. Railroad*, 2 H. & N. 424; *Martin v. Railroad*, 16 C. B. 179; *Bridge v. Railroad*, 3 M. & W. 244. The natural deduction from this opinion is that the damage must be occasioned *entirely* by the defendant's fault, and that if any negligence, even the slightest, can be imputed to the plaintiff, he cannot recover. The rule is thus broadly stated in many cases, but the courts of recent years have shown a disposition to recede from this somewhat narrow doctrine.

It would occupy needless time and space for us to trace the history of this modification of the rule. We need only take one case as exemplifying the change of base in this respect. In *Radley v. Railroad Co.*, L. R., 1 App. Cas. 759, Lord Penzance stated the law thus: "Though the plaintiff has been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could, in the result by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

Such is the rule as recently declared. It is, however, unsatisfactory, as it seems to do away entirely with the doctrine. It is valuable, however, as showing the tendency of courts to mulct in damages the most culpable party of the two.

That persons of defective understanding and of tender years have special immunities before the law, is now well settled and thoroughly understood by the profession. This is a necessary consequence and outgrowth of the rule, that a plaintiff is not entitled to recover, unless he used ordinary care and diligence at the time of receiving the injury. The ordinary care exacted, is that care "which might reasonably be expected from him in his situation." *Beers v. Housatonic Railroad Co.*, 19 Conn. 571. Neither common sense or justice would require the same diligence, foresight and care from a deaf, a blind or an insane person, or from a child of tender years, as from one in the full possession of his faculties.

I. As to Deaf Persons.

In *Isbell v. N. Y. & N. H. Railroad Co.*, 27 Conn. 405, Judge Ellsworth made these remarks, which although uttered as *obiter dicta* are worthy of consideration: "Let us suppose, in this case, that instead of the plaintiff's cattle, the plaintiff himself had been on the railroad track, and that he was too deaf to hear the noise of the train or the ordinary alarm given in such a case. This would certainly have been most culpable and inexcusable conduct on his part, but would it have absolved the defendants from the duty to exercise reasonable care if they saw the plaintiff, or with proper attention might have seen him? Ought they not in that case to check the speed of their train? May they run over him merely because he is on their track? They may well suppose that he is deaf, or blind, or insane or bewildered, and have no right, as we believe, to continue their headway as if he was not there. If they are bound to ring their bell or sound their whistle, as they certainly are, they may be bound for the same reasons to go further and check their speed a little or to stop entirely."

Accordingly it has been held, that the cases of blind or deaf persons are in the same category, and that a person who, from his deafness or other causes, does not understand calls made upon him to escape danger, is not chargeable with negligence in meeting a danger of which he was unconscious. *Telfer v. Railroad Co.*, 30 N. J. 188; *Whalen v. Railroad Co.*, 60 Mo. 323; *Schierhold v. Railroad Co.*, 40 Cal. 447; *Illinois Cent. Railroad v. Buckner*, 28 Ill. 299; *Chic. & R. I. Railroad v. McKean*, 40 Id. 218.

These cases go the whole length in holding, that a deaf person cannot be debarred from a recovery in a suit for damages, by that conduct which would be negligence in a person having perfect faculties of vision or hearing. The same rule of law holds in his case as in that of all persons. Infants, persons *non compos mentis*, deaf and blind persons must all exercise ordinary care, ordinary care being "that care which might

be expected and demanded from any man of ordinary prudence under the circumstances of the case." Their misfortunes enter as an element in the case, to determine whether they have exercised that care which the law exacts.

But what is the degree of caution which the law requires of a deaf person? Is he not bound in the case put above, to take notice that a railroad track is a dangerous place? Is he not supposed to know that it is especially dangerous for him? If he approaches the track for the purpose of crossing, either with a team or without, is he not bound to look up and down the track carefully? The law requires that of a person in the full possession of his faculties. Will it not exact it from one whose hearing is permanently impaired? Accordingly, it has been held to be negligence for a deaf person to drive an unmanageable horse across a railroad track, when a train is approaching. It is his duty, it was said, to keep a lookout and avoid the danger; and it is no excuse, that the horse in crossing turned and ran up the track ahead of the engine or was driven there to avoid it. Ill. Cent. Railroad Co. v. Buckner, 28 Ill. 299.

If the defendants in such a case were guilty of gross negligence, there ought to be no question of their liability. But we submit that they ought not to be mulcted in damages unless in extreme cases. If the driver of a locomotive sees a man on the track, in front of him, he has a right to assume that the man is in full possession of his faculties, and that he will get off the track in time to avoid a collision. Such cases are not infrequent, and we are assured by engineers that it is no uncommon thing for persons to continue walking on the track until a few seconds before the engine reaches them. How is an engineer to know that a man walking in front of the train is deaf? He can only judge from appearances, and the conduct of men is such that the fact that a man walks along without seeming to notice the presence of the train, is really of no weight in influencing the engineer's conduct. Besides, the speed required in order to make their connections renders it a very doubtful question whether an engineer should, under such circumstances, slacken the speed or stop the engine.

It should be kept in mind that the plaintiff must prove negligence on the part of the defendants affirmatively. The considerations offered above, are applicable only in an inquiry as to the facts which are sufficient to constitute negligence in a defendant. It has been held, therefore, that an engineer who sees before him on the track a person apparently able to take care of himself, has a right to presume that such person, on due notice, will leave the track, if there be an opportunity to do so; and the engineer will not, in such cases, be chargeable with negligence, if, in consequence of such person's not leaving the track, the train cannot be checked in time to avoid striking him. Jones v. Railroad Co., 67 N. C. 123; Railroad Co. v. Spearen, 47 Penn. St. 300; Telfer v. Railroad Co., 30 N.

J. 188; Railroad Co. v. Graham, 46 Ind. 240; Rex v. Longbottom, 3 Cox C. C. 439; Rex v. Walker, 1 C. & P. 320.

II. As to persons of defective vision.

Owing to causes which may be readily surmised, the decisions on this topic are necessarily few. Here, also, ordinary care must be exercised, and ordinary care is that care which may reasonably be demanded under the circumstances of each case.

Before any cases arose which concerned persons totally or partially blind, the courts had frequently adjudicated upon cases where accidents had happened in the darkness of the night. In Williams v. Clinton, 28 Conn. 264, it was decided that it is not negligence *per se* to travel in the darkness of the night unattended, when there can be no lookout. The court held that the fact of negligence on the part of the plaintiff was purely a question of fact for the jury to consider, and sustained the verdict against the defendant town.

That such is the case with reference to persons of perfect vision is palpable. The law requires a person to keep his premises in a safe condition and under all circumstances. Persons riding or walking in the darkness of the night, have a right to presume that the ways are perfectly safe and secure. This rule also applies to the stations of railroad companies or the wharves of steamboat companies. McDonald v. Railroad Co., 26 Iowa 124, the leading case on the subject. See also Cornman v. Railroad Co., 4 H. & N. 781; Martin v. Railroad Co., 16 C. B. 179; Longmore v. Railroad Co., 19 C. B. (N. S.) 183.

In Winn v. Lowell, 1 Allen 178, the plaintiff, a female, sustained an injury in crossing the street. The evidence showed that her eyesight was poor and weak, that she usually wore spectacles when walking in the street, but did not wear them at this time, and that she was walking very fast. The defendants, among other requests, asked the court to charge the jury, "If the plaintiff was a person of poor sight, common prudence required of her greater care in walking the streets and avoiding obstructions than is required of persons of good sight." The judge refused to so charge, but instructed the jury that "although the sight of the plaintiff was impaired, yet, unless materially affected, that they should take the state of her eyesight as proved, into consideration, upon the question of due care on her part." For error in refusing to charge as requested by the defendant's counsel, the Supreme Court granted a new trial.

Perhaps no exception can be taken to the abstract rule of law as laid down in the opinion of Judge Morton, who delivered the opinion of the court. The only question is, whether the charge of the court was not suitably adapted to the facts of the case.

In the first place, it must be observed, that the court in the case above cited, do not intend to lay down the doctrine that a person of defective vision is obliged to exercise extraordinary care. If so, it would be in opposition to the

whole current of authorities, and the law exacts extraordinary care of no one (*Daley v. Norwich & Worcester Railroad Co.*, 26 Conn. 597); they merely say, that the court should have charged as requested by the defendant's counsel (see *supra*).

Secondly, this case would seem to be in conflict with that class of cases of which *Williams v. Clinton*, is a specimen. This latter case is strikingly analogous in its circumstances to *Winn v. Lowell*. There, the plaintiff received an injury while walking in the darkness of the night; in the latter, the plaintiff met with the accident in the daytime, through her defective vision. In the former, too, an element existed which was not proved in the latter, the plaintiff having been advised not to go along the elevated highway on which the accident occurred, without a guide, and offers of assistance having been refused by her.

In the former case, too, the defendant's counsel requested the court to charge the jury as follows, a request almost identical with that asked in the Massachusetts case, making allowance for the difference in the circumstances: "that if the night was so dark that the plaintiff in passing over the highway in question, could not discover the pathway or distinguish other objects along the route she took, on the edge of the highway, or distinguish whether it was an embankment or level ground, and had been warned as to the darkness of the night and the risk of attempting to go without a light or a guide, and persisted in attempting to travel over the highway alone and without a light, the plaintiff could not recover; and that it was the duty of the plaintiff to show that she was in the exercise of ordinary skill and care, and that her own misconduct did not essentially co-operate with the negligence of the defendants in producing the injury complained of."

It will be seen that the request of the defendant's counsel, is very similar to the request asked in *Winn v. Lowell*; the charge of the judge is also similar. He told the jury, "that they were to inquire whether the plaintiff at the time of the accident, was in the exercise of ordinary care under all the circumstances, and whether she fell from the embankment in consequence of the want of a railing upon it; and, that the question whether there was negligence or want of reasonable care on her part under all the circumstances, was a question of fact for the jury." This charge, as we remarked above, was sustained by the Supreme Court.

The rule of law then announced in the case of *Winn v. Lowell*, may be accepted as good law (though doubted by the learned authors of the leading treatise on the Law of Negligence; *Shear & Redf. on Neg.*, sect. 413), that a person of defective vision is bound to exercise greater care than one in the full possession of his faculties, although it may be reasonably doubted whether under the circumstances of that case, and in view of the other decisions of which *Williams v. Clinton* is a specimen, the charge

of the Massachusetts circuit judge was not sufficiently clear and explicit.

The case of *Davenport v. Ruckman*, 37 N. Y. 568, will, we apprehend, be regarded as much more satisfactory by the profession, both with respect to the abstract doctrines announced in the masterly opinion of the court, and in the thoroughness with which the case was examined, which contrasts favorably with the meagre report of the Massachusetts case.

In that case the plaintiff sued the defendant for injuries which she sustained by falling into an excavation made in the sidewalk of a public avenue in the city of New York. At the time of the accident the plaintiff was, and previously had been, suffering from *amaurosis*, paralysis of the eyes, and the power of vision of both eyes was impaired. She could not distinguish the features of those she met, but she knew that they were persons walking, and a short time before the injury she had been able, as proved, to distinguish the color of her physician's coat, and was in the daily habit of walking the streets as she had occasion. The court instructed the jury that the circumstance that the plaintiff was partially blind and fell into the opening in the sidewalk in the daytime was of no importance, and that it was not important that a distinction should be made in that instance. And the judge added: "The question is this: whether it was so improper and imprudent for the plaintiff to have gone into the street unattended in her then condition of eyesight, that it would be negligence on her part to do so, sufficient to prevent her from recovering compensation for an injury she might sustain from the negligence while traveling or passing along the streets." "This," said Hunt, C. J., in giving the opinion of the Court of Appeals, "was the precise question to be determined by the jury, and I think it should have been submitted as a question of fact, and that it was fairly submitted in the above proposition. The streets and sidewalks are for the benefit of all conditions of people, and all have the right in using them, to assume that they are in good condition, and to regulate their conduct on that assumption. A person may walk or drive in the darkness of the night, relying on the belief that the corporation has performed its duty, and that the streets or walks are in a safe condition. He walks by a faith justified by law, and if he suffers an injury, the party in fault must respond in damages. So, one whose eyesight is dimmed by age, or a near-sighted person, whose range of vision was always defective, or one whose sight has been injured by disease, is each entitled to the same rights, and may act upon the same assumption. Each is, however, bound to know that prudence and care are in turn required of him, and if he fails in this respect, every injury he may suffer is without redress."

The latter part of this opinion, we think, justifies us in our criticism on the Massachusetts case, by the analogy drawn from the cases of

persons receiving injuries in the darkness of the night.

It may be mentioned incidentally that Judge Hovey, a judge of very great ability in the Superior Court of Connecticut, in an important case, refused to follow the authority of *Winn v. Lowell*, and relied upon this case of *Davenport v. Ruckman*, in rendering judgment for the plaintiff.

Only one case has, to our knowledge, been decided where the plaintiff was totally blind, that of *Sleeper v. Sandown*, 52 N. H. 244. There, a man totally blind, fell off a bridge through the want of a railing on one side of it. The defendant's counsel requested the judge to charge that, "it is negligence for one totally blind to travel unattended on the public highways, a mile and a half from home, where and in what manner the plaintiff did." The judge, as in the cases above cited, left it for the jury to say whether under the circumstances, the plaintiff exercised ordinary care. The remarks of Judge Ladd, in giving the opinion of the Supreme Court, threw a flood of light on this question. "Blindness of itself is not negligence. Nor can passing upon the highway, with the sight of external things cut off by physical incapacity of vision in the traveler, be negligence on and of itself, any more than passing upon the highway when the same things are totally obscured by the darkness of the night." * * * "Now, if in the present case, the plaintiff knew or ought to have known that it was dangerous for him to attempt to cross this bridge as he did, his attempt to do so would, beyond all question, be want of due care, and he could not recover for the injury suffered. But he had a right to assume that the bridge was reasonably safe and free from defect—that is, that the legal duty of the town with respect to its condition had been performed, and to act upon that assumption. If, considering its location, the kind and amount of travel usually passing over it, &c., a rail on one side was necessary to its legal sufficiency, this plaintiff, although blind, had the same right to assume the existence of a rail on each side that any traveler passing either in the day-time or night-time would have; and if an accident happened to him by reason of a want of a rail, his own fault not contributing, no reason can be conceived why he is not as much entitled to recover, as though having the sense of vision, he had attempted to cross by night and the same mishap had befallen him."

To conclude, we can regard these principles as settled by the decided cases:

1. The law requires ordinary care of every one.
2. It never exacts more than ordinary care.
3. Ordinary care is that care which may reasonably be expected of any one in his circumstances.
4. A person of defective senses is bound to the diligent use of such senses as he has; and if his defects are such as to deprive him of material aids to safety, which ordinary persons have,

conduct may be negligent in him which would not be so in ordinary persons.

5. In all cases the question of ordinary care is for the jury.

A. DAVIS SMITH.

Am. Law Register.

SUPREME COURT OF OHIO.

THE STATE OF OHIO,

v.

JOHN SHANNON.

Under section 33, chapter 8, title 1, of the crimes act of May 5, 1877, it is unlawful to shoot at or kill wild ducks on the lands of another person, although within the channel of a navigable river, when the owner has set up, in a conspicuous place on the shore "a board inscribed in legitimate English characters, thus: 'No shooting or hunting allowed on these premises.'"

Bill of exceptions to the Court of Common Pleas of Sandusky County.

Shannon was arrested on a warrant issued by a justice of peace of Sandusky county on complaint of George G. Tindall, charging a violation of section 33, chapter 8, title 1, of the crimes act of May 5, 1877. This section provides: "Whoever, having received verbal or written notice from any owner of inclosed and improved lands, or any lands the boundaries of which are defined by stakes, posts, water-courses, ditches or marked trees, his agent, or a person in charge thereof, not to hunt thereon, shoot at, kill or pursue with such intent on such lands, any of the birds or game mentioned in sections twenty-seven, twenty-eight and thirty of this chapter, and whoever shoots at, kills or pursues with any such intent any of such birds and game on the lands of another upon which there is set up in some conspicuous place, a board inscribed in legible English characters thus, 'No shooting or hunting allowed on these premises,' or pulls down or defaces any such board, or the letters thereon, shall be fined," &c.

Among the birds or game mentioned in said section 28 are "wild ducks," and the complaint charged Shannon with shooting and killing wild ducks on the land of Tindall, situate in said county, &c.

Shannon, having been bound to appear and answer said charge in the probate court, was there tried, convicted and sentenced. On the trial a bill of exceptions, containing all the testimony, was taken, and upon proceedings in error, in the court of common pleas, said judgment was reversed. To this judgment of reversal, the prosecuting attorney, under sections 38 and 39, chapter 5, title 2, of said act, took exceptions, and the same are now submitted to this court.

The uncontradicted facts appearing in the bill of exceptions are, in brief: That Tindall was the owner and in possession of a tract of land in said county, bounded on one side by the Sandusky river—a navigable stream; that Shannon, on October 29, 1877, when the killing of wild ducks was not prohibited by the statute, was in a skiff on the Sandusky river, between the middle thereof

and the shore owned by said Tindall, from which position he shot and killed wild ducks swimming in and flying over the water between said shore and the middle of the river; that boards inscribed in legible English characters, "No shooting or hunting allowed on these premises," were set up in conspicuous places on said shore; and that Shannon had been duly notified by Tindall not to shoot or hunt on his lands. It also appears that the position occupied by Shannon on the river was within the limits of navigation as used by boats and other water craft engaged in commerce; and also, that the public generally had been accustomed to fish, and kill wild ducks, in the same location, in and upon the river.

Upon this state of facts, the State of Ohio seeks the opinion of this court. Did the court of common pleas err in reversing the judgment of the probate court?

Lemmon, Finch & Lemmon, for plaintiff.

W. J. Boardman, also for plaintiff.

Everett & Fowler, for defendant.

McILVAINE, C. J.

This cause and *June v. Purcell*, decided at this term and reported, having a question in common, were considered together. In that case it was held, that the title of a riparian owner of land bounded by a navigable stream in this state, extended to the middle or thread of the stream. It follows, upon the principle announced in that case, that the *locus* of the offense alleged in this, though upon the surface of a navigable stream, was within the boundaries of Tindall's land, and was embraced within the literal meaning of the notice, "No shooting or hunting allowed on these premises."

It is true, however, that the right of Tindall to so much of his lands as was covered by the waters of the Sandusky river, the same being a navigable stream, was not exclusive, but subject to the right of the public to use the same as a highway, so that the entry of Shannon within the boundaries of Tindall's premises, to-wit: within the limits of this public highway, did not, *per se*, make him a trespasser; and clearly, an action against him for trespass *quare clausum fregit*, could not be maintained. Hence, it was claimed by defendant, that his conviction was wrong, because, as is claimed, this section of the statute applies only to persons who wrongfully break and enter the close of another, contrary to his expressed will.

The provisions of the statutes were not intended to punish trespassers *quare clausum fregit*, merely because they may have been guilty of a trespass; but were intended to punish the act of killing, shooting at, or pursuing game on the lands of another, against which notice may have been given as provided in the statute; so that a person rightfully on the premises of another may commit the unlawful act, as well as one who commits a trespass by entering upon the premises.

It seems to us that whatever change this statute may have made in respect to the law in relation to trespass on real property, the main

purpose of the legislature was to confer upon the owner of the lands within this state, the exclusive right to hunt and kill the designated game upon his own premises, and to protect him in such right, provided he complies with the prescribed conditions in regard to notice.

And with regard to notice, if the lands be "inclosed and improved," or if the boundaries be "defined by stakes, posts, water-courses, ditches or marked trees," verbal or written notice "not to hunt thereon," will bring the offender within the operation of the statute. And where a water-course, for instance, a navigable stream, constitutes a boundary, it is the opinion of a majority of the court, that all persons who have received verbal or written notice not to hunt upon the lands of the owner, are bound to take notice that his lands extend to the middle of the water-course, if such be the fact.

But if the lands be not "inclosed and improved," or if they be not "defined by stakes, posts, water courses, ditches or marked trees," as well as where they are so defined, the owner may bring himself and his lands within the protection of the statute by setting up, in some conspicuous place thereon, "a board inscribed in legible English characters thus, 'No shooting or hunting allowed on these premises.'" And in such case, all persons engaged in shooting at, killing or pursuing the designated game, must take notice, not only of the statute, but of the setting up of such board, and also of the extent or boundary of the lands on which the same is set up. And in respect to this notice, it makes no difference whether the lands or any part thereof be covered by water or not.

It is claimed, however, that this statute was not intended to protect lands covered by the waters of a navigable river. A majority of the court can see no grounds upon which lands covered by navigable streams should be excluded. They are as much the subject of private ownership as unnavigable streams. There is no distinction between them made by the terms of the statute. True, navigable streams in this state are declared to be public highways; but the right to use a public highway is not abridged by protecting the owner of the fee in the exclusive right of killing game therein. Travel and commerce are not thereby hindered. And as the power of the legislature to protect game, or the exclusive right of the owner of land to kill the same on his own premises, is as ample over land covered by water, whether navigable or unnavigable, as it is over dry land, and as there is no attempt to distinguish between them in this statute, we must hold that all alike are within the protection of this statute.

Exceptions sustained.

White, J., did not concur. He was of opinion that the statute, being penal, must be strictly construed, and that it did not embrace game found upon the open public highways.

[This case will appear in 36 O. S.]

SUPREME COURT OF OHIO.

WILLIAM A. PEPPER

v.

N. H. SIDWELL, ADMINISTRATOR.

In an action against an administrator, the objection that the claim sued on was not presented for allowance before the action was brought, is waived, where the administrator joins issue and goes to trial on the validity of the claim without objection.

Error to the District Court of Brown County.

The plaintiff, William A. Pepper, brought an action against W. N. Raney and N. H. Sidwell, as administrator of the estate of James Sidwell, deceased, on a promissory note, joint in form and dated April 1, 1866, by which said Raney and James Sidwell promised to pay to the order of the plaintiff, the sum of \$1,218.50, with interest at ten per cent., at twelve months from date. The petition did not aver that the note or claim had been exhibited to the administrator for allowance, and by him disputed or rejected, nor that eighteen months had expired from the date of the administration bond or the further time allowed by the court for the collection of the assets of the estate of James Sidwell; nor were facts stated showing the case to fall within any of the exceptions of section 98 of the administration act.

No demurrer was interposed to the petition, and the only defense set up by the answer of N. H. Sidwell, administrator, was that James Sidwell was only a surety on the note, and that after the same became due, the plaintiff and Raney, the principal maker, entered into a valid agreement for the extension of the time of payment of the note without the consent of said intestate.

Wherefore, he prayed to be dismissed with costs.

Issue was joined by a reply, and the case went to trial to a jury. On the trial, the defendant Sidwell proved, without objection, that the probate court extended the time for the settlement of said James Sidwell's estate, first for one year from March 24, 1868, and again from February 10, 1871, until October 10, of the same year. The suit was brought long before this time expired.

The court was asked by the defendant, Sidwell, to instruct the jury as follows:

"If the jury find from the evidence in the case, that the said defendant was appointed administrator in the month of October, 1866, and that on the 26th day of March, 1868, the probate court of Brown county, Ohio, on application of said administrator, gave him the additional time of one year to collect the assets of said estate, and that said time had not expired at the date of the commencement of this action against said administrator, then the verdict of this jury must be for the said defendant."

The instruction was refused and an exception noted. The jury found a verdict for the plaintiff, on which judgment was rendered in the court of common pleas, but which the district

court reversed. This is a petition in error to reverse the judgment of the district court.

White & Waters, and Thomas & Thomas, for plaintiff in error.

Loudon & Young and John G. Marshall, for defendant in error.

BOYNTON, C. J.

We suppose that the judgment of the court of common pleas was reversed by the district court upon the ground that the claim sued on had not been presented to the defendant in error for allowance as a valid claim against the estate of James Sidwell, it having been shown in evidence without objection, that the action was brought before the expiration of the time allowed by the probate court for the collection of the assets of the estate.

The petition contained no averment that the note or claim sued on had been exhibited to the administrator, and had been disputed or rejected by him; nor that the period of eighteen months, or the further time allowed by the court, if any, to collect the assets of the estate, had elapsed, before the commencement of the action; nor was there any averment either that the estate had been represented to be insolvent, and that the action was brought to settle the validity of a contested claim, or that the claim was one that would not be affected by the insolvency of the estate, if such insolvency in fact existed. But the defendant neither demurred to the petition, nor did he take any objection by answer that the claim had not been presented for allowance. On the contrary he set up a defense to the merits of the claim, and went to trial on the issue joined thereto. In view of these facts we think he should be held to have waived the right to rely on the failure of the plaintiff to show a presentation and rejection of the claim, as a defense to the action. That a petition against an administrator is defective that does not show that the claim was presented and disallowed, or that the necessary time has preceded the commencement of the action, was held in *Hammerle v. Kramer*, (12 Ohio St. 252); and it was also there held, that the petition might be demurred to as not stating facts sufficient to constitute a cause of action against the administrator. In commenting on the question as one of practice, Scott, C. J., said: "As under the provision of this section, no action can be maintained against an administrator, by a creditor, till after the lapse of eighteen months from the date of the bond, unless in certain specified cases, we think the petition of the creditor should aver the necessary lapse of time. This is a condition essential, *generally*, to the plaintiff's right of action. It is also affirmative in its character, and if denied, the burden of proof is on the plaintiff, and we think, unless it is averred, the plaintiff does not show even a *prima facie* right to sue." This language had reference to the right of the administrator to raise the question of the plaintiff's right to sue by demurrer, where the petition did not show that the claim had been presented and rejected, or the

lapse of the time necessary to the maintenance of the action.

To the rule there laid down we fully adhere. In that case, the objection was timely taken and insisted on, that the petition failed to show such facts as rendered the administrator liable to an action at the time the action was brought. The case, however, does not support the proposition that the administrator, who takes no objection either by demurrer or answer to the failure of the plaintiff to bring the case within the statute, may go to trial under a defense by which he contests the validity of the claim sued on, and in case of failure in such defense, may fall back and defeat recovery on the ground that the claim was not presented for allowance, and consequently, that the action was prematurely brought. The provision of the statute exempting the administrator from liability to be sued, until certain preliminary steps are taken, or a certain period of time has elapsed, is a privilege that may be waived. The object of the statute is to afford the administrator an opportunity to allow all valid claims against the estate, and thereby avoid litigation and expense. It was designed to protect estates from unnecessary costs and vexation where the administrator is satisfied that the claim is just and valid. Here the validity of the claim was in fact disputed at the trial, and the liability of the defendant thereon denied, and the plaintiff subjected to large expense and trouble in resisting a defense made to its merits.

To subject him to the expense and hazard of a trial, and then deprive him of a judgment, notwithstanding the issues were determined in his favor, upon the ground that the petition was defective in the particular mentioned, would be manifestly unjust. The conduct of the administrator, in contesting the claim, shows that the estate lost nothing by the omission to present the claim for allowance. In our judgment, where the petition fails to show the disallowance of the claim, or that the time allowed for the collection of the assets of the estate elapsed before the commencement of the action, and the defendant takes no objection either by demurrer or answer, but goes to trial upon issues in which he contests the validity of the claim, it is too late to insist on the non-presentation of the claim, or the premature bringing of the action, as a defense to the plaintiff's right to recover. Other questions are made by the record, none of which, in our opinion, justified the district court in reversing the judgment of the court of common pleas.

Judgment of the district court reversed and that of the common pleas affirmed.

[This case will appear in 36 O. S.]

KEEPING BORROWED BOOKS.—Sir Walter Scott once lent a book to a friend, and as he gave it to him begged that he would not fail to return it, adding, good humoredly, "Although most of my friends are bad accountants, they are all good book-keepers."

SUPREME COURT OF OHIO.

WILLIAM A. KING, GUARDIAN OF CAROLINE F. COOPER,

v.

SAMUEL S. BELL, ET AL.

B. was appointed and qualified as guardian of C., an infant, and a person of unsound mind; but the record was silent as to the grounds of the appointment. C. was of unsound mind when she arrived of age, and so continues. For more than seven years after C. was of age B. acted as her guardian, and was repeatedly so recognized by the court in settling his accounts, in requiring a new bond, approving the same when presented, and in accepting his resignation and settling his final account. *Held:*

1. That, as the court had jurisdiction to appoint a guardian, on the grounds of lunacy as well as infancy, the presumption is, upon the facts stated, that the appointment covered both grounds.

2. That in such case, the taking of the new bond after C. arrived of age, but while still of unsound mind, was authorized by law.

3. The sureties on such new bond are liable for a breach of its conditions.

4. In an action against three defendants, upon a joint and several obligation, final judgment was rendered in favor of two of said defendants, and the action was allowed to stand undisposed of as to the third.

In a petition in error by the plaintiff to reverse the judgment against him in favor of the two defendants, the third, against whom no final judgment has been rendered is not a necessary party.

Error to the District Court of Licking County.

The court of common pleas and district court sustained a demurrer, filed by defendants Flory and Shields, to the following petition, on the ground that no cause of action was stated against them:

"The said plaintiff, William A. King, as the guardian of Caroline F. Cooper, for cause of action herein, says:

"That on or about the 4th day of February A. D. 1856, the said Samuel S. Bell was appointed by the probate court of said county to be the guardian of the said Caroline F. Cooper, who was then a resident of said county, an infant, and (as the plaintiff is informed and believes) a person of unsound mind; that the entry of said appointment, made upon the records of said probate court, did not contain any express adjudication that the said Caroline was then a minor of unsound mind; but stated that said Bell was appointed guardian of Caroline F. Cooper, aged seven years, heir-at-law of Elijah Cooper; that the said Bell then gave bond according to law, and entered upon the discharge of his duties as such guardian; that the said Caroline became eighteen years old on or about the 20th day of April, A. D. 1867, and at the time of arriving at that age she was and has ever since then, been a person of unsound mind, and incapable of managing her business affairs; that the said Bell, from that time until the 16th day of September, A. D. 1874, acted as her guardian, and from time to time, in the years of 1867, 1869 and 1871, filed his accounts as such guardian, in the said probate court, in which accounts he asserted himself to be such guardian; and his said accounts were passed upon and settled by said court accordingly; that on or about the 3d day of April, A. D. 1871, the said Bell appeared in and

before the said probate court, and represented to the same that Justin Morrison and Alexander Morrison, his sureties on his bond, as such guardian, theretofore given in said court, were non-residents of Licking County; thereupon, upon the motion of said Bell, the following order or judgment was made by said court:

"IN THE MATTER OF THE GUARDIANSHIP OF CAROLINE F. COOPER.

"This day came Samuel S. Bell, guardian of Caroline F. Cooper, and on his representation that Justin Morrison and Alexander Morrison, his sureties on his bond, heretofore given in this court, as such guardian, are non-residents of Licking County, *and for other cause on the motion of said guardian*, it is ordered by the court that said guardian enter into a new bond in the sum of \$12,000, as such guardian, with William Shields and Abraham Flory, freeholders of this county, as his sureties, conditioned according to law, and the said guardian having entered into said new bond, the same is approved and filed."

"That on the 3d day of April, A. D. 1871, the defendants *made and delivered* to the judge of the said court of probate, their writing obligatory of that date, sealed with their seals, (and a copy of which is attached to the original petition herein, and made a part of this petition), and thereby bound themselves, jointly and severally, to pay to the State of Ohio the sum of \$12,000.

"That the said bond was and is subject to the condition that it should become void if the said Bell should faithfully discharge his duties as such guardian, and otherwise, to be and remain in full force; that on the same day the said bond and sureties were approved by said court.

"That on the said 16th day of September, 1874, the said Bell resigned his guardianship, and certain proceedings were had in said probate court touching the same. The record whereof is in the following words:

"Be it remembered, that on this day, Samuel S. Bell, guardian of Caroline F. Cooper, a lunatic, tendered to this court his resignation as such guardian; and which resignation, for reasons satisfactory to the court, is hereby accepted, and said guardian is hereby ordered to file his final account herein, which is accordingly done."

"That, thereupon, on the 22d day of September, 1874, the plaintiff herein was appointed by said probate court to be guardian of the said Caroline as a lunatic or person of unsound mind, and on that day he gave bond, with sureties, according to law, which was approved by the court, and he entered upon the discharge of his duties as such guardian.

"That during the time the said Bell was so acting as guardian, as aforesaid, there came to his hands, of the moneys and estate of said Caroline, the sum of five thousand dollars or more; that the said Bell having, on the 14th day of October, 1874, filed his final account as such guardian in said probate court that there was, *and in fact there then was in the hands of the said Bell*, of the moneys aforesaid, the sum of four thousand one hundred

and twenty-six dollars and eighty-four cents (\$4,126.84), interest being computed to the said last named day, and which sum the said probate court then ordered the said Bell forthwith to pay to the plaintiff.

"That on the 8th day of December, A. D. 1874, the plaintiff, as such guardian, demanded of said Bell the payment of said last named sum; but he has not paid the same or any part thereof, except the sum of \$330.14, paid by his assignee on January 8th 1875. The plaintiff demands judgment against the defendants for the sum of three thousand eight hundred and twenty-six dollars and eighty-nine cents, with interest from the 8th day of January, A. D. 1875.

"J. BUCKINGHAM,
Attorney."

"The plaintiff, yielding to the defendant's motion in that behalf, says that the said sum of five thousand dollars, or more, received by said Bell was so received before the said 3d day of April, A. D. 1871, and before the making of the bond, on which this writ is founded.

"J. BUCKINGHAM,
Plaintiff's Attorney.

The demurrers of Flory and Shields to the petition were sustained, and final judgment rendered in their favor, leaving the case to stand as to Bell in the common pleas. He is not a party to this proceeding in error.

J. Buckingham, for plaintiff in error.

J. A. Flory, for defendant in error.

JOHNSON, J.

It is claimed that said petition does not state facts sufficient to constitute a cause of action against the sureties on said bond. 1st. Because the probate court had no authority to require, receive or accept the same; 2d. There is no breach alleged; 3d. It is void for a want of consideration; and, 4th. The bond was not delivered. It is further insisted, that as Bell is not a party to this proceeding in error, this court has no jurisdiction.

1. The point is made that Bell, who is the principal on the bond and a defendant in the original action, is a necessary party in this proceeding in error. *Smethers v. Rainey* (14 Ohio St. 287) and *Jones v. Marsh* (30 Ohio St. 20) hold that all parties to a joint judgment should be parties in error. Here the final judgment was in favor of Flory and Shields, and against plaintiff, and the case stands undisposed of as to Bell on the common pleas docket. This is authorized by section 371 of the Code, the action being upon a joint and several cause of action.

All the parties to this final judgment are before this court.

2. The petition alleges the delivery of the bond and its approval by the court, as in all like cases. Hence the claim that there was no delivery of the bond is not well founded.

3. Neither is the claim that there is a want of consideration for the bond, if it is otherwise valid. If the court had the power to take and approve this bond, the consideration is sufficient.

4. The principal, and, indeed, the only ques-

tion of difficulty in the case, is as to the authority of the court to take this bond.

Bell was appointed guardian February 4, 1856. The statute vested in the probate court exclusive jurisdiction to appoint and remove guardians, to direct and control their conduct, and to settle their accounts. Swan R. S. 1854, 753, a. This power embraced the appointment of guardians for minors (Swan R. S. 1854, p. 444), and idiots and lunatics. S. & C. 847.

In the appointment of guardians for lunatics, all laws relating to guardians for minors, and their wards, and pointing out the duties, rights and liabilities of such guardians and *their sureties*, in force *for the time being*, are made applicable to guardians for idiots and lunatics, and their children, so far as the same are in conformity with the provisions of the act relating to lunatic asylums. S. & C. 840, §45.

The law in force "for the time being," when the bond in suit was approved and filed, relating to guardians of minors, was the act of 1858. S. & C. 870. By section 8 full power is given the court over the bonds of guardians on exceptions thereto, and upon its own motion it may require guardians to give additional bonds, whenever the interest of the ward shall demand.

Section 9 provides that "No bond executed by a guardian after this act shall take effect" (July 1, 1858) "shall be void or held invalid on account of any informality in the same, *nor on account of any informality or illegality in the appointment of such guardian*," but such bond shall have the same force and effect as if such appointment had been legally made and such bond executed in proper form." The bond in suit is subject to the provisions of this section.

The facts admitted by the demurrer are:

1. That in 1856, Bell was duly appointed and qualified as guardian of Caroline F. Cooper, who was then both an infant and a person of unsound mind, and entered upon the discharge of his duties as such guardian, and so continued to act until his resignation, which was accepted by the court September 16, 1874, and the present plaintiff was appointed his successor as guardian of said Caroline, a lunatic.

2. That at her arrival of age, April 20, 1867, she was still of unsound mind, and without any further action of the court, so far as the record shows, Bell continued as guardian, and in 1867, 1869 and 1871, filed his accounts as such with the court, which were audited and settled; the court in all respects recognizing and treating him as the legal guardian, as well after as before her majority.

3. That in April, 1871, nearly four years after her coming of age, Bell represented to the court that his sureties had removed from the county, and on his application and upon an order of the court requiring it, he and the present defendants executed and delivered the bond in suit, which was, on his motion, approved and filed, whereupon he was permitted by the court to continue his guardianship until his resignation and the appointment of his successor.

4. October 14, 1874, in pursuance of the order of court, he filed his final account, which was audited and settled November 24, 1874, showing a balance due his ward of \$4,126.84, which he was ordered to pay over to plaintiff, but has failed to do so, except a small amount stated.

5. That prior to the giving of the present bond, April 3, 1871, he had received \$5,000 or more of his ward's moneys, and had in his hands, in fact, said sum of \$4,126.84 at the date of his final settlement, which, on demand, he refused to pay over.

We have not been furnished with a copy of the judgment of the court, making the appointment of Bell in 1856, but it is averred that Bell was then appointed guardian of the said Caroline F. Cooper, who was then an infant, and, as the plaintiff was informed and believes, a person of unsound mind; and it is averred there was no express adjudication by the court, upon what grounds the appointment was made; that is, whether she was a minor, or of unsound mind, or both.

The court having jurisdiction on either or on both grounds, to make the appointment, its validity cannot be inquired into collaterally, though the record is silent as to the particular ground upon which the appointment was made. *Shroyer v. Richmond*, 16 Ohio St. 455. Neither upon this state of facts does the presumption arise, that the appointment was made solely on the ground of infancy.

For over seven years after the ward's majority, Bell acted as guardian of a lunatic. The court so recognized him as her legal guardian by receiving and settling his accounts, by ordering and approving a new bond and allowing him to continue to act, though the record showed she was over age, by accepting his resignation and appointing his successor as guardian of a lunatic. All this is utterly inconsistent with the presumption that the appointment was made on the ground of infancy alone, but is in harmony with the presumption that the judgment of the court, by which he was appointed, was either based on the unsoundness of mind, or of that, as well as infancy.

In the absence of an express adjudication of the grounds for this appointment to the contrary, and in view of the fact that, after the ward arrived of age, the court continued for several years to judicially recognize him as the legal guardian, we are authorized to presume that this appointment covered both disabilities, the lunacy as well as the infancy.

This being so, the court was authorized by section 8 of the guardian act to order and approve this bond.

The condition being for the faithful discharge by Bell of his duties as such guardian, as required by law, his sureties are liable thereon for a breach of the condition.

Judgments of the district court and of the court of common pleas reversed.

[This case will appear in 36 O. S.]

SUPREME COURT OF OHIO.

PHILLIPS, ASSIGNEE,

v.

ROSS, ET AL.

Where a probate judge removes an assignee in trust for the benefit of creditors, and orders him to deliver to his successor the property and effects in his hands belonging to the trust estate, which order he fails to comply with, an action will lie upon the bond of such assignee, in favor of his successor, to recover the damages resulting from the failure to comply with such order.

Error to the District Court of Muskingum County.

In June, 1861, E.E. Henderson, by deed of that date, conveyed and assigned all his property to James P. Ross, in trust for the benefit of his creditors. Ross accepted the trust and executed the bond required by section 1 of the act regulating the mode of administering assignments in trust for the benefit of creditors (1 S. & C. 709), with his co-defendants, John Bell and James M. Lane, as his sureties.

On May 29, 1866, Ross filed a statement of his account in settlement of his trust in the probate court, and upon exceptions thereto, the court found a balance of \$766.44 in his hands for distribution among creditors. Failing to account for this sum the probate judge subsequently removed him, as assignee, and appointed the plaintiff in his stead, and ordered said Ross to pay over to the plaintiff the said sum of money, and interest thereon, from the date of said settlement.

Upon the failure of Ross to comply with such order the plaintiff brought an action upon said bond to recover said sum and interest. To the petition setting out the facts, the defendants Bell and Lane demurred for want of facts sufficient to constitute a cause of action. The court of common pleas sustained the demurrer, and dismissed the petition, and the district court affirmed the judgment. To reverse these judgments is the object of this proceeding in error.

T. J. Taylor, for plaintiff in error.

L. P. Marsh, for defendant in error.

BY THE COURT.

Section 14 of the act regulating the mode of administering assignments in trust for the benefit of creditors (1 S. & C. 712), authorizes the probate judge to remove the assignee for good cause, and to appoint another in his stead, and to make and enforce all orders necessary to cause the property and effects belonging to the trust estate to be delivered to the newly appointed trustee. Section 1 of the same act, requires the trustee to whom the debtor's property was assigned to enter into an undertaking payable to the State, in such sum and with such sureties as shall be approved by the probate judge, conditioned for the faithful performance, by said trustee, of his duties according to law, and authorizes an action to be brought on said undertaking against the assignee and his sureties, by any person injured by the misconduct, or neglect of duty, of the assignee in regard to said trust. The failure of Ross, the

assignee, to pay over to his successor the amount of the trust estate, found to be in his hands, and which the probate judge, on his removal, ordered him to pay over, was a clear neglect of duty, for which he and his sureties were liable on his bond, and liable, we think, to the plaintiff. The plaintiff was the representative of all persons entitled to the fund to be distributed, and, within the meaning of the statute, was a person injured by the failure of Ross to pay over the fund in his hands, belonging to the trust estate.

Judgment of the district court and of the court of common pleas reversed, and cause remanded to the common pleas for further proceedings.

[This case will appear in 36 O. S.]

SUPREME COURT OF OHIO.

THE STATE OF OHIO *on relation of* CHARLES PARROTT AND OTHERS

v.

THE BOARD OF PUBLIC WORKS OF THE STATE OF OHIO.

1. The special appropriation act of May 13, 1878 (75 Ohio L. 539), whereby the board of public works was limited to \$20,000 of the appropriation from the general revenue in the purchase of dredges, &c., required to keep the public works in repair, was not intended as a limitation upon the power to purchase implements necessary to keep the works in repair, as conferred upon the board by the act of April 4, 1859 (Revised Statutes, 1901), nor upon the power of the board to use the income of the public works, arising from tolls, fines and water rents, for the purchase of such necessary implements, as appropriated by such special act. And although the appropriation thus made expired, by constitutional limitation, at the end of two years, a like appropriation was made in the general appropriation act of 1880.

2. The board of public works having purchased from the lessees of the public works certain dredges, etc., for \$38,820, to be paid as follows: \$20,000 in hand, and balance in equal payments at three and six months, and being afterward advised, and believing that the promise to pay in excess of \$20,000 was unauthorized and void: *Resolved*, to pay on such contract the said sum of \$20,000, leaving it to the lessees to obtain a ratification of the contract by the general assembly, and an appropriation to pay the balance; and, thereupon, the lessees, with knowledge of said resolution, accepted the \$20,000. *Held*, That the lessees were not thereby precluded from demanding payment from the board, in accordance with the terms of the contract.

3. The state is not bound by the terms of a general statute, unless it be so expressly enacted.

4. In the absence of a statute requiring it, or a promise to pay it, interest cannot be adjudged against the state for delay in the payment of money.

5. In a proceeding in mandamus, where judgment is given for the plaintiff, section 6753 of the Revised Statutes does not authorize the assessment of damages against the state in favor of the relator.

Mandamus.

Previous to the year 1861, the public works of the state were under the exclusive control of the board of public works. During that year, the public works were leased to the relators for a term of ten years, which was afterward extended ten years more. In 1878, the lessees having abandoned the public works, because of an alleged violation of the contract of lease, the general assembly, by joint resolution adopted May 11, required the board of public works to take immediate possession thereof. On the 18th of the same month, the board, being in possession of the works, entered into an agreement with the lessees for the purchase of dredges, boats, tools and other implements necessary to keep the public works in repair

and fit for navigation, and agreed to pay therefor the sum of \$38,820 in three payments, to wit: \$20,000 in cash and the balance in two equal payments in three and six months.

The property so purchased, having been on the day of sale delivered by the lessees to the board, on May 23, the board, by proper warrant upon the state treasury, did cause the said sum of \$20,000 to be paid to the lessees; but upon maturity of said deferred payments, the board neglected and refused to pay the same, or cause the same, or any part thereof, to be paid, and have hitherto so neglected and refused.

Whereupon, on this showing, and the further allegation that there is, in the treasury of the state of Ohio, subject to the order and control of said board, more than \$40,000, applicable to the payment of said indebtedness, an alternative writ of mandamus, upon the relation of said lessees, has been issued by this court, commanding said board to issue its warrant to the auditor of state in favor of said relators for the amount due them (including interest) on said contract, or show cause why the same is not done.

By answer, the board of public works shows for cause why they have not complied with the command of this writ, certain matters which are sufficiently stated in the opinion of the court.

The cause is now submitted on demurrer to this answer.

J. T. Holmes and George K. Nash, attorney-general, for defendant.

MOLLVAINE, C. J.

In the first place, the defendants claim that, at the time the agreement was made, there was no authority or power in the board of public works to purchase dredges, boats and other implements at a price in excess of \$20,000, and, therefore, the agreement to pay in excess of that sum is void. This claim is based on an act passed May 13, 1878, entitled, "An act to appropriate money to repair the public works and render them fit for navigation." By this act, in addition to tolls, fines and water-rents of the public works, the sum of \$30,000, from the general revenue of the state, was appropriated "for the purpose of putting said works in such state of repair as will prevent an overflow, and render them fit for use at the opening of navigation," and it was provided, that of said sum of \$30,000, "that not exceeding \$20,000" * * * "may be used in leasing or purchasing the necessary dredges, and other boats, implements, tools, horses and mules, required to keep said works in repair." In this statute we find no limitation upon the power of the board in making such purchases. The limitation is solely upon the use of the appropriation from the general revenue. If necessary, any sum in excess of \$20,000, to be paid for such implements, might have been taken from the tolls, fines and water-rents of the public works. So that, in this act of appropriation, there was ample provision made for the payment of the whole amount of relator's claim, provided only, that in addition to the \$20,000, the receipts of tolls, fines and water-rents should prove sufficient to make up the amount.

Ample power to enter into the contract with the relators was conferred upon the board of public works, by the act of April 4, 1859, entitled, "An act conferring certain powers on, and prescribing certain duties of, the board of public works." Although the necessity for the exercise of the powers herein conferred was, in a great measure, suspended during the time the lessees were in possession of the public works, it was fully revived (the act not having been repealed) as soon as the board was again put in

possession of the works, under the resolution of May 11, 1878. And here it may be remarked, that the necessity and propriety of making the purchase, at the time and under the circumstances, are not questioned; while, on the other hand, it appears that the purchase was very advantageous to the state.

In the next place, it is claimed that the funds in the treasury, subject to the control of the board, are not applicable to the payment of relator's demand. It is true that the special appropriation act of May 13, 1878, cannot now be looked to as an authority for using the funds in the treasury for such payment, as section 22 of article 2 of the constitution provides, "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law; and no appropriation shall be made for a longer period than two years." But section 2 of the general appropriation act of April 15, 1880 (77 Ohio L. 254) provides, "That there is hereby appropriated from any money coming into the treasury, as receipts from the public works, the following sums, to wit: For the maintenance, repairs, compensation of superintendent, and other employes of the public works, not otherwise herein provided for, the receipts from tolls, rents, fines and other income, heretofore, and since the 15th day of November, 1879, received or hereafter arising from the use of the public works, not otherwise appropriated." The funds in the treasury sought to be reached are of this description, and we see no reason why they should not be used for the payment of relator's claim. To hold that this appropriation can be applied only to liabilities incurred after the passage of the act, would be unjust and unwarranted.

The answer further sets up, that on May 23, 1878, the contract with relators was modified by the board of public works, by the following action, as recorded upon its minutes:

"Board met. Present, Messrs. Thatcher, Schilder and Evans.

"The attorney-general verbally submitted his opinion, as requested yesterday, to the effect that the board could not exceed in the purchase of the boats, tools, &c., of the lessees, the sum of \$20,000, appropriated for that purpose.

"On motion of Mr. Evans, the following preamble and order were then adopted by a unanimous vote of the board, to wit:

"Whereas, This board, on Saturday, the 18th inst., resolved to buy the dredges, boats, tools, &c., belonging to the lessees of the public works of this state, at the sum of \$38,820, under the erroneous impression that the board could use a part of the revenue of the public works, in their purchase, in part, and

"Whereas, The attorney-general has given his opinion that no such use can be made of the revenues of the public works, under the existing laws; therefore,

"Resolved, That the terms of said agreement to purchase be modified in this, to wit: That the board of public works will now pay to said late lessees the sum of \$20,000 on account of said tools, &c., the same being the amount appropriated for that purpose, May 13, 1878, leaving the lessees to depend upon the affirmation of said contract of purchase by the general assembly, and the making of the necessary appropriation to pay the remainder of said consideration to the general assembly.

"Thereupon, on motion of Mr. Schilder, the following order was adopted, to wit:

"Ordered, That the president of this board issue his check on the auditor of the state in favor of the lessees of the public works for \$20,000, on account of the purchase

of dredges, boats, horses, tools and implements, bought of them on the 18th inst., as per schedule furnished."

And it is averred that relators, with full knowledge of the above action of the board, acquiesced therein, and received the payment of said \$20,000.

It is quite evident, that the sole inducement which led to the action of the board on the 23d inst., was the belief induced by the opinion of the attorney-general, that the contract of the 18th inst. was void for want of power in the board to make it, and the sole object of such action was to affirm the contract as far as was in the power of the board, leaving it to the legislature to ratify the unauthorized stipulations.

Except for this belief, which we have already shown was erroneous, no such action would have been taken by the board; and certainly any acquiescence on the part of the lessees to a modification of the contract (if any were shown) must be attributed to the same mistake. But the only fact, or act of the lessees tending to show acquiescence in a modification of the agreement of the 18th inst. was the receipt of the \$20,000, after knowledge of the action of the board on the 23d. This is not sufficient to bind the lessees to such modification. The payment and receipt of the \$20,000 were in strict accordance with the contract of the 18th. Plainly, there was no consideration moving to or from either party, to induce or support a modification of the contract, and, for all that appears, the relators may insist upon the original terms of the agreement.

It is also insisted by the defendants, that the claim of relators, being one against the State, interest thereon cannot be allowed.

On the other hand, it is claimed that the relators are within the terms and meaning of the statute which provides "That all creditors shall be entitled to receive interest on all money after the same shall become due, either on bond, bill, promissory note, or other instrument of writing, or contract for money or property." That the words of this statute are broad enough to embrace the claim of relators is not disputed; but it is contended that the state is not embraced within the general words of a statute, and can be held to be within the purview of statute only when so declared expressly or by necessary implication.

The doctrine seems to be, that a sovereign state, which can make and unmake laws, in prescribing general laws intends thereby to regulate the conduct of subjects only, and not its own conduct.

It is a familiar doctrine, that a state is not affected by the statute of limitation, however general its terms may be. *Green Township v. Campbell*, 16 Ohio St. 11; *Josselyn v. Stone*, 28 Miss. 753. Upon the same principle, it has been held, that a statute providing that "costs shall follow the event of every action or petition," does not apply to a party prevailing against the state even in a civil cause. *State v. Kinne*, 41 N. H. 238. Indeed, the doctrine of the common law expressed in the maxim, "The king is not bound by any statute, if he be not expressly named to be so bound" (*Broom Leg. Max.* 51), applies to states in this country as well. Moreover, upon the same principle rests the well-settled doctrine that a state is not liable to be sued at the instance of a citizen. Not because a citizen may not have a just claim against the state or may not suffer injury at the hands of the state; but because it must be assumed that the state will ever be ready and willing to act justly toward its citizens in the absence of statutes or the intervention of courts. *Coster v. Mayor*, 43 N. Y. 399.

In view of these principles, we must hold that the state, as a debtor, is not within the purview of the statute above quoted, and cannot be adjudged to pay interest upon any claim against her in the absence of a promise, expressed or implied, to do so; and it is not claimed that any such promise has been made to relators. *Attorney-General v. Cape Fear Navigation Co.* 2 Ired. Eq. 444; *Auditorial Board v. Arles*, 15 Texas, 72; *State v. Thompson*, 5 English (Ark.) 61; 9 Opinions of Attorneys-General, 57.

It is suggested, however, that even in the absence of a statute, or an agreement, requiring the state to pay interest upon relator's claim, that damages in place of interest, might be awarded, under section 6753 of the revised statutes, which provides, "If judgment be given for the plaintiff, the relator may recover damages which he has sustained, to be ascertained by the court, or a jury, or by a referee, or master, as in a civil action." This section certainly does not contemplate an award of damages against the state, in whose name alone the writ of mandamus can be prosecuted. And to assess damages in this case to be paid out of moneys in the treasury belonging to the state, would be in effect an assessment against the state. And to assess them against the members of the board of public works would be unjust, for several reasons: 1st. The members now composing the board, and sued, are not the same members who composed the board during the greater part of the time during which payment has been delayed. 2d. The delay has been occasioned by an honest conviction that there was no authority in the board to make payment.

If the relators have been injured by delay in making payment, they can look only to the general assembly for redress.

Peremptory writ awarded.

[This case will appear in 36 O. S.]

A SOLICITOR STRUCK OFF THE ROLLS.

"In the Queen's Bench Division, on Saturday the 21st inst., an application was made, at the instance of the Incorporated Law Society, to strike William Henry James Pook, solicitor, of Greenwich, off the rolls for misconduct. He had received for his client a considerable sum of money—about £400—for payment to his creditors; and though he had, with his client's subsequent assent, applied part of the money to the payment of a debt due to himself, and had also applied a small portion to the payment of other creditors, he had applied the larger portion to his own use. But he had, since these proceedings, made full restitution. Lord Coleridge said that he and his brother Bowen, having taken time to consider the case, had come to the conclusion that there was nothing to mitigate the sentence they felt compelled to pronounce. It was obvious that the restitution so recently made was made under pressure and from fear, and could not be taken into account. He was a person clothed with a character of exceptional responsibility, and invested by the court itself with powers which might be abused. He was the officer of the court, and was accredited to the world by the court itself, and in that character he was intrusted with the confidence of clients in matters often of the most delicate and im-

portant nature. Honor and honesty, therefore, were of the very essence of the character of a solicitor; and if a person showed by his conduct that he was unfit to exercise those exceptional powers with which he was entrusted, the court had no alternative but to take those powers from him. Sorry as they were, therefore, to have to take such a course, they had no alternative but to order that Mr. Pook's name be struck off the rolls.—*Law Journal*, London, May 28, 1881.

Infant—Injury to while on the Track—Question of Contributory Negligence.—Where a child two years old strays away from his home, without the knowledge or consent of his parents, and goes upon a railroad track, which is about one hundred feet from his home, and within three minutes after leaving his home he is injured by a car belonging to the railroad company, running over him. *Held*, that it cannot be said, as a matter of law, that the failure of the parents to keep the child away from the railroad track, was *per se* culpable negligence contributing to the injury. *Smith v. Atchison, Topeka & Santa Fe Railroad Co.*, 25 Kans.

Where a railroad track is constructed in a populous neighborhood, near a city, and children and others often go upon the track, and a portion of the track has a steep grade down which cars will run with great force when the brakes are loosened; and the persons operating the road loosen the brakes of a car loaded with coal, and let it run down this steep grade, without any person being on the car, or any means of stopping it, and without first looking to see whether the track was clear, or whether any person was on the track or not; and a child, who was on the track, was run over and injured; and there is a conflict in the evidence as to whether the child could have been seen by the persons operating the road, before they loosened the brakes. *Held*, that the court cannot say, as a matter of law, that the persons operating the road were not guilty of negligence; but it is a question of fact which should be submitted to the jury.

Where a railroad company owns a switch track, constructed from the main track to a coal shaft belonging to a mining company; and the railroad company furnishes cars to this mining company to be loaded with coal, and when loaded, permits the mining company to loosen the brakes of the cars so that the cars will run down the steep grade of the switch track to a point where the track is level; and the mining company after loading a certain car, negligently loosens the brakes thereof and allows the cars to run down the steep grade of the switch track, and over a child, and thereby injures it. *Held*, that the railroad company is responsible for the injury.

Master and Servant.—Action for Loss of Service of Daughter.—Exemplary Damages.—Evidence of Defendant's Property.—A father may recover for loss of service of his infant daughter, caused by her being gotten with an illegitimate child, notwithstanding she was not at the time actually in the service of the father (but in that of the defendant), if he still retained the legal right to reclaim such service.

While the cause of action in such a case is technically the loss of service, the jury are not confined to the actual pecuniary loss, but may award exemplary or punitive damages; and evidence is admissible to show the defendant's pecuniary condition.

It is no objection to the maintenance of an action for seducing the plaintiff's daughter that defendant procured the sexual intercourse by force. *Lavery v. Crooks*. Supreme Court of Wisconsin.

Partnership.—Bank Deposit in the Name of One partner.—Use of Firm Name by Surviving Partner.—Partnership of Agents.—Where one of two partners carrying on business in his own name deposits moneys of the firm in his own name in bank, such funds belonging to the firm, the other partner will have the right to change the account during the life of the partner in whose name the deposit was made, and place it to the credit of the firm account, and, after his death, to check it out as surviving partner. But if the same was the private means of the partner so depositing, the other will have no power to control it or check it out during the life of the depositor, or after his death.

A surviving partner has the right to use the firm name in which to transact his business. A check drawn on a bank by him, either in the firm name or in his own name as surviving partner, when paid, will protect the bank.

Where a person engaged as an agent in the sale of manufactured articles on a commission, forms a partnership with another, and the firm continues the business, it will be a continuance of the agency, not only to sell, but also to collect for articles previously sold, for the principal. And such money, when collected, over and above the commissions allowed, belongs to the principal or original owner, and does not become the property of the agents selling. *The Commercial National Bank v. Proctor*. Supreme Court of Illinois.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Sept. 7, 1881.]

1151. *John B. Jones v. Franklin Insurance Co.* Error to the District Court of Licking County. C. H. Kibler for plaintiff; J. Buckingham for defendant.

1152. *J. B. Jones v. Clara Conley.* Error to the District Court of Licking County. G. Atherton and J. B. Jones for plaintiff; Charles Follett, & Son for defendant.

1153. *William Campbell v. Ensley D. G. Campbell.* Error to the District Court of Licking County. C. H. Kibler for plaintiff.

1154. *Elisha Wilkinson et al. v. Commissioners of Preble County.* Error to the District Court of Preble County. Robert Miller and M. L. Holt for plaintiff; Foss & Fisher and Thomas Millikin for defendants.

1155. *Theodore W. Moore v. Wm. H. Given.* Error to the District Court of Muskingum County. T. J. Taylor for plaintiff.

1156. *Plympton J. Liles v. Jacob J. Gaster.* Error to the District Court of Wyandot County. John D. Sears for plaintiff; McKelly & Hare for defendant.

1157. *Edward B. Clark et al. v. Maria McDonald.* Error to the District Court of Ross County. Hall & Bostwick for plaintiff.

1158. *John Rice v. George Ribe et al.* Error to the District Court of Morrow County. Olds & Dickey for plaintiff; H. L. Beebe for defendants.

1159. *A. W. Thompson et al. v. Thomas Massie et al.* Error to the District Court of Ross County. P. C. Smith and Vanmeter & S. for plaintiffs; McClintick & Smith for defendants.

1160. *Frank J. Bonewitz v. Van Wert County Bank et al.* Error to the District Court of Van Wert County. W. J. Beers for plaintiff; I. N. Alexander for defendants.

1161. *Theresa Eisenberg v. Marx Albert et al.* Error to the District Court of Belmont County. J. H. Collins for plaintiff.

1162. *The Baltimore & Ohio R. R. Co. v. Ira Lewis et al.* Error to the District Court of Belmont County. J. H. Collins for plaintiff.

Ohio Law Journal.

COLUMBUS, OHIO, : : : SEPT. 15, 1881.

PERSONAL.

—Thomas H. Kelley, of the Cincinnati Bar, was in the city Tuesday of this week and favored the LAW JOURNAL office with a call.

—Hon. Henry C. Noble has returned from his summer stay at Lake Chautauqua, where the pure air and pleasant surroundings must surely agree with him, judging from his hale and hearty looks.

—W. P. Richardson, Esq., of Marietta, stopped in Columbus a short time, the first of the week, on his way home from a summer's sojourn in the West. Mr. Richardson had some business with the Supreme Court, which he transacted with his Honor, Judge Okey, who is the only resident Justice of the Court to answer calls made here in vacation. The LAW JOURNAL was pleased to meet Brother Richardson.

—Hon. John McClure, Ex-Chief Justice of the Supreme Court of Arkansas, spent several days in Columbus last week, visiting old friends. Judge McClure is an old Ohio man, who was Chief Justice of his adopted State (Arkansas) at the time of the Brooks-Baxter excitement, a few years ago, when the Court was called upon to decide as to who was, in law, the Governor. The Judge now being clear of official duties, is enjoying the luxury of a handsome practice in the law, which his well-known ability righteously brings forth.

OBITUARY.

Willis W. Powers, Esq., of the Mahoning County Bar, died last week, and was buried at Youngstown on Saturday.

Although young in years he was old and well learned in the true principles of manhood, honor and firm friendship. We were boys together when he attended College in Pennsylvania. We were together when he was a law student at Pittsburgh. We gave him a hearty grasp of the hand, and bid him God speed when, crowned with the title of attorney and counselor, he entered upon a bright professional career. Within the last year he was admitted to the Ohio bar and located at Youngstown, where his prospects were most flattering. His love of home and family was one of the admirable characteristics of his affectionate nature, and we know how well he was loved in return by the members of that bright home circle, within which we were often gathered together in days past. With the members of his family, we mourn their loss, and in their affliction they have

our sincerest sympathy, for we know how greatly he will be missed.

THE Supreme Court of Ohio will convene September 26.

THE time for business in our County Courts is at hand, but so great is the power of politics over law and justice, that Courts must give way to political pressure and allow the channels of justice to remain closed until after the election.

NUMBER one of "THE LAW-CENTRAL," a monthly magazine devoted to the interests of the legal profession, has just reached us from Washington, D. C. The CENTRAL is edited by William R. Smith, Esq., and starts out with sixty-four pages of valuable reading matter, which on its face will surely pilot this new monthly into the good graces of the profession at once. Terms \$5.00 per annum. Single copies 50 cents.

QUESTIONS IN THE LAW.

We have received the following queries from subscribers:

No. 1. A person is arrested for the violation of an ordinance of a village. The ordinance does not make imprisonment a part of the punishment, but imposes a penalty not exceeding fifty dollars. The accused demands a jury trial. There is another ordinance of the village providing for impaneling a jury "*in cases where the party is entitled to trial by jury.*" Would the accused in this case, under the Constitution, Art. 1, § 10, and the Revised Statutes §§ 1823 to 1830, and § 1839, be entitled to a trial by jury?

No. 2. Has any Court decided that bees kept in proximity to the dwelling house of another are a nuisance before real injury is done by them? Would an injunction be granted to restrain the keeping of the animals?

"Step by step," reads the French proverb, "one goes very far." "Nothing is impossible," says Mirebeau, "to a man who can and will. This is the only rule of success." "Have you ever entered a cottage, or traveled in a coach; ever talked with a peasant in a field, or loitered with a mechanic at the loom?" asked Sir Edward Bulwer Lytton, "without finding that each of these men has a talent you have not?"

THE PUNISHMENT OF ATTEMPTS AND THE DEFENCE OF INSANITY IN CAPITAL CASES.

The recent attempt upon the life of the President has naturally attracted attention to the state of the criminal laws of the country with reference to the punishment of the crime committed and the effect of the defence of insanity. That there should be, as there clearly is, general dissatisfaction with the law as it stands upon these points is natural, and no time could be fitter than the present for the consideration of such matters.

The law regulating the punishment of attempts to commit crime is, of course, chiefly statutory; but all statutes, and the rules when the offence attempted is not statutory, agree in affixing a lighter punishment to the attempt than to the completed crime. This distinction seems neither logical nor sensible. Much discussion has recently been had over the proper definition of an "attempt," in which the late Chief Justice of England, the authors of the proposed criminal code of New York, and numerous other persons figure; but the one point here material, and which is certainly undisputed, is that an attempt only fails of being a crime by the operation of some cause outside of the act or control of the criminal; that he has done all that he could, with the intent of committing a given offence, but that his endeavor is rendered ineffectual in spite of himself.

Now it does not seem, on any just theory of crimes and punishment, that such failure should effect the position of the criminal. The theory of punishment for crime is twofold. In crimes where the penalty is not death it is designed to deter the criminal from repeating the offence for which the punishment is imposed, and to deter others, by the example of that punishment, from committing similar offenses. In capital cases, while the deterrent effect of the example is certainly one element, another, and an equally important one, is the protection of society by the destruction of one whose existence is a constant menace to its members.

In either view of the case, and whatever the punishment, can these reasons for enforcing it be less potent or effective in the case of an attempt than in that of a completed crime? To take the present case: the criminal, with the design of committing murder, does an act which is calculated to produce that effect, and which under ordinary circumstances might do so. The victim, being a man of strong constitution, carefully treated, and supplied with the best medical advice, recovers from the effect of the injuries received. Does this in the mind of any one alter the criminal's guilt? Is he not equally dangerous to society? Or if he does not deserve the extreme penalty of the law if his victim recovers, does he any more deserve it because, owing to unskillful treatment or a feeble body, he dies? The question of the deterrent effect of his punish-

ment on others is immaterial here, because it may be presumed that any punishment will exercise some such effect, and because no one attempts a crime without intending its success.

On the other ground, that of the protection of society, it is as clear as anything can be that the attempt deserves the same punishment as the crime. The theory here clearly is, that, in the case of capital offences, the existence of the criminal is a danger to society, which must be removed by his death; and in other cases, that one who is so depraved and dangerous as to commit any given offence needs to have his dangerous propensities restrained by the punishment attached to its commission by the law. Now these views depend solely on the *character* of the criminal, and his commission of the act is only evidence of such character. It is selected as the only safe guide by which a government can proceed in administering punishment, as it is the only conclusive proof of that tendency which is punished as reprehensible.

But an attempt is as conclusive evidence as is the committed crime. If an assassin shoots, stabs, or otherwise assaults another with evident intent to take his life, the death of the victim does not go one step farther than does the fact of the attempt, to prove the dangerous character of his assailant. Nor in other cases of crime does the accidental disappointment of the perpetrator take away from the proof of his criminal disposition which his success would furnish.

There can be no just or rational system of punishment for crime that is not based on the theory of an evil and dangerous disposition in the criminal, which is to be restrained or rendered impotent; and on any such system there can be no reasonable distinction between the punishment of the complete offence and the punishment of the attempt to commit it.

The second point for consideration is the defence of insanity in capital cases. This defence has been in such frequent use of late years as to bring it much into discredit, and very slight evidence has been sufficient to establish it. The States may be divided into three classes, according to the rule of evidence prevailing on this point, which varies greatly. In some States, the rule is that a reasonable doubt of the sanity of the accused is sufficient for an acquittal; in others, the prisoner must establish his insanity by a preponderance of evidence; while in New Jersey the late Chief Justice Hornblower laid down the rule that the accused must establish his insanity in the same way that the State must establish his guilt, i.e. beyond a reasonable doubt.

The reason for this difference is easily seen; the first view being based on the general presumption of innocence, and the latter two on the technical theory of a plea of confession and avoidance. The syllogism in the first case is this:—

A reasonable doubt of guilt must acquit;

A reasonable doubt of sanity is a reasonable doubt of guilt; *ergo*,

A reasonable doubt of sanity must acquit.

In the second case it is this:—

A party pleading new matter must prove it;
The defence of insanity is a plea of new matter; *ergo*,

A party pleading insanity must prove his plea.
In the third case there are two:—

(a) A defendant is as to new matter pleaded as the prosecution as to the matter alleged against him;

Insanity is new matter; *ergo*,

A defendant is to his plea of insanity as the prosecution to the charge.

(b) The prosecution must prove its case beyond a reasonable doubt;

The defendant is to his insanity as the prosecution to its case; *ergo*,

The defendant must prove his insanity beyond a reasonable doubt.

The first of the views above referred to is undoubtedly the most prevalent, and under such a rule it is, of course, as experience has shown, easy to obtain the acquittal of almost any murderer on the plea of insanity. As an example of what may be done with such a plea by a judge desirous of acquitting an influential criminal, the outrageous charge of Mr. Justice Hogeboom, of the Supreme court of New York, in the well-known case of *The People v. Cole*, is interesting and instructive. It may be questioned whether the doctrine of a reasonable doubt has ever been carried so far, and it is to be hoped for the credit of the bench and the safety of society that it never will be again.

But behind and beyond the question of what proof of insanity should be required lies the question, which does not seem to have occurred to many people,—whether insanity should be a defence in capital cases at all. It may seem at first startling to put it as a debatable matter, but that it is at least open to argument, a little consideration will show. Capital punishment differs from other forms of punishment in that it is no part of its aim to work any reformation in the criminal. The two aims of punishment in general are, however, as prominent here as anywhere else. These aims are, 1st, to prevent repetition of the offense by the criminal; 2d, to prevent the commission of the offense by others. Both kinds of punishment rely on the same means of effecting the second object, which is the dread of the punishment inflicted in a given case; but to effect the former object capital punishment removes from the criminal all power of ever acting at all, while milder forms rely upon the dread of again incurring them, to induce the criminal to abandon his evil ways. The theory of the two clearly is, that one who commits the higher offenses is supposed to be so depraved that nothing but his death can protect society from him, while in other cases it is supposed that less extreme measures will suffice.

Now, if these views are applied to the case of a lunatic it will be seen that every argument that can be adduced to show the necessity for the death of a sane murderer has tenfold weight in

case of an insane murderer. If it be hopeless that a sane murderer should ever cease to be dangerous, it is certainly so in the case of a lunatic. He is possessed of an insane delusion, under the influence of which he has committed one murder and may commit others, or (if we except the theory of "emotional insanity") he is liable under certain circumstances to be so much excited as to be irresponsible, and in that state to commit murder. If committed to an asylum, he may so far improve as to be discharged as cured, and yet he may have a recurrence of *dementia* which may again impel him to a performance of new crimes. Society is never safe while he lives.

In considering this matter, the province of human law must carefully be borne in mind. With the measure of the moral guilt of an offender it has nothing to do. Its only province is to protect the society which establishes it, and to punish such acts as are harmful to society, regardless of their moral aspects. It is easy to see that this has been practically recognized to be true, in spite of some isolated instances of an attempt to make the law cover all moral offences, as in the case of many of the early enactments of the New England colonies; and the converse of the proposition which the Puritans strove to establish, that all moral offences should be held legal offences, is seen in the numerous acts everywhere in force prohibiting under various penalties acts in themselves perfectly proper.

Now, it is only by a confusion of ideas upon this matter of the province of the law that insanity has been held to be a defence in capital cases. There may be and frequently is no moral guilt attached to the act of an insane murderer and it is due to a certain feeling in the public mind that a person not morally guilty should not be punished for his act, that his lack of responsibility has been held a defence.

This feeling is reasonable enough when applied to punishments not capital, but to what is called "capital punishment" it has no proper application; and this for the reason that capital punishment is in fact not *punishment* at all. It is of the essence of punishment that it should have an ulterior end beyond the infliction of the penalty, and this ulterior end (as to the criminal) is that he, by experiencing the penalty for his offence, should be deterred from a repetition of the crime. It would, in general, be manifestly vain to hope for such an effect upon a lunatic, and therefore such punishments are not applicable to him.

But in capital cases the only aim of the law is to destroy the offender, and remove by his death a danger to society which can be removed in no other way. The danger to society from an insane murderer is at least as great as from a sane murderer, and society has as much need for protection in the one case as in the other. If it is vain to hope that the sane murderer, who is open to the effects of milder penalties, can be rendered harmless while he lives, it is still more

so in the case of an insane murderer, upon whom milder penalties would have no effect. Every argument that will apply in favor of the death penalty at all, will apply with greater force in the case of the insane than in that of the sane, with perhaps one seeming exception.

This exception is that of the argument derived from the deterrent effect of the example upon others who might be tempted to commit the same crime. Of course, if insanity were no defence it would never be falsely set up by one accused of murder; but would the death penalty have any deterrent effect upon those not yet guilty? It would certainly take away one hope for escape from the sane murderer *in posse*, and it may be doubted whether it would not have some effect upon the insane, who certainly seem sometimes to calculate upon the immunity which their state affords them. But whether this be so or not is really immaterial. The great object of the death penalty is the death of the criminal, and this being attained, and society being freed from the menace of his existence, the rest is but of secondary importance.

It is too late now to altar the law so as to cover the President's assailant, but apart from the considerations attached to this particular case, the safety of the public no less than that of its rulers requires these two amendments to the general law. Let us have no man escape the consequences of his crime because he is happily foiled in completing it, and let us destroy an insane murderer as we do any one or anything else whose continued existence threatens the general safety.—EDWARD B. HILL, New York, in *American Law Review*.

SUPREME COURT OF OHIO.

FIRST NATIONAL BANK,
v.
HENRY FOWLER, ET AL.

1. A promissory note containing the words, "I promise to pay to the order of myself," having been signed by two persons and placed by one of them in the hands of the other to be by him put in circulation for his own benefit, the latter may, before the note is due, by indorsing his name thereon, invest a *bona fide* holder with a complete title thereto, although the name of the other maker is not so indorsed.

2. In violation of an agreement between principal and surety in a promissory note, the principal transferred the note, before due, as collateral security for an extension of ten days in the time of payment of a protested draft for a less amount, the person receiving the collateral acting in good faith, and having no knowledge of such agreement: *Held*, that the title of such holder, to the extent of the draft, is valid.

Error to the Court of Common Pleas of Trumbull County. Reserved in the District Court.

On September 23, 1874, the First National Bank of Warren, plaintiff in error, brought suit in the Court of Common Pleas of Trumbull County, against Henry Fowler and James H. Humiston, defendants in error, on a promissory note executed to the plaintiff by the defendants for \$1,067.25, dated April 15, 1874, and payable four months after date.

An answer and a reply were filed, and the cause was submitted to a jury, which jury returned a verdict for

the defendants, on which verdict judgment was rendered. The plaintiff having prosecuted error in the district court, that court reserved the case to this court for decision.

The facts, so far as it is material to state them, are as follows: On May 24, 1873, Nathan B. Tyler, at Warren in Trumbull County, filled the blanks in a printed note, and signed it. The instrument was then in the following form:

"WARREN, O., May 24, 1873.

"\$1,000. Four months after date, I promise to pay to the order of myself one thousand dollars, at Trumbull National Bank, Warren, O., value received.

N. B. TYLER."

On the same day he took the note to Henry Fowler, residing in a village in the same county, and the evidence tended to show that he represented to him that he needed money and wished to get the note discounted at the bank named therein, which representation Fowler believed to be true, and at the request of Tyler then signed his name on the note below that of Tyler, and handed the paper to him. There was also evidence tending to show that both Tyler and Fowler believed that Fowler had then done everything necessary to be done in order to clothe Tyler with full authority to dispose of the note and transfer a complete legal title to any person, for his (Tyler's) own benefit.

Tyler was then indebted to the plaintiff in error in the sum of \$469.55, money paid by it to Tyler for his draft for that amount on G. Eichler, known as the Canton draft, and also in the sum of \$500 on a promissory note falling due that day, indorsed by John Koehler.

On the day of the execution of the note by Tyler and Fowler, Tyler presented it to the plaintiff in error for discount, but discount was refused. The plaintiff in error was willing to take it as collateral security. Tyler said he could take up the draft in ten days, and the plaintiff in error desired the collateral security that he would perform his obligation. Nothing was said with express reference to collateral security for the Koehler note. Tyler agreed to transfer the note of Fowler and himself as collateral security, and thereupon wrote his name across the back of it and delivered it to the plaintiff in error. The name of Fowler was never indorsed on the note. Evidence was given that the plaintiff in error had no knowledge of any understanding between Tyler and Fowler as to the manner in which the note executed by them should be disposed of by Tyler.

On April 15, 1874, Tyler being in failing circumstances, Fowler as principal, and James H. Humiston as surety, executed to the plaintiff in error the note upon which this suit was prosecuted, and took up the note executed by Tyler and Fowler. Subsequently, Fowler obtained judgment against Tyler on the latter note, but during the trial of this case, tendered to the plaintiff in error an assignment of that judgment.

A bill of exceptions was taken during the term, setting forth certain requests by the plaintiff in error for instructions to the jury, the charge given, and exceptions to the refusal of the court to charge as requested, as well as to the charge given. Among other things which the plaintiff in error requested, was that the jury be charged as follows: "That the defendant Fowler was bound by whatever disposition Tyler made of the note, in the ordinary course of business, unless the transferee had notice of some special arrangement between said Tyler and Fowler, limiting Tyler's authority in the use of the note." The court refused so to charge, and on the contrary charged, among other things, as follows: "If the defendant Fow-

ler did not authorize the use made of the old note, and in no manner assented thereto, being a mere surety upon the note, he was not liable upon it when received by the plaintiff as a security or pledge for the payment of the Canton draft within ten days." And again: "In order to transfer the legal title of the note, as commercial paper, the note should have been indorsed by both Tyler and Fowler."

The case was decided in this court during the term of Gilmore, C. J.

E. B. Taylor, for plaintiff in error.

G. M. Tuttle, for defendants in error.

OKAY, J.

On the trial of this case the testimony was quite conflicting. We do not find it necessary to express any opinion as to the preponderance of the evidence. Of course the plaintiff in error was entitled to recover, if Fowler and Humiston, at the time they executed the note sued on in this case, knew the terms upon which the note of Tyler and Fowler was held. Equally clear it certainly is, that the plaintiff in error was not entitled to recover if it concealed from the defendants in error the terms upon which it held that note, and thereby induced the execution of the note here in suit. The question is as to the liability of the defendants in error upon the assumption that without their fault, or the fault of the plaintiff in error, they were ignorant of those terms. In that case their liability should be measured by the liability of Fowler on the note executed by himself and Tyler. The requests for instructions to the jury, the refusal to charge as requested, and the charge given, in connection with the tendency of certain testimony set forth in the statement of the case, fairly present the question as to the liability of Fowler on the Tyler-Fowler note in the latter view, and require us to say whether the action of the court in that respect was or was not erroneous.

The note executed by Tyler and Fowler was what is known as an irregular instrument. Byles on Bills (6th Am. ed.) §90; 1 Daniel on Neg. Inst. §§ 128, 148. Although signed by both of them, its terms are, "I promise to pay to the order of myself one thousand dollars." Where a note signed by two or more persons is payable to the order of one of them, it becomes effectual when he writes his name upon the instrument and puts it in circulation. If it is payable, in terms, to the order of two of the makers, the same thing must be done by both of them in order to vest in the holder a legal title. A note payable to the maker's own order is wholly void until indorsed by him and put in circulation, but becomes by such transfer a valid promissory note in the hands of a *bona fide* holder, and is, in effect, payable to bearer.

The only indorsement made upon the note by Tyler and Fowler, was that made by Tyler by writing his name on the back of the instrument. Was the court warranted in saying to the jury that, "in order to transfer the legal title of the note, as commercial paper, the note should have been indorsed by both Tyler and Fowler?" In our opinion this question must be answered in the negative upon three grounds.

First. Where a note the terms of which are, "I promise to pay," is signed by more than one person, it may be read, "We or either of us promise to pay." Wallace v. Jewell, 21 Ohio St. 163. Here the instrument is signed by two persons, and its language is, "I promise to pay to the order of myself one thousand dollars." No greater violence is done to language by reading it, "We or either of us promise to pay to the order of ourselves or either of us," than was done in Wallace v. Jewell; and

we think where such interpretation is in harmony with what seems to have been the intention of the parties, the instrument may be so read. Conner v. Routh, 7 How. (Miss.) 176; Boyd v. Brotherson, 10 Wend. 93; Pearson v. Stoddard, 9 Gray, 199; Higley v. Newell, 28 Iowa, 516.

Second. Parol evidence is inadmissible to vary the terms of a promissory note; but where the instrument is of the class we are now considering, parol evidence may be admitted to explain it. McCrary v. Caskey, 27 Geo. 54; Taylor v. Strickland, 37 Ala. 642; Kelsey v. Hibbs, 13 Ohio St. 340. "If you can construe an instrument by parol evidence, where that instrument is ambiguous, in such manner as not to contradict it, you are at liberty to do so. Parke, B., in Goldshede v. Swan, 1 Welsby, H. & G. 154, 158. And Prof. Parsons says: "Where the language of a note is capable of two meanings, parol evidence may direct the proper choice to be made between them." 2 Bills & N. 517.

Third. The evidence shows that when Tyler received the note from the hands of Fowler, the latter intended to invest him with the power to negotiate it, and to do whatever was necessary to be done in order to transfer a legal title to the instrument. Tyler, under the circumstances, was empowered, on his own behalf and as agent for Fowler, to invest another with a legal title to the note. One may be orally authorized to indorse for another a promissory note, and where the instrument is in the form of the one under consideration, the indorsement may be made as the note was indorsed, if that was the manner of indorsement contemplated by the makers. 1 Daniel on Neg. Inst. §§ 272-306.

But the defendants in error claim that Tyler diverted the note from the object for which it was executed, and hence Fowler, who executed the note for the accommodation of Tyler, was discharged. The note, as we have seen, is an irregular instrument, and is payable at another bank than the plaintiff in error; but having been indorsed in the manner stated, if there was an understanding between Fowler and Tyler that the latter had general authority to transfer the note, the instrument differs, in no legal sense, from the most formal instrument, although the plaintiff in error knew Fowler was surety. Stone v. Vance, 6 Ohio, 246; Riley v. Johnson, 8 Ohio, 526; Williams v. Bosson, 11 Ohio, 62; Clinton Bank v. Ayres, 16 Ohio, 282; Portage Co. Bank v. Lane, 8 Ohio St. 405; Erwin v. Shaffer, 9 Ohio St. 43; Knox Co. Bank v. Lloyd, 18 Ohio St. 353; Kingsland v. Pryor, 33 Ohio St. 19. Indeed, according to the syllabus, the transfer of such note, even in violation of an agreement between the principal and surety, will not discharge the latter, if the indorsee had no knowledge of the agreement.

Finally, it is urged, in support of the instruction to the jury, that Tyler had no power, however fair the transaction may have been on the part of the plaintiff in error, to pledge the note as collateral security for the payment, within ten days, of a protested draft for \$469.55. But the position is not untenable, for there was an agreement to delay collection of the draft for the specified time. Erwin v. Shaffer, supra; Roxborough v. Messick, 6 Ohio St. 448; 1 Daniel on Neg. Inst. §§ 829-832.

For error in refusing to charge as requested, and for error in the charge as given, in the particulars indicated in this opinion, the judgment will be reversed, and the cause remanded for a new trial.

Judgment reversed.

Boynton, J., dissented.

[This case will appear in 36 O. S.]

SUPREME COURT OF OHIO.

DANIEL L. JUNE ET AL

v.

JOHN PURCELL.

1. The principle decided in *Gavit v. Chambers* (3 Ohio, 496), that the owners of lands situate on the banks of navigable streams running through the state are also owners of the beds of the rivers to the middle of the stream, as at common law, has become a rule of property, and, irrespective of the question of its original correctness, ought not to be disturbed.

2. The same rule applies to lands bordering on the Sandusky river, in the tract of two miles square surveyed and sold under the act of congress of April 26, 1816. 3 Statutes at Large, 308.

3. Hence, the riparian owner can recover for sand tortiously taken from the bed of the river.

Error to the District Court of Sandusky County.

The original action came into the court of common pleas by appeal.

April 8, 1873, John Purcell filed his petition in said common pleas court against Daniel L. and Daniel S. June, setting forth that he is the owner, in fee simple and in actual possession, of out-lots number 61 and 62, in said city of Fremont, Sandusky county, Ohio, which said lots were designated in the original survey thereof as tracts number 23 and 24 in the United States Reservation of two miles square at the foot of the lower rapids of the Sandusky river. That said lots or tracts comprise all of the large island in the Sandusky river, which is a navigable stream.

That said Purcell owns to the center of the river, subject, however, to the right in the public to navigate the same.

That a portion of the bed of the river immediately adjacent to the westerly side of said island had, at the time of committing the wrongs complained of, risen so high as to form a distinct ridge or bar, which at ordinary stage of water was left dry. That said bar lies wholly between the center of said river and said island, and connects with said island by a narrow neck, bar or ridge.

That about December 1, 1870, and at other times between that day and the commencement of this action, the said Daniel L. and Daniel S. June, wrongfully and unlawfully entered upon said premises, dug up, took and carried away from said bar or ridge, and converted to their use, one hundred and twenty wagon loads of said Purcell's sand, earth and soil, being the alluvium and accretions so as aforesaid deposited upon the bed and shore of said river adjacent to and on the westerly side of said island, to said Purcell's damage, &c.

Daniel L. and Daniel S. June, answering, admit:

That the lots described in Purcell's petition comprise the large island in the Sandusky river, which is a navigable stream. That said island is situate in the city of Fremont, Sandusky county, Ohio, and within the United States Reservation of two miles square at the foot of the lower rapids of the Sandusky river.

They also admit that during the month of

December, 1870, they caused to be taken and removed from the bed of the river, below the low-water mark thereof, opposite said island and between it and the center of the river, about sixty wagon loads of sand. They deny all statements of facts contained in said Purcell's petition not in this their answer specifically admitted.

At the April term, 1873, the court found the issues in favor of the plaintiff and assessed his damages at \$10 for which judgment was rendered.

The motion of the defendants for a new trial having been overruled, a bill of exceptions was taken, embodying all the evidence.

The following are the material parts of the bill of exceptions:

"Be it remembered, that on the trial of said action to maintain the issues on the part of the plaintiff, the following facts were agreed to by the defendants, and with the consent of both the plaintiff and defendants, received and considered by the court as evidence in said action on behalf of the plaintiff, that is to say, that at the date of the alleged trespass herein, the plaintiff was the owner in fee, and was in the actual possession to the ordinary or low-water mark, of out-lots sixty-one (61) and sixty-two (62), the same being out-lots twenty-three (23) and twenty-four (24), according to the original survey thereof, in the city of Fremont, Sandusky county, and state of Ohio. That said out-lots comprise all of the large islands in the Sandusky river, which is a navigable stream, and within the Reservation of two miles square at the foot of the lower rapids of said river. That within the bed of said river, on the north-west side of said island, opposite the willow tree designated in the sixth course in the record of the survey and field notes hereto attached, and marked exhibit 'A,' as being '10 inches in diameter, bearing very much down stream, marked with six notches,' and between said island and the center or thread of the stream there is a sand-bar, lying parallel with said island, the result of gradual and imperceptible accretions to the bed of said river, which sand-bar at ordinary or low-water, is surrounded by water. That during the month of December, A. D. 1870, the defendants dug up, took, and carried away from the north-west side of said sand-bar, and between said island and the center or thread of said stream, about 60 wagon loads of sand, of the value of ten dollars. Whereupon the plaintiff rested. Thereupon, the defendants, to maintain the issues on their part, gave, in evidence on the trial of said action, the record of the plat and field notes of a survey of said out-lots, made by the United States in the month of July, A. D. 1816, under and in accordance with an act of congress approved April 26th, 1816, and 'entitled an act providing for the sale of the tract of land at the lower rapids of the Sandusky river,' of which record a copy duly certified is hereto attached, marked exhibit 'A' and made part hereof. Also, the following facts were

agreed to by the plaintiff, and, with the consent of both parties, admitted and considered by the court as evidence on the trial of said action on behalf of the defendants, that is to say, that by the survey of the Reservation of two miles square at the foot of the lower rapids of the Sandusky river, made by the United States, in the month of July, 1816, under and in accordance with the act of congress aforesaid, none of the subdivisional lines of said survey extend to or embraced the bed of the river, but that, on the contrary, all of the subdivisional lines of said survey, approaching the river, were so run as to extend only to certain points on the bank of the river at greater or less distances from the margin of the water, which points are designated by said survey as corners to the respective subdivisions of said Reservation. And also that the river was meandered on the bank thereof, to and from said respective corners. And thereupon defendants rested. Whereupon the court found and ruled that the aforesaid act of congress under which said surveys were made, reserved only an easement to the public of the right to navigate the waters of said river, and that by said act and the said surveys of the United States, made under said act as aforesaid, the boundary line of plaintiff's said land was not restricted to the margin of the water at ordinary or low-water mark, but the same extended to the center or thread of the stream, and that the plaintiff, being the owner of the island aforesaid, was by virtue thereof the owner of the bed of the river opposite to said island to the center or thread of the stream, subject only to the right of the public to navigate the waters thereof, and thereupon rendered a judgment in favor of the plaintiff against the defendants."

The judgment having been affirmed by the district court, the present proceeding in error is prosecuted by the plaintiffs in error, in this court, to obtain the reversal of the judgments of both courts.

WHITE, J.

The ruling of the courts below is in accordance with the decision of this court in *Gavit v. Chambers* decided in 1828. 3 Ohio, 496. In that case it was held; that in this state the owners of land situate on the banks of navigable streams running through the state, are also owners of the beds of the rivers to the middle of the stream, as at common law. The same doctrine has been recognized in subsequent cases, and has become a rule of property in this state. *Lamb v. Rickets*, 11 Ohio, 311; *Walker v. Board of Public Works*, 16 Ohio, 544. The rule is in accordance with the doctrine of the common law, which regards all non-tidal streams, that are navigable in fact, as mere highways; and the same rule prevails in most of the states.

In *Jones v. Soulard*, decided in 1860, the rule was applied by the supreme court of the United States, to the Mississippi river. In speaking of the rule, it is said in the opinion: "We think this as a general rule too well settled, as part of

the American and English law of real property, to be open to discussion. * * * The doctrine, that on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark, has no application in this case; nor does the size of the river alter the rule. To hold that it did, would be a dangerous tampering with riparian rights, involving litigation concerning the size of rivers as matter of fact, rather than proceeding on established principles of law." 24 How. U. S. 65. See also, *Delaplaine v. C. & N. W. R'y Co.*, decided in 1877, by the supreme court of Wisconsin, 42 Wis. 214; and *Braxton v. Bressler*, decided by the supreme court of Illinois in 1872, 64 Ill. 488.

In *Sloan v. Biemiller*, 35 Ohio St. 492, it was held that the rule did not apply to Lake Erie and its bays; and a similar ruling was made in Wisconsin, in *Delaplaine v. C. & N. W. R'y Co.*, *supra*.

The plaintiffs in error rely on the case of *Railroad Company v. Schurmier*, decided by the supreme court of the United States in 1868. 7 Wall. 272.

In that case it was declared that the common law rules of riparian ownership did not apply, under the acts of congress, to lands bordering on navigable non-tidal streams, where the title to such lands is derived from the United States.

But in the subsequent case of *Barney v. Keokuk* (94 U. S. 338), it is said, whether, as rules of property, it would now be safe to change the doctrines of the common law where they have been applied, is for the several states themselves to determine. "If they choose to resign to the riparian proprietor, rights, which properly belong to them in their sovereign capacity, it is not for others to raise objections."

The common law doctrine, having been incorporated into the jurisprudence of this state at so early a day, and having been regarded as a rule of property for more than half a century, it ought not now, irrespective of the question of its original correctness, to be disturbed. To disturb the rule now, "would be a dangerous tampering with riparian rights."

The decision in *Gavit v. Chambers* related to the Sandusky river, the same river that is involved in the present case; but the land in question in that case was surveyed and sold under the act of May 18, 1796. Ohio Land Laws, 35. In the present case the land was surveyed and sold under the act of April 26 1816. 3 U. S. Statutes at large, 308.

It is contended on behalf of the plaintiffs in error, that the decision in *Gavit v. Chambers* does not apply to the act last named. It is true the case arose under the former act, but the doctrine of the common law which it lays down in regard to the rights of riparian owners must be kept in view in giving construction and application to the act now in question.

It is admitted in the agreed statement that "none of the subdivisional lines of the survey extended to, or embraced the bed of the river, but that, on the contrary, all of the subdivisional

lines approaching the river were so run as to extend only to certain points on the bank of the river, at greater or less distances from the margin of the water, which points are designated by the survey as corners to the respective subdivisions of the reservation. And also that the river was meandered on the bank thereof, to and from said respective corners."

That the meander-lines run in surveying portions of the public lands bordering upon navigable rivers, are run, not as boundaries of the tract, but as a means of ascertaining the quantity of land to be paid for by the purchaser, was decided in *Railroad Company v. Schurmeir*, *supra*. The meander-line, therefore, in the present instance, not being a boundary line, the only boundary was the river; and the question is, when the boundary line of a riparian owner is thus described, where is it to be located? *Gavit v. Chambers* answers, at the middle of the stream, as at common law.

The act in question provided for the survey and sale of the tract of two miles square, at the lower rapids of the Sandusky river, ceded by the Indians to the United States, by the treaty of Greenville.

The second section provided that, previously to the disposal of the tract, the surveyor-general should re-survey and mark the exterior lines of the tract, conformably to a survey previously made. It also required him "to cause divisional lines to be run through each fractional section, and that of the adjoining quarter section, so that each subdivision, having *one front on the river*, may contain, as near as may be, eighty acres. And in like manner to cause the large island, lying in the west half of section number one, to be surveyed, and the same to be divided into two equal parts."

One of the provisos in the section is, "That in no case shall the subdivisional lines so run as to extend to, or embrace the bed of the river, which shall be deemed, and is hereby declared to be, a public highway."

The third section provides, "*That all the land contained in the aforesaid cession, of two miles square, shall, with the exception of as many town lots and out-lots as in the opinion of the secretary of the treasury may be necessary to reserve for the support of schools within the same, and with the exception also of the salt springs, and the land reserved for the use of the same, be offered for sale to the highest bidder,*" &c. It is also provided that "the divided quarter sections and fractional sections shall not be sold for less than two dollars per acre; the in-lots for less than twenty dollars each, nor any out-lots for less than at the rate of five dollars per acre."

It seems to us that the only exceptions or reservations from sale intended by the act, were the lots for the support of schools, the salt springs, and the land for the use of the same, and the use of the river for the purposes of a highway.

In the argument for the plaintiffs in error, stress is laid on the provision requiring the sub-

divisional lines to be so run as not to extend to or embrace the bed of the river. But if it was intended not to embrace the bed of the river as land to be paid for, which was in accordance with the policy of the government, it was necessary for the lines to be thus run, in order to ascertain the quantity of land in each subdivision and the amount to be paid therefor by the purchaser.

Judgment affirmed.

[This case will appear in 36 O. S.]

SUPREME COURT OF OHIO.

WILLIAM V. SKED,

v.

JAMES SEDGLEY ET AL.

1. The act of May 1, 1861 (58 O. L. 113), which exempts from sale the property of persons belonging to the militia of Ohio, who have been mustered into the military service of the United States under any requisition of the president, is an act conferring upon a certain class of persons a right or privilege, which must be asserted by him who seeks its benefit.

2. Where, after judgment and order of sale have been duly and regularly entered in an action to foreclose a mortgage, the mortgagor becomes entitled to this exemption, by being mustered into the United States' service for three years, if the war should last that long, and a sale is made and confirmed, and deed executed to the purchaser, while he is still in such service, the sale and proceedings are not void, but voidable only.

3. In case of a sale of the mortgaged premises upon a decree of a foreclosure, while the mortgagor is entitled to such exemption, and the sale is confirmed, deed made and possession taken without objection by him, his proper mode of relief, if entitled to any, after confirmation, and the proceedings are not reversible for error, is by a direct proceeding in that case, to have such sale and confirmation set aside.

Appeal—Reserved in the District Court of Cuyahoga County.

The question for decision arises on a demurrer to the petition, on the ground that it does not state facts constituting a cause of action.

The petition was filed in the Superior Court of Cuyahoga County, and on appeal to the district court was reserved for decision in this court.

The plaintiff alleges that, on September 28, 1861, one Hiram Iddings, now deceased, commenced an action in the court of *common pleas* of said county against him, for a foreclosure of two mortgages, executed in 1853 and 1856, by him, to secure certain notes, of which notes and mortgages Iddings had become the owner; that on December 1, 1861, judgment for the amount due was rendered, and an order of sale granted on default of payment for ten days, and that the property was appraised and advertised to be sold January 30, 1862.

He also alleges that he was a citizen of Ohio, belonging to the militia force of the state, and that he volunteered into the United States' service in the late war, and was accepted and mustered into such service January 21, 1862, for three years, if the war should last so long, and continued in such service until January 2, 1865, when he was discharged.

For the purpose of staying the proceedings

and sale, he, on January 29, 1862, filed a petition under the act of May 1, 1861, to exempt from sale the property of Ohio militia in the military service of the United States, and obtained a restraining order against such sale. Whether a bond was given, does not appear, but it is alleged that Iddings and the master-commissioner charged with the sale had notice thereof, and of his claim for exemption, nevertheless the sale was made to said Iddings on the day fixed.

March 18, 1862, this sale was confirmed by the court, the petition for an injunction having been dismissed before the day of sale, by plaintiff's attorney, but without his knowledge or consent, as he alleges. No objection was made in court to the confirmation or conveyance to Iddings.

Iddings received a deed, and went into possession April 2, 1863; he conveyed to James J. Monroe, and died November, 1863, leaving heirs, who are defendants. April 4, 1865, Monroe conveyed part of the land to Augustus Fuller, one of defendants now in possession. April 9, 1866, Monroe conveyed part to Ahimaz Sherwin, who, in October, 1872, conveyed the same to James Sedgley, a defendant now in possession. April 9, 1866, Monroe conveyed the balance of the land to C. C. Beckwith, who conveyed to McDowell. In 1867, McDowell conveyed to Sarah Stewart, a defendant now in possession.

Iddings' heirs, with Monroe, Sherwin, Beckwith and McDowell, former owners, are made defendants.

The object and prayer is, to have an account of the rents and profits since the sale, and their application to the mortgage debt, and that he be restored to the possession of the premises, upon paying the balance found still due.

This action was commenced November 14, 1874.

McMath & Everett and A. M. Jackson, for plaintiff in error.

J. E. Ingersoll, for defendant in error.

JOHNSON, J.

It is claimed that the sale made January 30, 1862, and the order of confirmation thereof, March 18, 1862, are void, and that plaintiff is now entitled to be let in to redeem, notwithstanding the sale and conveyance stated.

The ground of this claim is, that under the act of May 1, 1861, his property was exempt from sale. This statute is entitled: "An act, to exempt from execution the property of the militia of Ohio, mustered into the service of the United States," and reads:

"That the individual, real and personal property of any person, who may belong to the militia of this state, and who shall be mustered into the actual service of the United States, under any requisition of the president, shall be, and the same is hereby declared exempt, during the time such person shall remain in the actual service of the United States and two months thereafter, from the sale on any execution or order of sale issued on any judgment rendered by any of the courts of this state, and the individual, personal property of such person shall also, for the period

aforesaid, be exempt from the levy of execution, any law of this state notwithstanding." 58 Ohio L., 113.

On the other hand it is claimed:

1. That this statute is in contravention of the constitution of the United States, because it impairs the obligation of the contract embodied in the notes and mortgages on which the judgment and order of sale were founded.

2. But if not void, it only confers a personal right or privilege in favor of a judgment debtor who belongs to the Ohio militia in the United States service, which can be and has been waived.

3. That the statute is not self-operating, but its immunity must be sought and obtained by the interposition of the soldier within some reasonable time. And it is claimed, that the present demand, now first interposed more than twelve years after the sale and confirmation, is stale, and barred by the statute of limitations. This statute does not operate to stay judicial proceedings in an action against one in the military service. It simply exempts his property from sale while in such service, and for two months thereafter. It does not apply to all judgment debtors, but only to persons belonging to the Ohio militia mustered into the actual service of the United States under any requisition of the president.

Whether the legislature had the power to pass this act has now ceased to be a question of public concern. While it was so, the general current of authority was, that an act like this, simply staying the power of sale for a definite period during a period of public war and great financial depression, in favor of soldiers in the active service, while the creditor was left free to prosecute his action, and to secure by judgment and levy all possible security that an order of court or a levy could afford, did not impair the obligation of the contract.

In the view we take of this case, however, it becomes unnecessary to consider this question.

This act is unlike those statutes which, in terms, exempts from execution and sale specific property of the judgment debtor. There, the process in the officer's hands definitely fixes the person whose property is to be exempted, and the law enumerates the specific property not subject to levy and sale. It does not depend on the selection of property by the debtor, and applies to all debtors alike. The officer takes such property at his peril, and if he takes property so exempted, he is a trespasser, and his levy and sale are void. *Frost v. Shaw*, 3 Ohio St. 270.

The act is for the benefit of a certain described class of persons. Whether a person belongs to that class is a question of fact, outside of the record or order of sale, of which neither the court nor the officer can take notice. The burden of bringing this fact before the court, so as to entitle the party to his exemption, is upon the person claiming to belong to that class. As in the case of exemptions dependent upon selection, the claim must be asserted at the proper time, and before

the proper court or officer. The officer has no power to disobey the command of the process in his hands upon an order of sale legally made. Again, like all other exemptions, whether of enumerated articles, or dependent upon selection, the right may be *waived*. *Frost v. Shaw*, 3 Ohio St. 270.

This being so, the sale and confirmation without objection is not void, but, at most, is voidable only. The remedy for the debtor is to assert his privilege either by resisting the confirmation before the court, or, if he has had no opportunity to do this, by a direct proceeding in the foreclosure suit, to set aside the sale and confirmation. Being voidable only, the title cannot be attacked collaterally.

What are the facts of this case?

The notes and mortgage were given long prior to this statute. The action to foreclose and for judgment, and the judgment and order of sale, were made in due course of law. Subsequently the debtor, by being mustered into the United States service, became entitled to have the order of sale stayed while he was in such service, and for two months thereafter. He made an ineffectual attempt to do this by a petition for a restraining order, but this failed, either because he did not give the proper bond, or by the act of his attorney in dismissing the action. The fact that his attorney did this without his knowledge or consent cannot affect the action of the court, in confirming a sale against which there was no objection interposed, after the dismissal of the action to restrain.

He made no further objection, by motion or otherwise, to the confirmation of the sale, or to the execution of the deed to the purchaser. He surrendered possession of the premises, and without objection, to the court or the purchaser, allowed the latter to take possession, and by sales and conveyances transmit title and possession to Monroe, and through him by sundry mesne conveyances to the present owners, none of whom had notice, so far as is alleged, of the plaintiff's claim. It is not alleged that they are not *bona fide* purchasers for a valuable consideration, and we must assume that they were.

The sale was confirmed in March, 1862, and this action was brought in November, 1874.

For more than twelve years he slept upon his rights, if he had any, after failing to object to the confirmation, and has allowed the property to be several times sold, and to pass into the hands of innocent holders.

His proper remedy in the first instance was, to object to the sale and confirmation. Aside from the provisions of the statute of limitations, the rule in chancery was, that the proper remedy for a party whose property was sold by a master without authority, was by an application in the foreclosure suit to have the sale set aside. But such an objection would not be listened to after a great lapse of time. *Nichols v. Nichols*, 8 Paige, 349.

Neither will a sale be set aside and a re-sale directed, to protect persons competent to protect

their own rights, from their own negligence. *American Ins. Co. v. Oakley*, 9 Paige, 259.

The purchaser at such a sale has the right to be protected in his purchase, and after the sale had been confirmed, deed made and possession taken thereunder, his title is perfect until the proceedings in the foreclosure suit are opened up in a direct proceeding for that purpose. And this rule applies as well to a mortgagee who is a purchaser as to a stranger. *Brown v. Frost*, 10 Paige, 204.

This was a case of a purchase by a mortgagee, at his own sale in foreclosure, who received a deed from the master. On the same day, but after actual delivery of the deed, the mortgagor tendered the whole amount due and demanded a redemption, which being refused, he filed an original bill in chancery to be allowed to redeem.

Chancellor Walworth, in deciding against the complainant, says, the decree in the original suit in foreclosure, is conclusive upon the rights of the parties, and cannot be opened up or disturbed in a collateral way; and he expressed the very decided opinion "that an original bill in chancery cannot be sustained by a party to a foreclosure suit, to impeach or set aside the proceedings upon a master's sale under the decree, when there was nothing which could have prevented an application to the court, *in that suit*, for a re-sale, by those who are interested in the premises;" and he cites numerous authorities to the effect that the proper remedy is by a summary application, in the suit in which the foreclosure decree was made, for relief.

The present action is in the nature of an original bill in chancery, filed in the *superior court*, by the mortgagor, for a redemption of premises sold and conveyed under a decree of foreclosure, made in the court of *common pleas* of the same county, over twelve years before the commencement of this action. It is not an appeal to the same court in the same suit. This cannot be done unless the sale, confirmation and conveyances are nullities. Clearly they are not, but at most are voidable only.

No reason is shown why plaintiff did not appear and resist confirmation of the sale. If, after neglecting to do this, he was entitled to relief, he should state facts warranting the court in granting it. No such facts are stated even as against the heirs of Iddings, after the lapse of so many years, much less as against innocent *bona fide* purchasers.

Demurrer to the petition sustained, and petition dismissed.

[This case will appear in 36 O. S.]

SUPREME COURT OF OHIO.

MARY JANE ABBOTT v. HENRY BOSWORTH.

1. Where the signing and sealing of a lease for ninety-nine years, renewable forever, are attested by but one witness, the lessee acquires only an equitable title.

2. To entitle a widow to dower in an equitable estate of her husband he must have owned said estate at the

time of his decease. *Rands v. Kendall*, 15 Ohio, 671, followed.

Error to the Superior Court of Cincinnati.

This was an action by Mary Jane Abbott against Henry S. Bosworth, for dower in the south half of the premises below described.

The Court found the following facts, and upon them gave judgment for the defendant.

"1. On February 1, 1840, the trustees of Lane Seminary, by indenture of that date, and recorded in book 104, page 430 of the records of said county, demised to Jonathan Ely, his heirs, executors, administrators and assigns, a tract of ground fronting 167 34-100 feet on Elm street, by 406 6-10 feet on Locust street, for 99 years, from October 21, 1830, renewable forever on the same terms, for an annual rent of thirty-one dollars, which Ely for himself, his heirs, etc., covenanted to pay. Said lease was duly executed, and acknowledged, save that there was but one subscribing witness.

"2. By an instrument in writing, without date, but acknowledged May 8, 1841, and attested by one witness only, and indorsed on the original lease, Jonathan Ely, in consideration of fifteen dollars, paid by Isaac C. Abbott, sold and conveyed to the said Abbott, his executors, administrators, and assigns, 'the within lease and all and singular the within demised premises.'

"3. On June 25, 1841, Isaac C. Abbott, in consideration of \$1.25, demised all his claim, title, and interest to the south half of said land to Leonard H. Nason, for the unexpired term of said lease and renewable forever, Nason covenanting in the instrument to pay to the trustees of Lane Seminary, sixteen dollars per annum rent, payable on the same days as the rents reserved in the original lease.

"The plaintiff, who was the wife of said Abbott, did not join in this instrument."

The trustees of said seminary at the date of the lease to Ely held the title in fee. The defendant now holds through sundry meane assignments the interest acquired by Nason. Isaac C. Abbott died in 1876. Upon this state of facts the plaintiff claims that she is entitled to dower in said south half of said premises.

C. D. Robertson, for plaintiff in error.

Sage & Hinkle, for defendant in error.

BOYNTON, C. J.

To entitle the plaintiff to dower in the premises demised by Isaac C. Abbott to Nason, it must appear that such estate was one of inheritance within the meaning of the act relating to dower, passed January 28, 1823 (1824), 29 Ohio L. 249. The first section of that act provided, that the widow of any person dying shall be endowed of one full and equal third part of all lands, tenements and real estate of which her husband was seized, as an estate of inheritance, at any time during the coverture. And of one third part of all the right, title and interest, that her husband at the time of his decease, had in any lands and tenements, held by bond, article, lease, or other evidence of claim.

By the act of March 5, 1839 (2 S. & C. 1142), it is provided, "that permanent leasehold estates, renewable forever, shall be subject to the same law of descent and distribution as estates in fee simple are or may be subject to." If it be granted that the effect of this provision is to convert permanent leasehold estates into estates of inheritance, where the instrument creating the estate is properly executed and acknowledged, and that the widow of the lessee is consequently entitled to dower in the leasehold premises, there still is an insuperable ob-

jection to the plaintiff's right of dower in the estate or interest assigned to her husband by Jonathan Ely.

The lease to Ely from the trustees of the seminary had but one witness, and his lease to Abbott had but one. Consequently neither of them acquired any legal title to the premises demised. The first section of the act to provide for the proof, acknowledgement and recording of deeds and other instruments of writing (1 S. & C. 456) requires the signing and sealing of all instruments in writing by which any land, tenement or hereditament shall be conveyed, or otherwise affected or incumbered in law, to be acknowledged by the grantor or maker in the presence of two witnesses, who must attest such signing and sealing, and subscribe their names to such attestation. By the ninth section of said act, a lease of school or ministerial lands for a term not exceeding ten years, and of any other lands for a term not exceeding three years, is excepted from this requirement.

The lease in the present case does not fall within the the class not required to be acknowledged. It was a lease for ninety-nine years, renewable forever, and to create thereby a legal estate or seizin, its execution attested by two witnesses was an indispensable formality. Hence, the estate acquired by Ely, and the only one he could part with, was wholly equitable; and had he possessed a legal estate instead of an equitable one, Abbott could have acquired but an equitable interest under a lease attested by but one witness. To entitle a widow to dower in an estate of which her husband had an equitable title only, he must have owned such equitable estate at the time of his decease. *Rands v. Kendall*, 15 Ohio 671.

Judgment affirmed.

[This case will appear in 36 O. S.]

SUPREME COURT OF PENNSYLVANIA.

ASH v. GUIE.

MAY 2, 1881.

1. *Mutual Beneficial Society—Partnership.* A mutual beneficial society is not governed by the same rules as to the liability of its members to third persons as a trading partnership, but rather by those applicable to a club, and the authority of its officers and committees depends on its constitution and rules.

2. *Masonic Lodge—Seal.* Where a contract is made in the name of a masonic lodge and under its seal, with reference to a matter not contemplated by its constitution, those members who so far assent to or ratify the contract are bound and no others.

3. *Seal.* In such case the seal will be regarded as the seal of those members so signing, assenting, or ratifying, and not as the seal of the lodge.

4. *Former Recovery.* A recovery against a masonic lodge by its name and without naming any of its members will not be a bar to a subsequent action against a member who was not served and did not appear.

Error to Common Pleas of Chester County.

Action against Ash and one hundred and nine others described in the writ as lately trading as Williamson Lodge No. 309, A. F. M. The writ was an assumpsit, and the *narr.* contained a count in debt on a sealed instrument with the common counts in debt. Pleas non assumpsit, the statute of limitations, and a plea by one of the defendants of a former recovery. The action was brought on a certificate of indebtedness in the following form, under the seal and signed by the officers of Williamson Lodge: "This is to certify that Williamson Lodge, No. 309, A. F.

M. * * * * acknowledges itself indebted to Wm. H. Guie in the sum of \$100, payable in two years from November 11, 1870, with lawful interest for the same, payable annually." The certificate was issued to obtain money to complete a masonic temple. Pending the suit several of the defendants died; at the trial their death was suggested, and the jury was sworn as to the survivors alone, the defendants objecting. The equitable and legal plaintiffs and two of the defendants were permitted to testify under objection. It appeared that Guie had previously brought suit against the Williamson Lodge, without naming any of the members individually, and had obtained judgment. Verdict and judgment for plaintiff. The defendants took this writ.

TRUNKEY, J.,

In delivering the opinion of the court, said: One of the defendants called by plaintiffs testified, "The purposes of our lodge are charitable, benevolent, and social." A partnership has been defined to be a "combination by two or more persons of capital, or labor, or skill, for the purpose of business for their common benefit." It would seem that there must be a community of interest for business purposes. Hence voluntary associations or clubs, for social and charitable purposes and the like, are not proper partnerships, nor have their members the powers and responsibilities of partners. Parsons Part. 6, 36, 42.

A benevolent and social society has rarely ever been considered a partnership. In *Lloyd v. Loaring*, 6 Ves. 773, the point was not made; but Lord Eldon thought the bill would lie on the ground of joint ownership of the personal property in the members of a masonic lodge; there was no intimation that they were partners. Where a society of odd fellows erected a building which was afterwards sold at sheriff's sale in satisfaction of mechanic's lien, in the distribution of the proceeds it was said that, as respected third persons, the members were partners, and that lien creditors who were not members were entitled to performance as against the liens of members. *Babb v. Reed*, 5 Rawle, 151. Had the members been called joint tenants of the real estate the same principle would have applied. In *Fleenyng v. Hector*, 2 M. & W. 172, Lord Abinger held that a club and its committee must stand on the ground of principal and agent, and that the authority of the committee depends on the constitution of the club, which is to be found in its own rules. A mutual beneficial society partakes more of the character of a club than of a trading association. Every partner is agent for the partnership, and as concerns himself he is a principal, and he may bind the others by contract though it be against an agreement between himself and his partner. A joint tenant has not the same power by virtue of the relation to bind his co-tenant. Thus one of several co-adventurers in a mine has not, as such, any authority to pledge the credit of the general body for money borrowed for the purposes of the

concerns. *Ricketts v. Bennett*, 4 C. B. 676; 4 M., G. & S. 686.

Here there is no evidence to warrant an inference, that when a person joined the lodge he bound himself as a partner in the business of purchasing real estate and erecting buildings, or as a partner so that other members could borrow money on his credit. The proof fails to show that the officers, or a committee, or any number of members had a right to contract debts for the building of a temple which would be valid against every member from the mere fact that he was a member of the lodge. But those who engaged in the enterprise are liable for the debts they contracted, and all are included in such liability who assented to the undertaking or subsequently ratified it. We are of opinion that it was error to rule that all the members were liable as partners in their relation to third persons in the same manner as individuals associated for the purpose of carrying on a trade.

This unincorporated association had a seal which the officers were authorized to use for certain purposes. Some of those who engaged in the business of borrowing money directed it to be affixed to the certificate of indebtedness. All who did, adopted it as their seal for the specific purpose. It was not the seal of a corporation nor intended as such. The party borrowed the money in the name of the lodge, and gave the certificate in the same name, and adopted a common seal. They cannot repudiate it, in good faith to the lender. He loaned the money on a sealed instrument. Those who advised affixing the seal should be held the same as their officers who signed the certificate. Were the members partners, without evidence of agreement between them that the seal should be affixed to contracts, those not assenting to its use in that way would not be bound by a sealed instrument, though given for a debt for which all were liable. *Schmertz v. Shreeve*, 12 P. F. S. 457. The learned judge was right in ruling that the certificate was a sealed instrument, but not, under the evidence, in holding that it was authorized by all the members.

Elston pleaded a former recovery against "the Williamson Lodge, No. 309, A. F. M." The court properly remarked that if judgment had been recovered in that suit against any of these defendants it would not have precluded recovery in a subsequent action against those not joined. That was not a recovery against any person, natural or artificial. The writ was not served on Elston, nor did he appear. It is not to the purpose to speak of the result, had property held in the name of the lodge been sued in satisfaction of the judgment. The plaintiff has received nothing, and Elston was not a party in that proceeding. The act of May 25, 1878 (P. L. 153), provides that in all civil proceedings by or against surviving partners no interest or policy of law shall exclude any party to the record from testifying to matters having occurred between the surviving party and the adverse party on the record. Those jointly concerned in a

transaction are partners in the popular sense of the word, and considering the obvious intentment of the statute, it should apply in case of a surviving witness in the popular as well as the technical sense. Therefore Guie was a competent witness to prove what occurred between himself and the defendants.

It was clearly competent for the plaintiff to call Wells and Doan. Any party in any civil action may compel any adverse party to testify in his behalf in the same manner and subject to the same rules as other witnesses. Act March 27, 1865, P. L. 38. This statute is not affected by the act of 1869. Wells and Doan were not called to prove the liability of any deceased member of the lodge, and no objection was made on that ground. It was immaterial to the plaintiff in this trial whether the deceased members were liable. He has a right to prove everything he can by the adverse party which will establish his case. The adverse party is called against his interest, and the statute places him in a different position from a party proposing to testify in his own behalf.

The act of March 22, 1861, (P. L. 186), provides that in no case on any joint obligation shall a plea be entertained on the part of any heir or personal representative that one of the joint debtors has deceased since the commencement of the action, but the same shall be proceeded in against the estate of said decedent as though the suit had been commenced against the decedent alone. Literally and strictly upon the death of a party to the record, jointly sued with others, the further progress of the action against his estate is the same as if he had been sued separately. A liberal construction of the statute permits the plaintiff to bring in the executor or administrator, and proceed against him and the survivor at the same time to judgment. *Dingman v. Amsink*, 27 P. F. S. 114. But it does not follow that he is compelled to do this, or that the representatives of the decedent may come in and have trial with the survivors against the plaintiff's consent; much less can the survivors claim delay till the representatives be substituted. There was no error in directing the jury to be sworn as to the survivors.

It is difficult to conceive of a meritorious defense by those who actually got the money, some of whom signed the certificate and others actually participated in the giving of it. They have a legal right to refuse payment until judgment be recovered according to law. But they cannot complain if the plaintiff fails to include every one in the action who is liable, or fails to discover proof against every one included. In the nature of the case it is difficult for the plaintiff to determine in advance the precise individuals who are liable, though he be sure of some of them, and the court below has not been and will not likely be slow to allow necessary amendments authorized by the statutes.

Judgment reversed and *venire de novo* awarded.

KENTUCKY COURT OF APPEALS.

ROBINSON v. DUVAL, &c.

SEPTEMBER 18, 1880.

1. A life policy as between the assured and the insurer is strictly and only a contract, and is subject to the general rules which govern in the interpretation of other contracts, but with respect to the beneficiaries it is held to be a testamentary provision rather than a contract.

2. The share of one of the beneficiaries upon his death, will pass to the surviving beneficiaries and their heirs, and does not result to the assured, where the policy is renewed by the payment of the annual premium, and no contrary intention appears.

3. "A policy of insurance on the life of any person expressed to be for the use of any married woman, whether procured by herself, her husband, or any other person, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors, or the person effecting the same or his creditors." Section 30, Act of March 12th, 1870.

4. The assured had no right to assign the benefit of the policy, in this case, where the policy was for the benefit of his wife and children, so as to defeat the heir at law of one of the beneficiaries who died before the assured.

COFER, C. J.

April 1, 1872, B. F. Crowfoot insured his life in the Connecticut Mutual Life Insurance Company for the sum of \$5,000, payable to his wife and children or their representatives. At the date of the policy the insured had three children, all minors and unmarried. In a few days thereafter his wife died. He continued to pay the annual premiums, as they fell due, until April 7, 1878, when he died, having survived all his children, two of whom died in infancy and unmarried, and one, having married, left an only child, the appellee W. T. Duvall, and her husband surviving her.

Before his death, and after the death of all his children, the insured assigned and delivered the policy to his niece, the appellant, Hattie E. Robinson, intending it as a gift to her.

The executor of the insured, the guardian of the infant grandson, W. T. Duvall, and Hattie E. Robinson all claiming the proceeds of the policy, the insurance company brought its petition of interpleader and paid the money into court, and the court having adjudged it to W. T. Duvall, Robinson alone has appealed.

Her counsel argues, in effect, that upon the delivery of the policy Mrs. Crowfoot and the three children of the insured became invested each with a one-fourth interest in it, and that upon the death of Mrs. Crowfoot her interest passed to her husband under the statute of distributions, and that at the death of the unmarried daughters their interest passed to their father in the same way, and at the death of Mrs. Duvall, during the life of her father, her interest lapsed as if it had been a legacy, and in this way the insured became the owner of the entire policy and could invest the appellant with a good title.

A life policy, as between the assured and the insurer, is strictly and only a contract for the payment of money upon the happening of a contingency, uncertain only as to the time when it will occur, and is subject to the general

rules which govern in the interpretation of other contracts. But when considered with respect to the rights of those who claim to be beneficiaries, especially when they are the natural objects of the affection and bounty of the person procuring and paying for the insurance, should be regarded in the light of a testamentary provision rather than of a contract.

The object of all interpretation of acts or words is to arrive at the intentions of the person whose acts or words are to be interpreted, and the nature of the transaction and the relation of the parties are frequently important, and sometimes controlling factors in the problem.

In taking the policy the insured was not providing for himself, but for his wife and children after his death, and it would be unreasonable to suppose that he intended, in case one of these objects of his affection should die during his life, that the interest of the one so dying should pass to himself and at his death to his personal representative. It would be more consistent with his evident design in insuring his life for the benefit of all his family, wife and children alike, to suppose that his intention was that, in case one or more should die before himself, without leaving children, the share to which those dying would have been entitled, had they survived him, should go to the survivors. He dedicated the whole to his family, share and share alike, and as the family was reduced by death and he came to renew the policy by paying the annual premiums, it can scarcely be doubted that he did so in order to provide for those who still survived, and this evident intention ought not to be defeated unless there are insurmountable legal obstacles in the way of effectuating it.

So far as any interest the wife of the insured had in the policy is concerned, the rights of the parties are regulated by statute in harmony with the view just expressed.

"A policy of insurance on the life of any person, expressed to be for the use of any married woman, whether procured by herself, her husband, or any other person, shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors, or the person effecting the same or his creditors." Section 30, Act 12th, March, 1870; 1 Acts '71.

When Mrs. Crowfoot died, her interest in the policy inured, under this statute, to the benefit of her children.

When one of the children subsequently died without living issue, and the policy was again renewed by the payment of the annual premium, there was, in a modified sense, a new contract (*Thompson v. Cundiff*, 11 Bush, 573), which inured to the benefit of the children then living, there being no issue of those who were dead. So that at the death of Mrs. Duvall, the last survivor of the children of the insured, she was the sole beneficiary.

Section 32 of the statute, *supra*, provides that, "When a policy is effected by any person on his own life, or on the life of another, expressed to be for the benefit of * * * a third person,

the person for whose benefit it was made shall be entitled thereto against the creditors and the representatives of the person effecting the same."

At the time the policy was last renewed before her death, Mrs. Duvall was the only surviving child of the insured, and as she was the only living person answering the description of beneficiaries as contained in the policy, as the other beneficiaries had died without issue, it is to be taken to have been renewed for her sole benefit. When it was last renewed she was dead, and there was no person living answering the description except her surviving child, who, in our opinion, is her representative within the meaning of that word as used in the policy.

In *Insurance Company v. Palmer*, 42 Conn., 50, the policy was payable to the wife if she survived her husband, if not, to their children. The husband survived the wife, and one of the children died, during the life of the father, leaving issue. It was held that the issue took the interest to which his father would have been entitled if he had survived the insured.

This is a much stronger case for the issue of the deceased child than that.

There the policy, in the contingency that had happened, was payable to the children, here it is payable to the children or "their representatives." This expression shows that the possibility of the death of some or all of the children during the life of the insured was not overlooked, and that such an event was intended to be provided for.

And when we consider the nature and design of life insurance and the relation of the parties, we think the policy should be construed as if it were payable to such of the children as should survive the insured and the surviving issue of such as might die during his life.

We are therefore of the opinion that the insured had no interest in the policy, and that the assignment made by him to the appellant gave her no right to any part of its proceeds, and the judgment is affirmed.

COMMISSIONERS OF APPEALS—TEXAS.

MECHANIC'S LIEN—WHEN THE WIFE'S SEPARATE PROPERTY AND THE HOMESTEAD SUBJECT TO PLEADING.

BLEVINS ET AL. V. CAMERON AND MAYFIELD.

May 12, 1881.

I. In order to subject the wife's separate property to mechanic's lien for improvements, contracted for by the husband, it must be alleged and proven that the husband was acting as her authorized agent at the time; and it will not be presumed that he was such agent because he was her husband. The averment of her knowledge of such purchase and the purpose for which it was made, does not supply, by implication, that essential ingredient of her liability.

II. In order to subject the homestead to mechanic's lien, it is necessary that the wife's consent to thus encumber the homestead, be evidenced in the mode prescribed by law for the alienation of her separate property.

Appeal from Grayson County.

This suit was brought in June, 1874, by the appellees

against the appellants, as husband and wife, on account for lumber sold and delivered by them to the husband, amounting to \$294.42, for the purpose of constructing a dwelling house and out houses on two certain lots in the town of Sherman, the title to which was in Mrs. Blevins, the wife. The plaintiffs alleged that it was not known to them at the time they furnished the lumber, that she owned the lots; that her title to them was not then recorded, and that the lumber was used in the construction of said houses with the knowledge of the wife; that the lots before and until said houses were constructed, were vacant, and not worth more than one-fifth part as much as they were afterwards, by reason of the improvements so made upon them; that after the houses were constructed the defendants resided upon the lots as their homestead, and that they had no other homestead in the county or in the State, so far as plaintiffs know or believe. The plaintiffs allege that they fixed their lien upon said property within the time and in the mode prescribed by law, setting forth the facts in respect thereto.

The plaintiffs prayed to subject the houses and lots to their lien and for general relief. The defendants filed a general demurrer, which does not appear to have been relied upon as no action was taken upon it by the court, nor to have been called to the court's attention. They also filed a general denial.

The plaintiffs account was attached, as an exhibit, to the petition, and its correctness sworn to. They also introduced, in evidence, their sworn and duly recorded statement of the verbal contract between themselves and Wm. Blevins, for the sale of the lumber which had been recorded in the proper office, in order to fix their statutory lien. This instrument recited, among other things, "that the lumber was purchased and used for the purpose, by said Blevins, of erecting and repairing a building situated in the town of Sherman," * * * upon the lots described in the petition. The plaintiff also proved the facts by one of their witnesses that the houses and lots, described in the petition, are the homestead of defendants "and was their homestead at the time mentioned in the account, at which said lumber was furnished; that he (witness) and his wife sold the lots mentioned in the petition, to Mrs. Blevins."

Verdict for the plaintiffs for the amount sued for with interest, and finding the property subject to the plaintiffs' lien, the court rendered judgment accordingly, decreeing sale to be made of the property in the usual form, with order to issue execution for any unsatisfied balance of the judgment against Wm. Blevins.

The defendants appealed to the Supreme Court and assign eight grounds of error which, so far as they need be considered, in the proper disposition of this appeal, it may be stated, relate to the charge of the court, the refusal to give instructions asked for by the defendants, and the admission of certain evidence over their objections.

WALKER, J.

Delivered the opinion of the court.

The plaintiffs' petition admitted that the wife had the title to the lots at the time of the transaction with her husband in relation to the sale of the lumber, nor does the petition attempt to qualify the implication from that admission, that she was the legal and equitable owner of the property. The averments in the pleadings of a party will be taken most strongly against him. Indeed, so far from seeking to charge the property to be community property, notwithstanding the fact that the title was held, as they allege, by her, the plaintiffs rest their right

to subject the property to their supposed lien, upon the wife's knowledge and silence or acquiescence in the acts of her husband in contracting for, and making improvements upon her property, and not upon the allegation that it was, in fact, property belonging to the community.

Considered, then, as her property, the question which is first presented is, whether the facts, which are alleged, show a cause of action against the wife to subject her property to sale for the payment of the debt contracted by the husband for lumber to improve it. It was held directly, in *Warren v. Smith*, 44 Texas, 245, that the statute regulating marital rights, and prescribing in what cases the wife's separate estate may be bound, will control the creation of mechanic's lien on her estate. Her estate cannot be made liable for improvements thereon not authorized by her. The rule is thoroughly established by many decisions of our Supreme court, construing the statute referred to, and the rights of the wife and her liabilities under it, that to make the wife's separate property liable for a debt it must be contracted by the wife herself, or by her authority. *Warren v. Smith*, *supra*; *Magee v. White*, 23 Tex. 180. The third section of that act, Art. 4643 P. D., provides that the husband and wife may be jointly sued for all debts contracted by the wife for necessities furnished herself or children, and for all the expenses which may have been incurred by the wife for the benefit of her separate property. The contract by the wife, her consent given expressly or impliedly, is necessary to maintain a suit against her with her husband, whether for necessities or for the purpose of benefitting her separate property. The husband, it is true, may be her agent to make contracts that will bind her separate estate, but it is not to be presumed that he is her agent, because he is her husband. The agency must be such, in fact, and not a thing to be presumed, because of the relation of husband and wife. *Magee v. White*, 180.

There was no averment in the petition of such agency, or that it was her contract. The averment of her knowledge of such purchase, and the purposes for which it was made, do not supply, by implication, that essential ingredient of her liability. The husband was entitled to the use and enjoyment, as well as to the care and management of her separate property, and both husband and wife expected to occupy together the homestead for which the lumber was designed, and it is quite as consistent with reason, to suppose that the wife relied upon the husband to purchase the lumber upon the responsibility of their community interest, as that she empowered him to contract for her, as her agent, to buy the lumber for her, in order to improve the place on her separate responsibility.

Chief Justice Hemphill, in a suit to subject the property of the wife to the payment of a debt alleged to have been contracted by a married woman for necessities, under that statute, used this clear and emphatic language: "A fundamental principle in relation to suits to bind the separate estate of the wife's is this, that such estate can not be held liable unless in cases clearly, strictly and fully authorized by the statutes or the equitable principles of the laws of the land." *McFadden v. Crumpler*, 20 Tex. 376. This rule was re-affirmed in *Stansberry v. Nichols*, 30 Tex. 149, where is said: "In order to charge the separate estate of a married woman under the statute, the act relied on must be explicitly averred and must be such, being true, as to exclude a fair and substantial doubt of her liability, otherwise no sufficient basis is laid for a judgment against her." It is

clear that there was neither averment nor proof of the main and essential facts, either that the contract was that of the wife, or that the husband professed, in any mode, to act as her agent in making the purchase of the lumber, and, evidently, there was no sufficient basis laid in the petition on which to rest a decree against the wife, and to subject her separate estate to the debt sued on. *Stansberry v. Nichols*, 30 Tex. 149.

It is not necessary to consider what may have been the plaintiffs' rights and remedies, if any they had, on general principles of equity, because the plaintiffs' case is presented upon the legal statutory right to enforce the specific remedy under the law giving a lien to mechanics and material men. But if they had relied upon such relief as a court of equity could afford them, the allegations contained in their petition were equally insufficient to support a decree against the wife. *Stansberry v. Nichols*, *supra*; *Brown v. Ector*, 19 Tex. 346; *Haynes v. Stovall*, 23 Tex. 625.

But the evidence adduced by the plaintiffs on the trial, and none whatever, indeed, was introduced by the defendants without contradicting the fact, that the lots in question were, in truth, the separate property of the wife, showed, besides, that the property was the homestead of the defendants at the time of the lumber contract, and the recorded statement of the contract made by the plaintiffs and read in evidence, indicate that there existed a house or houses on the lots at that time.

Under such facts, treating the property as then being the homestead of the defendants, there existed the same necessity for the wife to enter into the contract whereby the property should be subjected to the lien of a material man who furnished material to make improvements on the homestead, as is necessary in the case of her separate property. Thus to affect her homestead rights it seems, too, that it would be necessary that her consent, thus to encumber the homestead must be evidenced in the mode prescribed by the law for the alienation of her separate property. *Gaylord v. Loughridge*, 50 Tex. 576; *Campbell v. Fields*, 35 Tex. 754.

Thus it appears that neither, under the facts stated in the petition, nor those which were proved on the trial, were the plaintiffs entitled to a decree against Mrs. Blevins; there was no basis for a decree subjecting the houses or lots to the payment of the debt, under either the case made by the pleadings or that which was developed by the evidence.

The charge of the court was predicated upon the assumption that whether the property was community estate, the wife's separate estate, or constituted the homestead, if the plaintiffs had complied with the statute prescribing the mode of fixing their lien, and without service upon Mrs. Blevins, of a copy of the bill of particulars of the account provided for in the lien statute, that if the plaintiffs were otherwise entitled to recover for the debt, they would also be entitled to have a lien upon the property described in the petition, and the jury were so instructed.

The defendants excepted to the charge in these respects, by asking instructions which presented counter propositions of law, which were refused. Neither the charge nor the instructions need be more specifically stated. The jury were, of course, misled in following the charge to a wrong result, to the injury of the appellants.

The questions presented as to the admissibility of evidence, in view of the conclusion we have reached need not be discussed. As the cause will be remanded for another trial, we will make the simple remark, that we do not consider the objection to the admissibility of the affi-

dayit of plaintiff's agent well taken by the defendants. The court did not err in admitting it in evidence; the grounds of objection urged in the brief of appellants' counsel, in support of their second assignment of error, therefore, we consider untenable.

If the plaintiffs are entitled to a lien on the property, to satisfy their debt (the justness of which does not appear to be doubted) the facts which show its existence should be presented on another trial, by appropriate allegations, in an amended petition. The views of the law, applicable to the plaintiffs' case, as it was presented on the trial, under both the pleadings and the evidence, which were entertained by the judge who presided, and which seem to have been held, also, by the plaintiffs' counsel, may have influenced the latter, not to rely on or present other facts, or to ask for other relief in some shape or other, consistent with the rights of the plaintiff under the law. Therefore, although there is no error in the finding of the jury in favor of the plaintiffs for the amount of the debt and, notwithstanding their finding the property to be subject to the lien is erroneous, would not preclude the Appellate Court from discarding such erroneous part of the verdict, and proceed to render such judgment as should have been rendered in the court below. We conclude, for the reason above given, that the proper disposition of this appeal is to reverse the judgment and remand the cause to be tried again under further proceedings.

Report of Commissioners examined, opinion adopted and judgment reversed.

GEO. F. MOORE,
Chief Justice.

A COUNTY Justice of the Peace in Kansas has gone back on the Supreme Court of the State, and declared the liquor law unconstitutional.

"Why, your Honor," exclaimed the prosecuting attorney, "the Supreme Court has affirmed its constitutionality."

"Let 'em affirmed and be blanked," responded the learned court, "I know my business."

SUPREME COURT RECORD.

[New cases filed since our last report, up to Sept. 14, 1881.]

1163. *Adam Orth adm'r v. The L. S. & M. S. Ry. Co.* Error to the District Court of Fulton County. W. C. Kelly and C. H. Scribner for plaintiff.

1164. *Springfield, Jackson & Pomeroy R. R. Co. v. Ambrose Scott.* Error to the District Court of Jackson County. Irvine Dungan for plaintiff.

1165. *Evan Brock et al. v. Urban Hidy et al. executors.* Error to the District Court of Fayette County. M. J. Williams and Mills Gardner for plaintiffs; M. Barclay and Savage & Hidy for defendants.

1166. *Homestead, Building and Loan Association et al. v. Continental Life Insurance Company et al.* Error to the District Court of Fayette County. M. J. Williams and M. Millard for plaintiffs; Maynard & Hadley and S. N. Yeoman for defendants.

1167. *Continental Life Insurance Co. v. Benjamin Kaup.* Error to the District Court of Seneca County. Saylor & Saylor for plaintiff; George E. Seney for defendant.

1168. *Samuel T. Billingsley v. The State of Ohio.* Error to the Court of Common Pleas of Franklin County. E. L. Taylor, D. K. Watson and H. J. Booth for plaintiff; George K. Nash for the State.

1169. *Carrie E. Conkling et al. v. Francis L. Reahard.* Error to the District Court of Clinton County. Stone & Walker for plaintiffs; A. C. Dibal and Mills & VanPelt for defendant.

Ohio Law Journal.

COLUMBUS, OHIO, : : : SEPT. 22, 1881.

NOTICE.

All persons are notified that W. W. Wickham is not now, and has not been for thirty days past, in any way connected with the OHIO LAW JOURNAL. We have permanently severed all business relations with him.

LORD & BOWMAN.

SEPTEMBER 22nd, 1881.

THE NATION'S SORROW.

The days of mourning are upon this Nation to-day, brought about by the assassin's hand, which has laid low a Chief Magistrate, whose many noble qualities had endeared him to all hearts, both at home and abroad. After suffering untold pain and agony in bravely struggling to overcome the effects of the pistol wound received on the morning of July 2d last, President James A. Garfield was called from earth away at 10:35 on Monday evening last. He died at Long Branch, surrounded by his wife, the celebrated physicians and his few faithful friends who had proved so devoted in his last days. The ways of Providence are wrapped in mystery. In His wisdom He has seen fit to visit us with great affliction and bring distress upon us; yet we bow in humble submission to His omnipotent will, and more fervently ask His aid and guidance in the future.

President Arthur deserves, and we doubt not he will receive the confidence, support and encouragement of every loyal citizen of the country in his trying position.

The President's assassin, Guiteau, should be speedily dealt with in strict accordance with the law. All thoughts of mob violence should be banished from every mind, for the law is fully adequate to dispose of his case, although it can never bring back the dead or restore the peace and happiness which was our former lot.

We unconditionally surrender the columns of the LAW JOURNAL this week to the very interesting address delivered by Judge Matthews, before the New York State Bar Association, at Albany, on Tuesday, the 20th inst. We could not find more valuable or instructive matter for our paper, or anything more welcome to our readers.

When Stanley Matthews' name was proposed to fill the vacancy in the roster of Supreme Judges, there was more or less opposition to his

confirmation by political and partisan men and newspapers. This was to be expected as of course. The opposition, however, which excluded from IRVING BROWNE, of the ALBANY LAW JOURNAL, was made up of the most villainous imbecility that ever entered into a contest of the kind. This self-adored Fadladeen proclaimed from the pinnacle of his superb vanity, that "Matthews did not have the proper Judicial mind which a Judge of the Supreme Court must possess," and that "being from Ohio he was not fit for a Judge."

This invitation to Judge Matthews is a mark of the high esteem in which he is justly held by the New York Bar, and such a rebuke to Browne as would overwhelm any man less hedged about with a panoply of self-conceit.

THE professional card of Messrs. Banning & Davidson, of Cincinnati, will be found in our advertising columns this week, and henceforth. These gentlemen have reduced the practice of the law to a science. Their business is so extensive as to require the presence and labor of eight trained lawyers as assistants, each of whom has his own special department at the office and at the Courts. Whether or not this thorough and systematic disposition of business has given them their wide and enviable reputation as lawyers, we do not know; but the fact is that their practice is extensive and still rapidly increasing. Personally, Messrs. Banning & Davidson are as pleasant and agreeable as they are successful professionally.

CONCEALED WEAPONS.

In an article on the prevalence of crime in the United States, the *Toronto Globe* pays a sensible tribute to the manly American habit of carrying revolvers, as follows:

"Some of the American papers are crying out for a tax on revolvers. They propose to tax them, as they have done their shipping, out of existence. This would be to make the revolver a luxury for the rich, and would, we fancy, make it more, rather than less popular in certain circles on that account. There is a more excellent way. Let them settle it as a principle that the carrying of weapons of any kind is a relic of barbarism, and unworthy of citizens of a free and enlightened State. Let the carrying of a deadly weapon be made a crime against the State—accounted prima facie evidence of some evil intent, and punished by fine or imprisonment. Thus alone can the brand of criminality be put upon the practice, and the presence of a revolver in the pocket made to appear, in the eyes of Young America, in its true light—as a sign of cowardice rather than of the manly, fearless courage of conscious rectitude."

THE Supreme Court Room of the State of Ohio, has been thoroughly cleaned, re-painted, and re-carpeted, and looks bright and inviting for the Court, which is expected to convene next week.

THE FUNCTIONS OF THE LEGAL PROFESSION IN THE PROGRESS OF CIVILIZATION.

The Annual Address Before the State Bar Association of New York, at Albany, September 20, 1881.

BY HON. STANLEY MATTHEWS.

It is scarcely necessary for me to say that the invitation in response to which I address you to-day was most unexpected. None know that better than those who framed and communicated it. The promptness with which it was accepted was the impulse of a spontaneous sense of obligation which did not stop to consider the possible responsibilities it involved, nor the perils of criticism it might provoke. There were reasons to which I can not more specifically refer why I desired to meet face to face, the representatives of the Bar of this great imperial State. Suffice it to say I come here to-day not an unbidden guest, and claim, as I doubt not I shall receive, the gracious courtesies of your hospitality. That I am sure will be my sufficient shield and defence against all malice and uncharitableness, and proof enough of the propriety of my presence.

The selection of a topic of discourse suitable to the occasion was not without embarrassment. It seemed to be necessary to avoid the commonplace of too much generality, and, at the same time, to shun many definite discussions, otherwise appropriate, for reasons purely personal. This necessity reduced the range of available subjects to narrow limits, and made difficult a wise and successful choice.

In the midst of this perplexity, my attention was casually attracted by an editorial article in a leading daily newspaper in one of the larger cities in the interior, styled, "The Evening of the Age of Law," which seemed to suggest an unobjectionable theme for discussion. Its prediction was that the age of law and lawyers was passing away—that its knell had been struck.

Its argument was that, in an early stage of social development, the profession of arms embodied the principal intellectual and moral forces of the world; then followed the teachers of theology, as leaders of the people and chief agents in the work of advancing civilization; after them the lawyers and judges and jurists, who have interpreted and developed and reformed the codes of rights and remedies which the interests of society and the necessities of government demanded. But now, their influence and power is on the wane and falling into relative decay. It is the age of steel described by Ovid—

Ultima coelestium terras Astrea reliquit.

And the leader of modern society is the inventor, the organizer of industry, the railroad manager, the manipulator of corporate wealth and power, the skillful and far-sighted financier.

And mankind, in its social and political arrangements, is shaping its institutions so as to dispense with lawyers and legal tribunals. Laws for the collection of debts are falling into disuse, because creditors find they can depend with more confidence as to results in restricting credits and trusting more to character and self-interest than to coercion; and great lenders rely not on names but on collaterals, the titles to which give them control of their proceeds without legal process. The limits of the law are being straitened in many ways, while larger scope is given to the influence of public opinion upon the wills and conduct of men; so that litigation is lessened, the machinery of the law less frequently resorted to, and, consequently, the professional services of lawyers diminished in importance.

This expected crisis and culmination in the fate of our profession, however, is not supposed, by the writer of this article to be so imminent as to involve the personal interests of even its younger members of this generation, even if his forecast be accepted as true; but whether the opinions expressed be well or ill grounded as to its future, it suggests a professional interest, worth our present consideration, of this question:

What is the true function, in the social and political state, of the legal profession?

Of course in that denomination are included both Bench and Bar. They are in constitution and in function but one. Their work is joint, and its result arises from the necessary and harmonious co-operation of both. The two together constitute an organic whole, and are not only intimate in their union, but inter-dependent. They are fellow-servants of justice, and responsible to each other, under mutual guarantees, against miscarriage in their common employment. Their common relation to the law, which they assist in administering, is official and representative. Whatever weakness, failure, incompetence, or unworthiness, overtakes judges or lawyers, as a class, is to be counted, not only as a common misfortune, but a mutual fault.

The judge is a trained and disciplined lawyer, who has been able to abandon advocacy, resign his clientage, forget persons, accustom himself to look with indifference and impartiality upon all sides of every controversy without bias, except in favor of his science, with no prejudice save the love of justice. But the arguments of counsel are the materials of his judgment; and if it is his duty to weigh their reasons and incline as they preponderate, so he must pronounce and declare the grounds of his opinion. His audience is the profession at large, and they are the judges of his judgments. The decrees of the final tribunal are conclusive upon the parties, but devoid of authority, nevertheless, unless they can successfully withstand the intelligent and disinterested criticism of the bar. And thus, by friendly but independent discussion, Bench and Bar are mutual support.

in the advancement of the cause of civil justice.

Lord Bacon, in his essay on Judicature, has sketched the relation of advocate and judge in language that has lost none of its force or picturesqueness by lapse of time or change of circumstances. He says, "Patience and gravity of hearing is an essential part of justice and an overspeaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the bar; or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions, though pertinent. The parts of a judge in hearing are four; to direct the evidence; to moderate length, repetition, or impertinence of speech; to recapitulate, select, and collate the material points of that which hath been said; and to give the rule or sentence. Whatsoever is above these is too much, and proceedeth either of glory and willingness to speak, or of impatience to hear, or of shortness of memory, or of want of a staid and equal attention. It is a strange thing to see that the boldness of advocates should prevail with judges; whereas, they should imitate God in whose seat they sit, who represseth the presumptuous and giveth grace to the modest; but it is more strange that judges should have noted favorites, which cannot but cause multiplication of fees and suspicion of by-ways. There is due from the judge to the advocate some commendation and gracing where causes are well handled and fair pleaded, especially toward the side which obtaineth not, for that upholds in the client the reputation of his counsel and beats down in him the conceit of his cause. There is likewise due to the public a civil reprehension of advocates where there appeareth cunning counsel, gross neglect, slight information, indiscreet pressing, or an over-bold defence; and let not counsel at the bar chop with the judge nor wind himself into the handling of the cause anew after the judge hath declared his sentence, but on the other side, let not the judge meet the cause half-way nor give occasion to the party to say his counsel or proofs were not heard."

A counterpart to this may be found in the words of Lord Langdale, when Master of the Rolls in the case of *Hutchins v. Stephens*, 1 Keen, 168, where he said: "With respect to the task, which I may be considered to have imposed upon counsel, I wish to observe that it arises from the confidence which long experience induces me to repose in them, and from a sense which I entertain of the truly honorable and important services which they constantly perform as ministers of justice, acting in aid of the judge before whom they practice. No counsel supposes himself to be the mere advocate or agent of his client, to gain a victory, if he can, on a particular occasion. The zeal and arguments of every counsel, knowing what is due to himself and his honorable profession, are qualified not only by considerations affecting his own character as a man of honor, experience, and

learning, but also by considerations affecting the general interests of justice."

The function of lawyers is not that of merely private persons. They exercise a public office and constitute part of the judicial system.

This was expressly decided by the Supreme Court of the United States, in the case of *Garland*, 4 Wall. 333. In that case Mr. Justice Field, delivering the judgment of a majority of the court, said: "They are officers of the Court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. * * * The order of admission is the judgment of the Court that the parties possess the requisite qualifications as attorneys and counselors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the Court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the Court after opportunity to be heard has been afforded." (p. 378). And Mr. Justice Miller, in the same case, said: "It is believed that no civilized nation of modern times has been without a class of men intimately connected with the Courts, and with the administration of justice, called variously attorneys, counselors, solicitors, proctors, and other term of similar import. * * * They are as essential to the successful working of the Courts as the clerks, sheriffs, and marshals, and, perhaps, as the judges themselves, since no instance is known of a court of law without a bar." (p. 384.)

If there, in fact, has been any decline in the influence and power of the legal profession, during the present generation, it certainly can not be said to be due to any failure on its part to realize, from time to time, as in times past, in its foremost men, its highest ideal. Doubtless, there will arise, to the memory or imagination of every one present, the figure of one, at least, that answers to the call for the exemplar of his profession. I have in my mind's eye—for he has passed from corporal sight, though but recently—one that might have sat, even to such a painter as Bacon, for his portrait as a model lawyer. Nature had done much for him. She endowed him with many graces, both of body and of spirit. He was a picture of manly beauty and dignity; his presence was benign, but majestic; his address winning, insinuating, persuasive, impressive; his posture firm, collected, self-possessed, self-respecting, full of respect to others; his movement gracious and inspiring; his voice musical and various; an eye, beaming with sympathy and intelligence, he had every physical quality to fit him for grave and serious oratory. His intellect was keen, incisive, rapid, and unhesitating; his logic inexorable; he had a rare faculty of language, which pictured in vivid and striking colors all the images of his mind. A moral and intellectual energy that was tireless, answered every call, of an enthusiasm that was born of a union of a lofty sense of duty with a

strikingly sincere love of his profession. Unremitting and systematic study had filled a retentive memory with the stores of learning that yielded treasures for every emergency, and made the habitual and diligent preparation of every case and argument, the instinctive delight which all living activities have in natural exercise. In judicial tribunals he recognized the authority and majesty of the law, which he felt, that both they and he were appointed to administer, and he respected, as well, his own function as counsel and advocate, as the person of the magistrate. He recognized no man as master, but respected all men, each in his own place and degree, and stood for his cause, like a knight, answerable only to his own honor. He was, indeed, the very prince and paragon of lawyers. Doubtless there are those who survive him entitled to be numbered with him, whom, living, it were invidious to discriminate; but him, dead, it is no offence to praise, no shame to name; he lives still in the love of those who will always take pride in recalling the name and person of Henry Stanberry.

In spite, however, of the lustre shed upon it by the virtues of its best and most eminent members, the profession has not been able, altogether, to escape the shafts of satire. Ben Jonson described them as those

"Who could speak
To every cause, and things were contraries
Till they were hoarse again, yet all be law;"

and as,

"So wise, so grave, of so perplexed a tongue
And loud withal, that could not wag, nor scarce
Lie still, without a fee."

Dean Swift painted them as "a society of men among us, bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black and black is white, according as they are paid." And Junius accounted for what he deemed the perversity of Lord Mansfield's politics, on the ground that he was one of that class in whom "the indiscriminate defence of right and wrong contracts the understanding while it corrupts the heart."

The profession has undoubtedly often been misjudged, being condemned for the offences of its worst members. A prejudice still exists, perhaps, to some extent, in every community, in some, more generally, that lawyers intentionally contrive ambiguity in legislation in order to beget and promote litigation; so that it has sometimes been made a popular objection to candidates for political honors, that lawyers could not be trusted as legislators. Indeed, it is related, no doubt, with truth, that in a canvass for a state legislature, one of the candidates claimed as a ground for being preferred over his competitor, that he was not lawyer enough to hurt.

A prejudice not altogether extinct, is apt to regard lawyers as a body of men, who thrive upon the misfortunes, weaknesses, and vices of the community; and, therefore, by self-interest prompted to foster and encourage the sources of their own profits. Sir Walter Scott, by the

mouth of the Scottish counselor Pleydell in "Guy Mannering," has given a neat turn to that, when he says: "In civilized society, law is the chimney through which all *that* smoke discharges itself that used to circulate through the whole house and put every-one's eyes out. No wonder, therefore, that the vent itself should sometimes get a little sooty." Certain it is that were there no rogues out of the profession, there would be none in it. And if the question were merely whether the world would grow to be so good that lawyers could not live in it, it would cease to have a practical interest for this generation.

We may, therefore, still conclude with Chancellor Kent, that "the necessity of a distinct profession to render the application of the law easy and certain to every individual case, has always been felt in every country under the government of written law. As property becomes secure, and the arts are cultivated and commerce flourishes, and when wealth and luxury are introduced and create the infinite distinctions and refinements of civilized life, the law will gradually and necessarily assume the character of a complicated science, requiring the skill and learning of a particular profession." 1 Kent, 306.

We may rightfully assume that the legal profession is a necessary part of every organization of the social and political state as yet known to civilization. An accurate and complete estimate of its function is to be obtained by an analysis of our conception of the grounds and scope of that necessity on which it rests. We say, in a general way, that the business of the legal profession is the administration of law, and that law is the science of justice. But this explains nothing. What is law? What is justice? We find ourselves at once in the realm of ideas, and exploring the philosophy of human nature, or human life, of human destiny. We are required to ascertain and determine the relation of men with each other and with the universe of things and beings. What are we, whence are we, and to what end? These are the grave and serious questions that lie at the bottom of our science.

Go where you will or can, over the whole surface of the inhabited globe, or extending our researches into the history of the human race, travel back as far as its monuments and records carry us, we find men living together according to the habitual observance of certain forms of social order. From the earliest beginnings in the natural family, the family of patriarchal times as enlarged by adoptions and dependents, the wandering tribe or clan of migratory herdsmen, the nucleus of the village community first establishing permanent abodes, and appropriating land for dwelling and for tillage, through the more highly and specially organized periods, from military colonies and feudal tenures and systems, to the free and divided industries of modern times, under every form of government, Asiatic despotisms, theocracies, monarchies, aristocracies, democracies, and representative republics, we find, in all, some definite order, organi-

zation and hierarchy, uniting and binding men together in certain relations to each other, and which each expects to be observed, maintained, and obeyed by all. It is this social order that constitutes the unity of the particular people or community who yield it customary, respect, and confers upon them a corporate character, separating them for the purposes of their local development from the rest of mankind. This is that body politic of which Sir John Fortescue treats in the 13th chapter *De laudibus legum Angliæ*. Its constituting element is the law; wherefore, he says: "The law under which the people is incorporated may be compared to the nerves or sinews of the body natural, for, as by these, the whole frame is fitly joined together and compacted; so is the law, that ligament (to go back to the truest derivation of the word, *lex a ligando*) by which the body politic and all its several members are bound together and united in one entire body. And as the bones and all the other members of the body preserve their functions and discharge their several offices by the nerves, so do the members of the community by the law."

The fundamental institutions of society, without which it does not and can not exist—the family and the personal relations involved in or implied by it, and property in land, in domestic animals, and all other useful things, and the relations between men, begotten by it, are natural and instinctive. They are antecedent to any positive creation by human enactment, express the necessities of human nature, and are the modes and conditions of human living. The observances which in any given community are habitual in respect of them, spring up unconsciously, and are obeyed under an instinctive dictate of nature. What is essential in them is universal, and is found wherever men are found in society; their accidental features, which distinguish them from those which are similar, are the result of local circumstances, or are merely personal and arbitrary differences.

The nature, out of which these elemental institutions arise, to whose necessities they minister and whose character they express, is that of a being endowed with reason and conscience. By these, man discovers the relations which his nature implies, perceives the obligations to which they give rise, and deduces the rights which correspond to his duties, acknowledges the impulse by which he is compelled, as a matter of right, to seek the perfection of his own being, and the obligation of doing so, in company with his fellows, entitled equally to share the same destiny, and the natural means and opportunity of its realization. Hence, the law, springing from the reason and conscience of mankind, becomes the science of human rights and obligations, the science of justice. Its fundamental maxim is the golden rule of the New Testament: "Whatsoever ye would that men should do unto you, do ye also to them," and finds its exact legal statement in the maxim common to all systems of jurisprudence—*Summ cuique tribuere*.

This is the law of nature, the foundation and informing spirit of all law. An anonymous writer says: "It may be said of laws that mankind have but one law, though every nation has had its own system of laws. For positive law is not essentially a simple collection of isolated rules and ordinances arbitrary or conventional in their nature, but it is a system exhibiting, amid all its variations in time and place, invariable and fixed principles and relations which constitute the foundation or identical part of all laws; that is to say, universal or natural law." (2 Law, Rev. and Mag. Lond. N. S. 548). Or, as was magnificently said by Burke: "It would be hard to point out any error more truly subversive of all the order and beauty, of all the peace and happiness of human society than the position that any body of men have a right to make what laws they please, or that laws can derive any authority whatever from their institution merely, and independent of the quality of their subject matter. All human laws are, properly speaking, only declaratory. They may alter the mode and application, but have no power over the substance of original justice."

The same law of mutual justice which binds individual men together into independent political communities, and prescribes their relative rights and obligations, also embraces as one family the various States and nations into which mankind are, at the same time divided and gathered. Individuals, under the collective name of a government, are none the less bound by the rules and principles of right which they recognize and obey in their intercourse with each other as natural persons; and the relations, intercourse and dealings between independent States, are, therefore, subject to the law of equal justice. When applied directly between sovereigns it is appropriately styled the public law of nations; when administered between subjects of States, foreign to each other in the forum of either, it constitutes private international law.

Indeed, it is the domain of international law that the foundation of the rule and duty of justice is most plainly manifested as rooted and grounded in the indestructible and immutable nature and constitution of the universe; for, as is pointed out, I think by Sir Henry Maine, the attempt to regulate the relative rights and duties of independent States upon any system of utilitarianism or expediency, as determined by the balance of good or evil consequences, completely breaks down. To say that the obligation of a powerful state to observe its treaty stipulations with a weak and helpless neighbor, or to avoid aggressions upon its territorial or other sovereign rights, may be determined by the application of the greatest happiness principle, upon the calculation of the greatest good to the greatest number, is simply to say that power may substitute its will for its conscience, and that in the domain of the public international law might makes right. If such has too often been the practice of arbitrary Govern-

ments in their dealings with other and weaker sovereignties, it is, nevertheless, condemned by the conscience of mankind, and if admitted as legitimate on grounds of reason, destroys the possibility of a scientific jurisprudence.

This social order—so exact and careful that it descends with its protecting power to enumerate and defend all the rights of the most helpless of its subjects; so wide and all-embracing that it includes within its sphere and jurisdiction all the races, tribes and nations of men, in every stage of development, as to strength and knowledge—is the secure medium in and through which is realized the personal, civil, and political liberty of mankind. It prescribes the limits within which each individual is left free to employ the activities of his nature in the development and perfection of his being, making those limits the boundaries which no one is permitted to transcend in the eager gratification of his own will. And by the law of equality—for justice makes no distinction of persons in the domain of rights—there is guaranteed to each individual the opportunity freely to seek his own, on the sole condition that he does not cross the boundary of his neighbor.

This social order, from the nature of the case, in the history of the race, obeys the law of evolution and development. The various forms which at any given period we find co-existing in the world—as there are now, and always have been, many—are but stages of this development. Everywhere, and at all times, we see the energies of man displayed and exerted in efforts to conquer the world, without and within—to subdue the material universe in order to support and improve his physical and to unfold and develop his spiritual life. And if too often history has to record the fall of nations, and the lapse of races and people into barbarism, and even to lament their extinction, nevertheless, the law of progress, in all that we know and call civilization, on the whole asserts itself, even by means of adverse experiences; for the education of the world has come from the knowledge of both good and evil. The hope of this advancement and progressive improvement in the conditions of our earthly life, and increase in the elements of individual well-being, is what sweetens the bitterness of living, makes light its burdens, and turns sacrifice into delight. Without it, it is not perhaps too much to say that life would scarcely be worth living; and that society itself becoming stagnant, would also become corrupt, and of corruption die. At least, out of this hope is begotten all the grace and loveliness of life, all art and literature, painting, poetry, sculpture, architecture, and music—every thing that cultivates and embellishes our earthly habitation. It were rash to predict whether a perfect social order would ever be realized by mankind on the earth. But as we are taught to pray for it, we ought not to cease to expect it. We shall, at least, know it when it comes. It will be the Kingdom of God on earth, in which His will shall be done, even

as it is done in Heaven. In it there will be a place for every man in which to do the work for which he is best fitted, wherein he will be able to perfect his individual being by the most complete and efficient exertion of every faculty and quality that constitute his characteristics as a man, and whereby he will have the opportunity of accomplishing the greatest good both for others and himself; when every right will be the most richly enjoyed, when every duty will be the most faithfully performed; where the perfect law of justice will be accomplished in every human relation, and cover with its invincible shield the weakest from every conceivable wrong.

If such is and has been the unextinguishable aspiration of men in all ages and countries, so is it the analogy of nature itself, which, from its lowest to its highest types, seeks to rise through every gradation to the contemplation and enjoyment of the Infinite and Perfect One.

The conception of law we thus find, by analysis, to be coincident in one aspect with that of social order. We find, also, that it is essentially related to the idea of physical force, which indeed enters into its accepted definition as being a "rule of action prescribed by the supreme power in a State commanding what is right and prohibiting what is wrong," or, as the Duke of Argyle has condensed it, "the authoritative expression of human will enforced by power."

Every independent political community—a State or Nation—as we have seen, is, although a corporate, nevertheless, a moral person, capable of exercising a rational will and subject to the obligations of the rules of morality, which spring from human relations. It represents, as it embodies, the collective will of all the individuals that are its constituents, and, thereby, acquires the right and power of disposing of their persons and possessions for the legitimate purposes of its own existence. This unlimited eminent domain is styled Sovereignty, and, according to American theories, resides in the whole body of the community. The powers of sovereignty are in fact exercised by the government, the constitution of which in any given case prescribes the limits within which they are restrained. This constitution, according to our practice in this country, is written; but it exists everywhere, and elsewhere is to be found in the history and practice of the particular community. So that while, in theory the powers of Sovereignty are despotic, they are practically limited in exercise either by express constitutional enactments or by a public opinion, entrenched in the traditions, prejudices, and inveterate customs of many generations. The legal relation between the government and the people who are its subjects thus established, gives rise to the public or constitutional law of the particular state. This branch of jurisprudence embraces also the relation which the different departments and agents of government

bear to each other, where, as in most modern States, there is a distribution of its powers.

It is not true, as is sometimes supposed, that the public law, which regulates the conduct of governments toward each other and toward their own constituents respectively, is without the usual sanction of force necessary to the strict definition of law proper. For, in many instances, unconstitutional exercises of power by governments are nullified by judicial action, even in the absence of express prohibitions, on the ground suggested by Chief Justice Marshall in the case of *Fletcher v. Peck*, 6 Cr. 135, that the very nature of society and government prescribes limits to legislative power. But, in all others, there remains the reserved right of the true sovereign, the body politic itself in its original capacity, by revolution to displace a government which has abused its authority. And so in every case of the infraction of the international law, if the cause be of sufficient gravity, the injured nation has the right, by a just war, to enforce its claim or redress its wrong, and while all others may remain neutral, they commit no offence if they espouse the quarrel of the innocent party. So that, even in these cases, in addition to the public opinion, which ordinarily suffices to support the law, there is a latent force which may be aroused to exert its energy in its vindication.

The machinery for the enforcement of the municipal or internal private law of the State, is regular and visible. The executive department of government is organized and authorized for that special duty, and to that end is armed with the whole civil power of the State. If that is not sufficient to quell resistance, the military power may rightfully be called to its aid, so that force lies couched behind every law, not always displayed, more often hid but ever ready to spring to its defense. Or, as described by Hobbes:

"This done, the multitude so united in one person is called a commonwealth; in Latin, *civitas*. This is the generation of that great Leviathan, or, rather, to speak more reverently, of that mortal god to which we owe, under the Immortal God, our peace and defense. For, by this authority, given him by every particular man in the Commonwealth, he hath the use of so much power and strength conferred on him that, by terror thereof, he is enabled to perform the wills of them all, to peace at home and mutual aid against their enemies abroad. And in him consisteth the essence of the commonwealth, which, to define it, is one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end that he may use the strength and means of them all, as he shall think expedient, for their peace and common defense."

But the justifying ground for the employment of the public force, to guarantee the enjoyment of private rights, is not to be found in the mere will of the State, nor the public judgment of its

expediency. It is of the nature of the right itself, as just, to declare and enforce which was the very purpose for which the State exists and is organized. It is not every moral claim that one person has upon his fellow that he is justified in prosecuting by force. It is not every moral obligation the performance of which may be compelled. The measure of Rights is not what conscience may bind one to do for another, but what that other is allowed by conscience to require. Justice is a demand of imperative obligation. If withheld, it may be taken by violence; for the rights which it secures belong to human nature, and are indispensable to the preservation of human society. Society is bound, therefore, by the law of its own existence to declare and enforce the just right of every individual, predicated on a duty of perfect obligation. Two corollaries flow hence, both leading to the same result.

The rights which are thus guaranteed by society to its members are not self-sufficient and absolute. They are not the ends and purposes of human living. No man exists and acts merely that he may enjoy his rights. His rights are merely opportunities. They are means to another end. They are the instruments by which he is enabled to perform duties, to discharge obligations. That general duty and obligation has already been expressed. It is the final cause of his existence. It is to perfect his being, to develop whatever there is in him, in the direction of the highest manhood. But a duty expresses a relation. It is something due to a person, and cannot center in that of him in whom it inheres. It binds him to some other person. It cannot be to any other human person, because the duty belongs to all alike, and if due to men would be due to all, which would be equivalent to a debt from each to himself; a conclusion already excluded. There must be some other and some higher Person who has laid his command on human nature, and has thus bound all men to Himself, that every man may illustrate in the exaltation of his own life, the perfect handiwork of his Creator. And thus there is revealed in the consciousness of man, duly seeking the highest gratification of his nature, the existence and claims and government of the great God and Ruler and Father of all.

And this conception of individual obligation to the Author of his being also reveals that Moral Law which constitutes the Order of the Spiritual Universe which, while it limits and restrains the authority and rightful power of organized Society over its individual constituents, at the same time establishes its rightful governance upon the immutable foundations of a Divine Right—a Divine Right, not of a particular person, family, dynasty, or even established government of any description, to 'bear and wield the sword of rule—but the Divine Right of Society, as the Human Sovereign over governments of its ordination, as well as over the natural persons subject to its jurisdiction, to rule the world of men, with all their contesting in-

terests, blind ignorance, and base and rebellious passions, in the interest of Righteousness and Peace.

This mission, however, it must be remembered, is not to be fulfilled directly by a human re-enactment of the divine law, and its enforcement as such, but rather indirectly, by securing to each natural person that largest liberty, consistent with that of all others, which will most securely protect him in that voluntary obedience due from him to the obligations of virtue, in which alone there is any merit and worth. Men can not be made good upon compulsion. It is only a small portion of the moral law—those duties which men owe to each other, which are called, on that account, of perfect obligations—which is capable of enforcement by the power of society, under pains and penalties.

And, even in respect to enforceable obligations, it is obvious that the actual exercise of the power of government in their enforcement must be the exception and not the rule. If the majority of the members of any given community were in a state of continual resistance to the performance of their just duties, it would not be in the power of the minority—except when it had exceptional advantages in the way of superior skill, intelligence, and organization—to enforce the law. Neither does the apprehension of its exercise supply the defect, for the fear of force could not accomplish what its actual application failed to effect.

There is, therefore, something else, by way of reserve, which strengthens the arm of the law and supplies a substitute for its sanctions. It is, of course, the instinctive obedience of the mass of right-thinking people to laws, the necessity and justice of which they recognize, and the judgment of moral condemnation, which they pronounce upon those who assail the public peace and order. The offender himself sees, in the aversion and righteous indignation of his fellows, the sentence of his own conscience, and is oftener deterred from the commission of wrong by this power of public opinion than by the fear of the punishment of the law. Without this moral support, it were vain to attempt the maintenance of public order; and when, in consequence of the demoralization of the public sentiment, disorders have become so formidable as to defy law, society falls into anarchy, to be revived too often only by the desperate energy of military power, applying force without regard to that civil justice for whose sake alone its use can be justified.

It is also to be borne in mind that the larger number of controversies, the settlement of which engages and employs the machinery of justice, are not those in which there is charged to have been any intentional, willful, wanton, or what the law styles malicious wrong. It is oftener a question whether the party charged has exercised the care and thoughtfulness of his neighbor's interests which, under the circumstances, was due from him or from those for whose conduct he is justly responsible; and equally as

often, perhaps, whether, as the facts appear, any enforceable obligation exists and has been violated. It thus happens that nearly every case that can be supposed, in which the invention of the law is invoked, presents a litigation involving mixed questions of law and fact. The question of law always is, what, if any, enforceable obligation arises out of the relation established by the circumstances between the parties; the question of fact is—are the circumstances shown which give rise to such an obligation, and has it been broken?

It is difficult to reconcile Coke's aphorism that the common law is the perfection of reason, and the admitted maxim of that law, that every one is presumed to know the law, and ignorance of it excuses no man, with the common opinion that it is a science, if one at all, intricate, complex, and hard to understand, full of uncertainties, confusions, and contradictions; a trap for the unwary; a net, whose meshes are strong enough to catch only small fish, while the strong break through and escape.

Yet an acute thinker and brilliant writer on elementary jurisprudence—Charles Spencer March Phillipps—has said:

"I believe that there exist certain general rules of justice which now are, which always have been, and which always will be, instinctively recognized by the human conscience. I further believe, that these rules are such as to be capable of being applied by the human intellect to every possible combination of facts upon which a question of Right can arise between two human beings, and that by such reasoning the abstract rights of one human being as against another may, under any conceivable circumstances, be logically defined."

When, however, we recollect that it is not all moral obligations which are enforceable at law, and that the very principle on which the law proceeds in drawing the line between perfect and imperfect obligations is not admitted by any general agreement, some systems proceeding upon one, and others upon a different, policy, it may well be questioned whether jurisprudence can properly be considered as one of the exact sciences, or classed as one that, by rigid processes of logic, can be deduced out of mere thought. It is not easy, for instance, to explain, on any consistent and intelligible ground, why the common law of England refuses, generally, to enforce a parol promise without a consideration, while the doctrine is not considered essential in the Roman law of contracts, the moral obligation being the same in both systems.

A more sober and, therefore, a more accurate view is taken by Sir Henry Maine, in the following extract from his "Early History of Institutions" (p. 49). He says:

"The truth is that the facts of human nature, with which courts of justice have chiefly to deal, are far obscurer and more intricately involved than the facts of physical nature; and the difficulty of ascertaining them with precision constantly increases in our age through the progress

of invention and enterprise, through the evergrowing *miscellaneousness* of all modern communities, and through the ever-quickening play of modern social movements. Possibly we may see English law take the form which Bentham hoped for and labored for; every successive year brings us in some slight degree nearer to this achievement; and, consequently, little as we may agree in his opinion that all questions of law are the effect of some judicial delusion or legal abuse, we may reasonably expect them to become less frequent and easier of solution. But neither facts nor the modes of ascertaining them tend in the least to simplify themselves, and in no conceivable state of society will courts of justice enjoy perpetual vacation."

It may be thought—indeed, that is one of the suggestions of the writer of the newspaper article, referred to at the outset of these remarks—that the advancement of society, in cultivation, intelligence, virtue, and all that enters into civilization, would necessarily diminish the area of enforceable obligations, and lessen the number of occasions for the intervention of the law. This result might be supposed to follow from the increased knowledge on the part of the community of what duty required in particular circumstances; increased efficiency on the part of the extra-judicial forces of the community, in their influence over individuals, resulting in a more ready and voluntary compliance with obligations generally recognized by the public conscience. But new questions of law arise with new facts and new relations among men; and as society progresses in its development, its organization becomes more intricate, men are brought nearer and into novel situations, and with unprecedented relations, which will constantly furnish new studies for the jurist and the legislator, and the area of enforceable obligations will enlarge and not diminish. Indeed, it is quite likely that many cases now occur, in which no remedy exists, which a more highly organized state of society, and a more perfect justice, may not be willing to leave to the mere good will of private conscience. Such was the opinion of Mr. Charles O'Connor, as expressed in his argument in the case of the "General Armstrong," argued in the Court of Claims. He is thus reported: "Jurisprudence, as administered by human tribunals, deals only with the means of enforcing rights which are recognized as perfect; but, like all moral sciences, it is capable of improvement. As the general mind of a nation advances in that freedom which is the result of increased knowledge, the legislative authority will constantly enlarge the sphere assigned to jurisprudence, and increase its power of establishing justice. Jurisprudence is only the means; justice is the end. Jurisprudence is of human origin; justice is an attribute of divinity, pre-existent of all created things, eternal and immutable. Its authority is not derived from any human code, either of positive institution or of customary reception; its decrees are found in the voice of God speaking to the heart,

which faith has purified to receive and reason enlightened with capacity to understand."

But the quick movements of society do not always wait upon the slow processes of legislation. If a new and useful device is invented, that seems calculated to serve a beneficial public purpose, it is adopted and brought into use through the energy of private enterprise, without previous inquiry as to what its legal status may finally be determined to be. And with the backing of its own utility and the interested opinion thus created in its favor, it takes its place and fights its way, against the opposition of existing interests and prejudices, to a judicial recognition of the rights and obligations which arise by reason of it. The introduction of the systems of telegraphs and street railroads exemplifies and illustrates this process. And see how rapidly and completely the unique local customs of rough and illiterate miners establishing themselves without previous legislative authority upon public lands became judicially recognized as giving rise to legal rights and obligations, before they were confirmed by statutory enactments. It has been so from the beginning. How very small a part of the existing body of our common law owes its origin to any express legislative authority! The whole large body of that refined system of rights and obligations, which constitutes the law of common carriers, is founded on the custom of the realm when transport on land was on horseback or by wagon, and which, from the decision of Lord Holt, in *Coggs v. Bernard*, has been expanded to meet the demands of carriage by land and sea, not then dreamed of. The *lex mercatoria* has been developed, out of the early usages of merchants, when trade and commerce were in their infancy, into a consistent body of rules, which govern communities the most widely separated in space and manners, and regulate transactions which represent the accumulated wealth of the world at a time when millions are as familiar as hundreds were to our forefathers, whose traditions we have inherited and enlarged. Legislation, in the meantime, has introduced into the body of the law few, if any, new principles, but has not been idle in improving the machinery of administration.

This growth, as we all know, is the process of what has sometime, but, I think, injuriously been termed, judicial legislation. This is a misconception. Courts have not made the law. The law, according to its very nature, is not the subject of manufacture. Neither has it been invented or devised. It has simply been discovered. It always was, and, when newly applied, is merely for the first time brought to light and consciousness. The faculty of speech is born in and with us, and it would be equally as inappropriate to say, whenever a new thought was expressed, that an innovation had been made upon the mother tongue.

It is the necessary mode of development, and could not be permanently arrested by any positive provision of legislation without at the same

time blocking absolutely the wheels of all social progress. If the whole body of our law were today reduced to a code, as perfect and precise as human language could make it, to-morrow the march of judicial decision would begin anew, expounding and expanding old principles in new relations, and drawing from the unexhausted and inexhaustible reservoir of abstract justice new rules for new duties.

This process is described by Chancellor Kent (2 Com. 471) in a passage quoted and approved by Justice Thompson, in *Wheaton v. Peters*, 8 Peters, 669:

"The common law includes those principles, usages and rules of action applicable to the government and security of the person and property which do not rest for their authority upon any express and positive declaration of the will of the legislature. A great portion of the rules and maxims which constitute the immense code of common law grew into use by gradual adoption, and received from time to time the sanction of the courts of justice without any legislative act or interference. It was the application of the dictates of natural justice and of cultivated reason to particular cases."

And M. Henri Ahrens, in his treatise, *Droit Naturel*, vol. 1, p. 98 (Ed. Leipsic, 1868), explains to the same effect, in the following passage:

"Every system of positive law, however perfect, reveals omissions, obscurities, and defects of decision for unforeseen cases; and as the judge ought to have the means of deciding in every case that may be presented, the law of nature may become an auxiliary source of judgment. It would not, indeed, be permissible for him to decide a case against the letter of the written law; for that would be to take from the law its general and uniform character, and put everything at the mercy of the personal and variable views of the judge; but when the law is silent, the conscience and reason of judges must speak; and the opinions which they derive from a study of the philosophy of the law then become grounds of decision. This truth has appeared so evident that many systems of law (among others the Austrian Code § 7) have recognized expressly the law of nature as a subsidiary source of positive law."

The result which this discussion has now, as it seems to me, made sufficiently plain, may be stated in this summary: The function of the law, in the civil and political state, is to reduce to a formulæ, from time to time, the various acquisitions made by society in its progressive civilization, incorporating the new with the old, and readjusting the whole with its several parts, according to the rules of an immutable justice.

Human societies, each for itself, but also in company with all others composing the whole race of mankind on the earth, are struggling, consciously and unconsciously, at all times, to organize themselves upon the principle of strict and equal justice. This is their chief business and purpose. To this end they exist. If they fail altogether in its achievement, they necessa-

rily disintegrate, fall into decay, and sink into nothingness. A certain approximation to success in this work is essential to their continued existence. Justice is to them the very element of life. It is what the blood is to the animal body. If it is rich and pure, and flows in its natural courses, it distributes to every tissue and organ of the body it vitalizes, in due and exact proportion, just the nutriment it needs to supply with health and energy; and every member, receiving satisfaction for its own wants, joins with all the rest to constitute the beauty and strength which comes from harmony in nature.

The struggle for justice goes on continually. The strifes between nations and races, between opposing classes and interests in the same people, are blind efforts to obtain it, in which each contestant thinks he is seeking to regain or retain what belongs to him.

And so the world, day by day, learns by its experiences of good and evil its lessons in the science of life, advancing by degrees in an education which, first teaching that the highest interest of mankind is universal justice, will eventually lead it into the practical establishment of the institutions by which it may be realized.

It is by its participation in the processes of this education, that, perhaps, the legal profession renders to society its greatest indirect service. It makes common and introduces into the popular mind and speech the ideas and language of jurisprudence. The daily spectacle of adjusting disputes, composing strife, securing rights, avenging and punishing wrongs, and administering the solemn judgments of the law, is to all participants and spectators, the litigants themselves, their friends, their witnesses, the jury, and the more or less large audience who hear and discuss the matters at issue—an impressive exhibition, which represents with striking and permanent effects upon the imagination of men, the majesty and dignity of that justice whose ministrations they witness or share.

This is true of all countries where the people have made considerable advances in intelligence, and take some active part in the work of government. It is specially true in reference to our own country, as was noted by De Tocqueville, in his observations upon our institutions. He says:

"The influence of the legal habits which are in common in America, extends beyond the limits I have just pointed out. Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate; hence, all parties are obliged to borrow the ideas, and even the language usual in judicial proceedings in their daily controversies. As most public men are or have been legal practitioners, they introduce the customs and technicalities of their profession into the affairs of the country. The jury extends this habitude to all classes. The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosoms of

society, where it descends to the lowest classes, so that the whole people contract the habits and the tastes of the magistrate."

But the direct and specific function of the profession, in the social and political state, in its progress in civilization, is to formulate its progress into laws and institutions, and superintend the gradual perfection of its organization, according to the idea of justice.

That its mission is as yet incomplete and subsisting, we are all, to-day, both witnesses and judges.

Time and the occasion forbid my entering upon a discussion of the departments, in which, in the near or possible future, we may expect to witness the advance of this work of the law, in the extension and growth of our existing civilization.

It seems Utopian even to hope, much less to look for the adjustment of all international disputes by peaceful arbitration, or the establishment of a confederation of powers, combined for the purpose of declaring and enforcing international obligations. Many people, organized into states—many, indeed, of the most ancient—have not yet recognized any common system of international obligations. Many are yet so little removed from the habits and manners of barbarism as not to understand any mode of asserting claims or resisting demands, except by war. And yet it ought not to be esteemed absurd to suppose it possible that States calling themselves Christian, and who do recognize their allegiance to the principles of a common justice in their necessary mutual intercourse, may find it practicable to adjust all controversies between themselves by amicable arbitrations. The real and only difficulty in the way seems to be the existence of those feelings and passions, allied and growing out of national pride and race antipathies which prevent a nation from recognizing its highest interest to be in the satisfaction of justice. Certainly, all true national interests, according to every probable expectation of the outcome in any given case, be far better served by the decision of a tribunal than by the chance of war. Let us suppose, for instance, that the recent war between Prussia and her allied German States, on the one part, and France on the other, having issued as it did in the fall of Napoleon and the Second Empire, the questions of the terms of peace had been submitted by the two parties to some arbitrament of peaceful meditation having no adverse interests, as surely might have been found—if not in Europe, then on this continent; and the award having been made, had been fulfilled. Does any one doubt that a peace, concluded on that basis, would have been far more useful even to the victorious party, than any indemnity wrested from the humiliation of a proud people by the strong arm? To say the least, both would probably have been spared the necessity and burden of armaments which policy has required both ever since to maintain.

And we may be certain that sooner or later, if civilization keeps its promise to future ages, the burdens of war and of constant preparation for

war must some day cease. They are in Europe almost intolerable to-day. The taxation necessary for the support of the immense armaments, kept up, either as menace or for defense, is grinding the faces of the poor, and driving starving men and women by the millions annually to more peaceful shores. It will bankrupt the people and destroy the governments whose policy maintains them. Surely we may expect the reason and conscience of men, most interested, soon to make themselves heard, and to find a way, through peace, for the more perfect administration of justice in international relations.

Perhaps, in the sphere of our own public law, there may be room and need for amendment and reform.

We have from the beginning, though not always with perfect consistency, recognized in our public law the right of expatriation, and made liberal provision for the naturalization of foreigners. This policy, no doubt, has been the line both of our interest and our duty. But a revision of our definitions seems to be called for. Unfortunately, some who have availed themselves of the privileges of our citizenship seem to have conceived the idea that by forswearing allegiance to the sovereign of their nativity, and subscribing the oath of fidelity to that of their adoption, they have become entitled to the privileges of a double citizenship, without the responsibility of either; and that they have changed their domicil merely that they might promote insurrection in a foreign country from a distant and safe base. These of our fellow-citizens should learn that they have discharged their whole duty to the cause of liberty in the protest they have recorded in their voluntary escape from oppression. And especially that if humanity requires us to sympathize with every people struggling to be free, nevertheless, the asylum of neutral territory, provided against political persecution, must never be desecrated by becoming the harbor and cover for murderers and assassins.

It may be, also, that we shall yet realize that advanced justice desired by our first Chief Justice, John Jay, when he said, in the case of *Chisholm's Ex'rs v. Georgia*, 2 Dall. 378.

"I wish the state of society was so far improved and the science of government advanced to such a degree of perfection as that the whole nation could, in the peaceable course of the law, be compelled to do justice and be sued by individual citizens."

Our national government is, and always has been, and very properly, exceedingly jealous of its commercial credit, and at every cost has maintained its faith with public creditors. But this has reference mainly to its public and negotiable debt. In almost all other cases of claims against its treasury, it insists on being judge in its own cause. The Supreme Court of the United States has decided, in the case of *Langford*, 101 U. S. Rep. 341, that the maxim, that "the king can do no wrong," as applicable to our government or any of its officers, has no place in our system of constitutional law; but has refused to

imply an enforceable promise against the government for indemnity, in a case where its officers, in its name and for its use, have unlawfully taken private property, the government claiming title in itself. So that Judge Nott, of the Court of Claims, in the case of *Brown v. The United States*, 6 Ct. Claims Rep. 171, said:

"The laws of other nations have been produced and proved in this Court and the mortifying fact is judicially established that the Government of the United States holds itself, of nearly all governments, the least amenable to the law."

The example of a submission of disputed claims to the judgment of an independent judicial tribunal, in that high quarter, might reasonably be expected to find imitation on the part of the State Governments, several of whom, unfortunately, refuse to recognize the duty of paying portions of their public debt, or what is claimed legally to be such. In all these instances, there are, of course, pretexts, if not reasons, urged in justification of an apparent repudiation; and the institution of judicial tribunals for the adjudication of the question of liability, even if they were powerless to do more than declare their judgments, would reinforce, by a strong moral support, all honest claims and just debts.

But beyond all, and above all, are many social and political questions and problems, of momentous import, which, sooner or later, must emerge into the sphere and jurisdiction of the expanding law. Among them, may be noted that relating to the regulation of the rules and rates of transportation by common carriers, for the protection of the public against undue discriminations; the question of monopolies, involving the problem of formulæ by which associated capital can be made most efficient for good, with the least power of mischief, and how the power of unlimited combination can be reconciled with that of unlimited competition, and the advantages of both be retained; and the fundamental and radical question of the true economic relations between the three elements which directly enter into production, labor, skill, and capital.

It may be that the science of political economy may hereafter discover and announce some rule of justice, founded in the nature of things, whereby to determine, in every given case, the share of produce, to which each of these agents in production is entitled, and some organization of productive industry may appear, through the voluntary action of those directly interested, which will furnish the machinery for the application of such rules and computations. If that should ever be realized, then jurisprudence will be ready to incorporate these methods and instruments into the system of its legal institutions, determine the relations which will spring from them, and ascertain and enforce the obligations of justice, which will then have the form and efficiency of law.

In the distant though delightful prospect of that consummation, we may adopt as our psalm and apostrophe, the memorial sentence of the ju-

dicious Hooker—none the less eloquent because familiar—and say:

"Of law, there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world; all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempt from her power; both angels and men, and creatures of what condition soever, though each in a different sort and manner, yet all with uniform consent admiring her as the mother of their peace and joy."

SUPREME COURT OF MICHIGAN.

RAYMOND v. LEAVITT.

June 29, 1881,

Contracts—Validity—Against Trade. A contract by which one party is to advance money to another, who, for their mutual profit, is to use the money to force a fictitious and unnatural rise in prices in the wheat market, the transaction being for the express purpose of getting the advantage of dealers and purchasers by reason of the unnatural fluctuation in prices, is void as against public policy, and will not be enforced in this state.

Leavitt sued plaintiff in error on the common counts and served a bill of particulars in which the demands were set out as \$10,000 money lent, \$10,000 handed defendants for their use on their guaranty that the sum should be repaid in a reasonable time, \$10,000 deposited with them for their accommodation, and \$2,327.53 on account stated. He recovered \$3,027.53 upon the latter item and an error of \$700. The plaintiff stated on oath that he advanced \$10,000 in May, 1880, for the purpose of controlling the wheat market in Detroit, with a view of forcing up prices, and producing what is understood as a corner; that he was to have a third of the expected profits, and that the amount advanced was to be repaid at all events. Defendant claimed that the sum advanced was a margin in the wheat transactions in which he was to bear his risks, and that the speculations resulted in a loss.

CAMPBELL, J.,

In delivering the opinion of the court, said: The object of the arrangement between these parties was to force a fictitious and unnatural rise in the wheat market for the express purpose of getting the advantage of dealers and purchasers, whose necessities compelled them to buy, and necessarily to create a similar difficulty as to all persons who had to obtain or use that commodity, which is an article indispensable to every family in the country. That such transactions are hazardous to the comfort of the community, is universally recognized. This alone may not be enough to make them illegal; but it is enough to make them so questionable that very little further is required to bring them within distinct prohibition. The cases of *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St. 173, and *Arnot v. Coal Co.*, 68 N. Y. 558, held contracts involving similar dealings with coal, to be against public policy. And we think the

reasoning of those cases is based on familiar common law principles, which apply more strongly to provisions than to any other articles.

There is no doubt that modern ideas of trade have practically abrogated some common law doctrines which are supposed to unduly hamper commerce. At the common law there is no doubt such transactions as were here contemplated, although confined to a single person, were indictable misdemeanors under the law applicable to forestalling and engrossing. Some of our states have abolished the old statutes which were adopted on this subject, and which were sometimes regarded as embodying the whole law of such cases. Where this has been done, as in New York, the statutes have replaced them by restraints on combinations for that purpose, leaving individual action free. In England there have been several statutes narrowing or repealing all of the ancient statutes, and more recently covering the whole ground. But so long as the early statutes only were repealed, it was considered that enough remained of the common law to furnish combinations to enhance the value of commodities. And when this doctrine became narrowed it seems to have been considered that such combinations to enhance the price of provisions remained under the ban. In *Rex v. Waddington*, 1 East, 143, and S. C. 1 East, 167, it was held the common law was still in force to punish engrossing the necessities of life or provisions by single persons. The chief difficulty was in determining whether hops came within that rule, and it was held they did, and that the legislature only could change the law. The defendant was heavily fined. The case has been sharply criticised as not in harmony with modern political economy, and it no doubt goes beyond what would be considered proper among us. It has never, so far as the researches of Mr. Bishop have gone—and he seldom overlooked important cases—been judicially disproved, although statutes have been made to change the rule. See 1 Bish. Cr. L. §§ 527, 528, and notes to 6th ed. And he intimates that conspiracies for such purposes may perhaps be punished, even where the individual offence has been abolished. See, also, vol. 2, §§ 202, 206, 216, 220, 230, 231 and notes. In *Rex v. Hilbers*, 2 Chitty, 163, it was held that there must be a combination of more than one person before an information will be granted for enhancing the price of necessities. Mr. Russell gives it as his opinion that in our day single offenders would not be regarded as punishable unless their offence relates to provisions. 1 Russ. 170. But where there is a conspiracy, the law has been given a much wider application, and the case of *Rex v. De Berenger*, 3 M. & S. 67, has obtained celebrity from the high rank of the offenders who were convicted (and one of them at least, Lord Cochrane, unjustly) of conspiring to raise the price of stocks by false rumors. We have not referred to these cases, to assert the propriety of enforcing common law criminal penalties, contrary to the general understanding of the business community. While

these offences have never been abolished in this state by statute, and might theoretically be, therefore, within the possible range of our laws, there would be no toleration of their strict prosecution against single persons to the common law extent as crimes. But the general sentiment has not led to any change in legislation, as to the legal propriety of allowing every species of produce gambling, to be made susceptible of enforcement by contract. We must wilfully shut our eyes before we can fail to see that a combination between a man who furnishes money and dealers who manipulate the market, where the money invested is but a trifling percentage of the property to be handled, and where the only intent is to produce unnatural fluctuations in prices, is entirely outside the limits of buying and selling for honest trade purposes. It is the plainest and worst kind of produce gambling, and it is impossible for any but dangerous results to come from it.

We do not feel called upon to regard so much of the common law to be obsolete as treats these combinations as unlawful, whether they should now be held punishable as crimes or not. The statute of New York, which is universally conceded to be a limitation of common law offences, is referred to in the case in 68 N. Y., as rendering such conspiracies unlawful, and this had been previously held in *People v. Fisher*, 14 Wend. 9, where the subject is discussed at length. There may be difficulty in determining conduct as in violation of public policy, where it has not before been covered by statutes as precedents. But in the case before us the conduct of the parties comes within the undisputed censure of the law of the land, and we cannot serve the transaction without doing so on the ground that such dealings are so manifestly sanctioned by usage and public approval that it would be absurd to suppose the legislature, if attention were called to them, would not legalize them. We do not think public opinion has become so thoroughly demoralized; and until the law is changed we shall decline enforcing such contracts. If parties see fit to invest money in such ventures they must get it back by other than legal measures.

Reversed and new trial granted.

SUPREME COURT OF MINNESOTA.

THE STATE v. WILSON.

Criminal Law—Forgery—Attorney in fact. Where one signs a deed as attorney in fact, or agent for another, and it so appears on the face of the instrument, and such attorney or agent has in fact no authority to execute such instrument, it is not a forgery.

Appeal from Hennepin County.

The defendant was indicted, under Sec. 2, Chap. 96, Gen. Stat., for uttering and publishing as true a false deed, knowing the same to be false, with intent to injure and defraud. The indictment sets out *in hac verba* the alleged false deed, which purports on its face to be a deed of

conveyance of land by one James D. Hoitt to Joseph F. Miller, and to be signed by H. H. Wilson, per procuration of said Hoitt, the form of the signature being "James D. Hoitt, by H. H. Wilson, his attorney in fact." Upon the trial of the cause it appeared that the defendant signed the deed in question, claiming the authority so to do under a power of attorney from Hoitt. The falsity of the deed claimed by the State consisted not in any simulation or imitation of the signature of Hoitt, or in putting forth the instrument with the false pretense that the signature was the personal action of Hoitt, but in the false assertion contained in the instrument that he, the signer thereof, was authorized so to make and sign it in behalf of Hoitt, when in fact he had no such authority. The appeal is from a judgment of conviction.

MITCHELL, J.

The question is whether an instrument, which appears on its face to have been executed by an agent authorized, while in truth he was not so, is a false instrument: or, to state the proposition in another form, when an instrument is really, in all its parts, written or signed by the individual by whom it purports to be written and signed, and the falsity consists not in the simulation or counterfeiting of the act of another, but in the false assertion which the instrument contains that he, the writer and signer thereof, is authorized so to make and sign it in behalf of another, as it purports to be, is it a false instrument within the meaning of the statute, and, upon negotiation of such instrument by the person who has so prepared it, is that person guilty of uttering a false instrument? In order to determine what is a false instrument we must resort to the common law. According to the ordinary and proper meaning of the words "false or forged," as applied to a note or other instrument in writing, we always understand one that is counterfeit and not genuine—an instrument by which one has attempted to imitate another's personal act, and by means of such imitation to cheat and defraud, and not the doing of something in the name of another which does not profess to be the other's personal act, but that if the doer thereof, who claims by the act itself to be authorized to obligate the individual for whom he assumes to act. This definition of "false" and "forged" is abundantly sustained by authority. *State v. Young*, 46 N. H., 266; *Rex v. Arscott*, 6 C. & P., 408; *Regina v. White*, 2 C. & K., 404 (2 Cox C. C., 210); *Heilbonn's case*, 1 Park. Cr. Cas., 429; *Commonwealth v. Baldwin*, 11 Gray, 197; *Commonwealth v. Foster*, 114 Mass., 311; *Mann v. People*, 15 Hun., 155. Now, in the case under consideration, the deed does not purport to be the personal act of Hoitt. The instrument, on its face, purports to be defendant's own act, but one which he was authorized to do for and in the name of Hoitt. The reader of the deed could not misunderstand it. By its terms the defendant declares that he made the writing, but that he so made it for Hoitt. The

falsity, if any, consists in the claim of authority from Hoitt. The law, as we have seen, is well settled that if a person sign an instrument with his own name per procuration of the party whom he intends or pretends to represent, it is no forgery, it is no false making of the instrument, but merely a false assumption of authority. This deed, therefore, is not a false deed, and consequently in uttering or publishing it defendant was not guilty of uttering or publishing a false deed. If defendant made false and fraudulent claim of authority to execute this deed, and by means thereof obtained money or property from another, he might be guilty of obtaining money or property under false pretenses, but not of the crime with which he is charged in this indictment. We therefore are of the opinion that the court below erred in not granting a dismissal of the action upon motion of defendant when the State rested. The defendant was, upon the evidence, clearly entitled to a dismissal of the action, or to a verdict of acquittal under the direction of the court.

Reversed and remanded.

A NEGLECTED DISTRICT.

In a recent trial in the Criminal Court of this District, the fact was disclosed that there was no statute operating here fixing a penalty for the crime of *incest*. The case was an outrageous one, such as the authorities could not afford to let go without an effort to punish; and so the government was driven to the necessity of bringing in an indictment charging *rape*, which, of course, required proof of *force*, or something tantamount thereto. The jury, not being able to agree as to the sufficiency of the proof on the question of *force*, were discharged.

Ordinarily, when a Legislature fails to provide punishment, the presumption is that they did not intend the crime to be punished; but we cannot visit such a presumption as this on the Congress of the United States. This is, of course, an oversight; but a very great one, and should be speedily provided for.

The misfortune this district lies under is—that the attention of Congress is absorbed by such commanding National questions that they lose sight of small matters. Having to legislate for all the States and the District as well, they do not reflect that the States have their own Legislatures to provide for home affairs, but that the district has no such protection.

It is not intended here to deny that the District receives a goodly share of Congressional attention; but this is not always directed in the best way.

The laws of this District, as to Courts of

inferior jurisdiction, are inadequate to the wants of a great community. The Justices of Peace here are absolutely crippled in the discharge of their simplest duties, in the collection of debts, by the lack of statutes giving and defining jurisdiction. There should be a Code for Magistrates and Constables.

A Constable, in Washington, is a sort of a *non-descript*; instead of being considered and treated as an officer of the law, he is a target for every old beldame that can swing a blunderbus.—*The Law Central, Washington, D. C.*

DISTRICT COURT OF HAMILTON COUNTY.

BOWLER, CARY ET AL.

v.

THE BIDDINGER FREE TURNPIKE CO., W. S. CAPPELER, AUDITOR, ET AL.

JOHNSTON, J.

This action was instituted for the purpose of obtaining an injunction against defendants, restraining them from levying and collecting extra taxes assessed upon the lands of these plaintiffs, for the construction of the Biddinger Free Turnpike. The plaintiffs allege that the preliminary steps were not properly taken; that the requisite majority of property-holders' names were not signed to the application, and, further, although their lands lie within one mile of said road, yet, that within two miles of the turnpike there is an unimproved country-road not connected. They further allege that the turnpike is of no benefit to them or to their lands. The defendants allege that all the proceedings for the construction of this road were regular; that the lands of the plaintiffs, which are assessed, lie within one mile thereof, and are within half the distance of any unimproved country-road, and are liable to said extra tax levied upon their land. To this answer a demurrer was interposed by plaintiffs, and the court below found the demurrer well taken, and the defendants not desiring to amend, a judgment that they be perpetually enjoined from collecting said tax was entered, from which they appealed to this court.

The case is submitted here on the same pleadings, on the demurrer to the answer of the defendants.

It is argued by counsel for plaintiffs, that the act under which the turnpike was constructed is unconstitutional in that a tax is imposed upon their property, when no benefit is conferred. That the act should have been so framed, as to provide for taxing only such land as might be benefited by the road, whereas it provided for taxing all land to the distance of one mile on either side of said pike without regard to benefits. This view seems to have been entertained of the act by the court below. The case is not here for review upon the petition in error and it is unnecessary for this court to say whether the court below took a proper view of the act under which this turnpike was constructed or not. Another view may be taken quite satisfactory to this court, that properly arises under the demurrer touching the constitutionality of the act. It is a well settled rule of practice that a demurrer, no matter by whom filed, searches the entire record, and that leads us to an examination of the petition as well as the answer. It is averred in the petition among other things "that there runs parallel with this free turnpike, a country-road unimproved, called the 'Biddinger road,' that it is unconnected with the free turnpike and within two miles of it." In the answer there is a substantial admission of this averment of the petition, for the defendants

among other things aver "that the lands of the plaintiffs are within one-half of the distance of any unimproved country-road and within one mile of said free turnpike road." Now the section of the act under which the extra tax was levied, reads as follows, Vol. 73, O. L., page 96, section 8: "Extra taxes when levied as hereinbefore provided, shall be on all real and personal property within one mile on each side of the free turnpike road, except * * * where any such roads, or any toll road, or unimproved State or County road, being unconnected with the same, (free turnpike) shall lie, be or run upon either side of such proposed road within less than two miles, then the taxes shall only be levied upon such lands and personal property, as lie one-half the distance of such roads."

Thus it will be observed that if no unimproved, unconnected country-road run or be within two miles of the free turnpike built, or proposed to be built, then all lands and personal property to the distance of one mile upon either side thereof shall be taxed to pay for the same. If, however, such unimproved, unconnected country-road does exist within two miles then there is a discrimination in favor of all property lying beyond one-half the distance of such country road, and yet within one mile of the free turnpike, that is to say that only such real and personal property situate and being within half the distance between such county and free turnpike is subject to the extra tax. Thus property upon one side of the turnpike may be liable to the tax for a distance back of only a few hundred feet, while at other points where no such country-road exists, it is liable to the full distance of one mile, the uniform operation of the law and of the extra tax thus being broken.

The Supreme Court has recently passed upon this same act in the case of Bowles v. The State, to be reported in 36 O. S. Bowles, as is well known, was convicted in this County of forging bonds directed to be issued to pay for this same free turnpike road. What the record in that case showed further than appears in the decision we do not know, whether if there was any evidence showing that there was an unimproved unconnected country road within two miles of this free turnpike road at any point thereon, the report of that case does not show. It would seem that the unconstitutionality of the act was claimed, for the reason that this free turnpike was crossed by another free turnpike, and that therefore, only such land within a mile of such crossing benefited by the proposed turnpike road should be taxed, or rather should be taxed only in proportion to the benefit derived therefrom. This discrimination it was claimed, rendered the act unconstitutional.

The Court after deciding that the Legislature in the exercise of the general taxing power as distinguished from the power of local assessment, may create a special taxing district without regard to municipal or political subdivisions of the State, for defraying the expenses of constructing and maintaining public roads then proceed to say inferentially that if the record did show the existence of such other free turnpike, and that it crossed the turnpike in question, the act and its operation would be in that respect unconstitutional. We quote from the opinion: "All property within the taxing district must be taxed by a uniform rule, according to its true value in money." Under the statute it is plain, that property within the taxing district and within a mile of the crossing of another free turnpike road, is not taxable by the same rule that applies to other property within the district. * * * Under the statute now being considered, the record does not show whether or not the taxes levied for the construction of the Biddinger road improvement would be uniform upon all the real and personal property within the taxing district, viz: within one mile on each side of the Biddinger road. Clearly if the Biddinger road improvement did not cross any other free turnpike road, the rule of uniformity required by the Constitution is not violated. We do not know, and cannot assume that there was any such crossing." And the Court then proceed to say that an act will not be declared absolutely void, if under certain circumstances which may or may not exist, the operation of the statute would not violate the principle of uniformity required by the Constitution. Cooley's Const. Lim. Sect. 178.

Now, if for the reason suggested, this act would have been unconstitutional, unquestionably had the record shown the existence of such a county road as is admitted by the answer in this case, for that reason must it also have been declared unconstitutional, the uniformity required

by Section 2, of Article 12, of the Constitution being disregarded in both cases. The record in the Bowles case not showing that another turnpike crossed the one in question, the Court had the right to and did presume that the Commissioners had proceeded according to law; that the extra tax was properly levied for a distance of one mile upon either side, upon all real and personal property and that another free turnpike did not cross the road in question; thus the act having a Constitutional operation—no discrimination being made in favor of any property within the mile on either side.

It appearing therefore upon a fair reading of the petition and answer in this case that an unimproved and unconnected county road lies within two miles of this free turnpike road, all property, real and personal, is not liable to be and we presume has not been taxed according to a uniform rule within the taxing district, and for that reason the operation of the Statute is in contravention of the uniform rule provided by Section 2, of Article 12, of the Constitution, and so far as this case is concerned, void. The demurrer is sustained and unless defendants desire leave to amend, denying that such a county road does in fact exist, a decree will be entered perpetually enjoining the collection of the extra tax against the plaintiff.

Cox and Longworth J. J., concurred.

ABSTRACT OF RECENT DECISIONS.

ACCOUNT.

Statute of Limitations does not run against each item of Mutual Accounts.—Where there is an open, running, mutual account between two persons, each person does not have a separate cause of action for each separate item of the accounts; but only the person in whose favor there is a balance due on the account has a cause of action for such balance against the other. In such a case, the Statute of Limitations does not run against each item separately; but only against the balance due; and it will commence to run only from the time of making the last item rightfully credited to the party against whom the balance is due; each item thus credited to the party against whom the balance is due, is a payment or part payment, not of any particular item against him, but of the balance due against him; and is, in one sense, a payment or part payment of every item rightfully charged against him in the whole account: *Waffle v. Short*, 25 Kans.

ACTION.

Payee may bring suit in his own name on Accepted Order. W. gave a writer order to the plaintiff for all that was due him, on the defendants, and it was accepted by them, by writing their names across the same. *Held* on demurrer, that the payee could maintain an action in his own name, and recover of defendants whatever was due from them to W.: *Bacon v. Bates*, 53 Vt.

The giving of the order by W.; receiving and presenting it for acceptance by the plaintiff, and accepting it by the defendants, under the circumstances, completed a novation: *Id.*

When an order is given by one party, received and presented by another, and accepted by a third, the agreement of each party is a sufficient consideration for the agreement of every other party: *Id.*

The negotiability of the order was restricted, being for an uncertain amount; but this did not render it invalid, nor affect the payee's right to enforce the same: *Id.*

CONFLICT OF LAWS.

Note made by Husband and Wife in another State.—A. and B., his wife, made and delivered their negotiable promissory note to the plaintiff. The note was made in Massachusetts, where the parties resided, and was valid there. Suit on this note was brought in Rhode Island, the writ being served, on the husband by attaching his interest in the realty of his wife, on the wife by attaching her realty, and on both, by attaching the wife's share of an intestate estate in the hands of an administrator. Pending the suit, the husband was adjudged a bankrupt and subsequently died. *Held*, that the wife being legally incapable in Rhode Island to make a promissory note, the action against her could not be maintained. *Held*, further, that as in Rhode Island the husband must be made co-defendant with the wife, and there was in

this case no service of the writ on the husband, the action was fatally defective: *Hayden v. Stone*, 13 R. I.

CRIMINAL LAW.

Confession.—Confession in a legal sense is, in effect, an admission of something which proves, or tends to prove, that the party making it was himself connected with the alleged crime, in a criminal or questionable manner; hence, admissions which tend to criminate a third party, are not within the rules of law, that exclude confessions, induced by promises and hope of favor: *State v. Carr*, 53 Vt.

LENGTHY PLEAS.

Eminent pleaders have always observed one rule which is inculcated by all writers upon oratory in general, namely, "say what you have to say, and then sit down." In this province, as elsewhere, no doubt, garrulous, voluble lawyers abound; not, we should say, in the higher ranks of the profession, but among the inferior members whose appearance in court is rather infrequent. Some lawyers imagine that an argument to be powerful must be lengthy, and a greater mistake was never made. Tacitus in his *De Oratore*, refers to a practice which obtained under the Roman emperors, of limiting the speeches of advocates to two hour-glasses in certain cases, a custom which now prevails in many courts, and notably in the New York Court of Appeals, where the addresses of counsel are limited to one hour. It is quite possible that such rules may at times work injustice, but a court should at least be allowed to exercise a certain discretion to limit the tedious harangues of long-winded practitioners. When one hears that a Montreal lawyer, whose most famous achievement is a speech of two hours on a motion in the Circuit Court, lately blocked the business of the Court of Appeals by speaking for over a day and a half in a comparatively unimportant case, one is inclined to censure the tribunal which permitted such an outrage quite as much as the lawyer who perpetrated it. With printed evidence and a well prepared factum there can possibly be no necessity for any such infliction; and if the court had peremptorily ordered the orator to desist, it would have given great satisfaction to those of the profession whose business was delayed in consequence, and have proved a salutary warning to others disposed to lengthy speeches. The fact that such an occurrence is the exception at the Montreal bar is our excuse for referring to it.—*Montreal Star*.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Sept. 20, 1881.]

1170. George W. Spangler et al v. Elvira Dukes. Error to the District Court of Wood County. A. Blackford and J. H. Reid, attorneys for plaintiffs.

1171. Francis Dawson et al v. Milton Bartholomew. Error to the District Court of Morrow County. H. L. Beebe for plaintiffs; T. E. Duncan for defendant.

1172. John Johnson v. Trustees of Otterbein University. Error to the District Court of Wood County. J. A. Shannon for plaintiff.

1173. Elmira Hershey, adm'r &c. v. Rebecca Bair. Error to the District Court of Stark County. A. C. Hiner and Lynch, Day & Lynch for plaintiff; Freese & Case for defendant.

1174. Andrew Brill v. Singer Mfg Co. Error to the District Court of Hamilton County. Tilden, Buchwalter & Campbell for plaintiff; King, Thompson & Maxwell for defendant.

1175. John W. L. Brown et ux v. North-Western Life Insurance Co. Error to the District Court of Washington County. R. K. Shaw for plaintiff; Ewart, Sibley & Ewart for defendant.

1176. Patrick Brannon et al v. John B. Purcell et al. Error to the District Court of Hamilton County. Healy & Brannon, King, Thompson & Maxwell, Wilby & Wald and Stallo, Kittridge & Shoemaker for plaintiffs; Hoadley, Johnson & Colston and Mannix & Cosgrove for defendants.

1177. Joseph Counsel v. C. H. & D. R. R. Co. Error to the District Court of Hamilton County. Jordan & Bettman for plaintiff; Matthews, Ramsey & Matthews for defendant.

Ohio Law Journal.

COLUMBUS, OHIO, : : : SEPT. 29, 1881.

FOR SALE !

We have for sale a complete set of Ohio and Ohio State Reports, only a few weeks out of the hands of the publishers, fully as good as new, (they are new, in fact,) which we will sell cheap for cash. Also, a large lot of new and second-hand law books, at very low prices. Send for list.

LORD & BOWMAN.

POSTPONING THE STAR ROUTE GRAND JURY.

Neither the Attorney General nor his associates can be held to be in the slightest degree responsible for the delay. They expected some of the cases to be taken up by the grand jury next week, and they were ready to present them. It will now be about the middle of October before they can hope for another opportunity, and in the interim a broad hint might be conveyed to the accommodating Corkhill that further trifling with this matter will be regarded as a proof of his unfitness to discharge the duties of his position.

We clip the foregoing from the New York Times. It appears to us very much like an insinuation that the Prosecuting Attorney of the District of Columbia is not hurrying the investigation and punishment of the *Star Route thieves* as he might do. It does seem strange that some people expect Prosecuting Attorneys to work miracles in bringing criminals to justice. The fact that such officers are only human seems to be entirely forgotten; and that their hearts are not always dead to the promptings of mercy, is likewise not remembered. Colonel Corkhill no doubt feels for those gentlemen who have been so unfortunate in their speculations in "advancing" mail routes. They were in a fair way to become very wealthy and very much honored in consequence, when Postmaster General James so officially interfered and broke up their business. In their misfortune good Colonel Corkhill no doubt deeply sympathizes, and does not, therefore, bear down upon them too severely.

We can understand this kind-heartedness on the part of the official. We have in this good old County of Franklin a very similar instance of the sweet mercy that shrinks from giving

pain to poor erring humanity. About two years ago a farmer went to a neighbor's house and playfully stuck his big jack knife into his neighbor's corporation, nearly severing his back bone and almost cutting his liver out. The party thus dealt with showed such rare good pluck that he kept on breathing and even trying to get away, and this roused the admiration of the carver to such an extent that he applied a still further test to his tenacity and mashed his head with a brick. Still he wouldn't give in and others induced the masher to desist. The neighbor was not confined to his bed more than five or six months; but upon getting out had his friend arrested and indicted for "cutting with intent to wound." The P. A. would not hurt his feelings by making it "with intent to kill"—such a nice gentleman he was! And until this day he has not been brought to trial. True the neighbor is very much incensed and tries hard to get the ease to trial, particularly as his cut liver shows a disposition to carry him off one of these days, and as the carver comes over periodically and sneers at him and his efforts to get the case to trial. But the good-hearted P. A. spares the feelings of the playful defendant and still he roams at large.

Besides this, there are a dozen butchers slaughtering cattle, hogs and sheep within a short distance of the benevolent institutions of the State, in violation of a well-known law. The officers of the State have long tried to have the butchers indicted for this flagrant violation of law. But the kind-hearted P. A. won't have it so. He sees the hard times these men have selling beef-steaks at eighteen cents the pound, and losing sleep to get them ready even at that price; and so he kindly refuses to get them indicted, allaying their fears and frowning upon the meddlesome people who would give them trouble. We admire this evidence of heart. None of your hard-hearted Prosecuting Attorneys for us. Give us one like our own William J., whose motto is that "man's inhumanity to man makes countless thousands mourn."

A CONUNDRUM.

An indignant Cincinnati writes for legal advice upon the following statement of facts. He says:

"I am a temperance man—a prohibitionist of the strictest sect, and an ardent admirer of the late lamented President. I was, moreover, one of the contributors to the 'Commercial Fund' to reward a man named Cook, of Newark, for

striking a Democrat who had expressed pleasure at the assassination. Since contributing, for myself and the members of my family—nineteen cents, in all—I have heard things which prompted me to investigate the matter. I find that Cook quarrelled with a Republican concerning the differences between the Half-breeds and Stalwarts; that the other man said 'there were many Republicans in New York who were no doubt glad that Garfield was shot;' that Cook, who was a Conkling man, called the Garfield man a 'scoundrelly half-breed,' and was in turn called a liar, and that the blow was then given. Now, I also learn that the 'Fund' has been expended by Cook in fitting up a whiskey shop and buying a stock of liquors, and that he is retailing liquid damnation at ten cents a drink, while I am working for fourteen shillings a day. Now, what can I do? The representations made by the parties calling for the 'Fund' were false. The money has been given to a man who insulted Garfield by the blow instead of defending him, and now, last and most humiliating of all, he has invested my money to carry on the hellish work of the rum-seller. Is there any redress?

"INDIGNANT."

Under the circumstances, we can only say to our correspondent that, while he has a very grievous grievance, the less said about it the better.

There can be little doubt that an action would lie against the solicitors of the "Fund," but the money could hardly be recovered from Cook. He would no doubt "set 'em up" to you, if you were to drop into his saloon and explain the matter, unless, indeed, he feared that each giver of a penny would be coming in for a free drink, in which case he would wisely decline. The best thing "Indignant" can do is to steer clear of "Funds" in the future, unless he is certain the object of the charity is entirely worthy and his tale a true one.

LAWYERS AS LAW MAKERS.

The following from the *Kansas Commonwealth* meets with our heartiest endorsement:

"It is not the fault of the lawyers in the legislature that so many unconstitutional laws are passed. Almost invariably such acts become laws in the face of protests from lawyers. * * * At every session there have been a lot of members who thought to make themselves popular by denouncing lawyers. Every measure proposed by a lawyer would be opposed by these wisacrees. They would try to make the people believe that lawyers were always trying to get some measure through to rob the people. The result has been, and always will be, that crude, unwise laws have been passed. We mean, always will be till the people send men to the legislature, who either know something themselves, or know enough to know that they don't know anything, and will follow the advice of those who do know something."

THE DEAD PRESIDENT.

Remarks before a Citizens' Meeting held at Columbus, Wednesday evening, September 21, 1881.

BY HON. R. A. HARRISON.

A meeting was called by the Mayor of Columbus, for the purpose of giving some public expression upon the death of the late President, Garfield, at which Hon. R. A. Harrison was called to preside, who, on taking the chair, said:

"To me the death of President Garfield is, in truth, a personal, individual bereavement. I had the delight and the honor of knowing him, personally, long and well. It was my good fortune to be an humble co-laborer with him in his first public service. Twenty-one years ago last January he and I entered yonder Senate Chamber as members elect of the Senate of Ohio. General Garfield was then a young man—the youngest man in the Senate. In spite of his youth, he soon became its foremost member in the important debates and the important measures. O, how vividly the sad and painful event of his demise has recalled what manner of man he was then. His private life was then, as it has ever been, spotless. His heart was then, as ever afterward, warm, generous, charitable and unsullied. His habits were then, as they have ever been, regular and abstemious, industrious and studious. His manners were then, as they always were, singularly youthful, simple, sincere and genial. He was then, as he never ceased to be, a man of sturdy, active and inspiring faith—believing in Christ and his fellow man. He was in the Ohio Senate, as he afterward became in the House of Representatives of the United States, the ablest debater and most eloquent orator. The finger of him who "touched Isaiah's hallowed lips with fire" touched his. Perhaps when he entered the Senate he knew more of books than he knew of men, but he soon read, understood and became master of the one as he did of the other. He then was without fortune, and so exclusively did he ever afterward devote all his energies to the public service, and so incorruptible was he, that he died without fortune. He was, at that time, when the clouds of civil war were rapidly gathering over the Republic, the determined and eloquent defender of the maintenance of liberty and Union, at all hazards. When the time for argument had passed, he left the Senate chamber for the tented field,

and there did yeoman service for the preservation of an individed and undivisible Republic. As a member of the Senate he was a devotee in the service whereunto the people had called him, taking an active interest not only in what concerned the physical well being of his country, but in every measure which might promote the intellectual and moral improvement of the people. He took a special interest in whatever concerned the public schools and the benevolent institutions of the State. He was then, as he always was, an unrelenting and active enemy of oppression in every form. He abhorred human slavery, and on every fit occasion denounced it. He was then recognized, as he has since so often demonstrated himself to be, a man of courage—not merely physical courage, but that which is far more noble and more rare, *moral courage*. No man then had more devoted friends; but they were confined to the comparatively few who then knew him. O, how from year to year they have multiplied. No public man was ever more beloved by his countrymen than General Garfield is to-day. And it can be said with literal truth that those who paint him truest, praise him most.

I watched, with lively interest, the career of General Garfield from the time he left the Ohio Senate in the spring of 1861, until he was placed by the American people upon the summit of earthly fame. I venture to say that there cannot be found in the world's history a man who, upon a theater so vast and varied, made a steadier and more rapid growth than he in all the great and ennobling qualities of statesman, orator, soldier, patriot and political leader. Would to God that he had been spared to complete a life of three score and ten years, for the sake of his country, the world and posterity, as well as for the sake of his noble family and of the aged and beloved mother, whose sterling characteristics were impressed upon the son and made him the idol of his countrymen and illustrious among mankind.

No other country could have produced such a man. He was a perfect type of our free institutions. The horrid hand of an assassin has deprived him of his life and his country of his services before he attained fifty years of age. Still, young as he was, his honest fame is as wide as the globe and will be perpetual as time. The announcement of his death carried inexpressible sorrow to every household and every heart. In common with the American people, the rest of

the civilized nations are in mourning that this young but illustrious man is now lost to his country and mankind. One touch of nature makes the whole world kin. While General Garfield's name and fame will be held in perpetual and sacred remembrance, the crime, and the name of the perpetrator of the crime, which has brought this irreparable calamity, will be given over to eternal execration.

The heroic and Christian patience, fortitude and courage with which General Garfield bore his terrible and prolonged sufferings from the day he fell until his demise, and the manner of his death, confirm Sir Thomas Browne's declaration that "marshaling all the horrors of death, and contemplating the extremities thereof, I find not anything therein to daunt the *courage* of a man, much less a *well-resolved Christian*."

EXEMPLARY DAMAGES.

There is, I believe, a growing conviction among the jurists of the present day, that the law of punitive or exemplary damages has been built upon a wrong foundation, and is alike contrary to principle and evil in its effects. I share deeply in this feeling, and in the hope of effecting something, however little, toward a reform, would willingly add a few words to what was once a much discussed question.

It is the aim of the common law in cases where damages are proper, to give complete redress, so far as this can be estimated in a pecuniary way. Whatever the practical result may be, the law does not confess its inability to give just compensation, nor abandon the theory that the remedy is sufficient. The controversy has been with reference to the proper rule of damages in cases of aggravated torts.

A few of our courts in this country maintain, that the proof of malicious motives forms a basis for special or extraordinary compensation; to cover not only the natural and legal results of the tort, but as near as can be estimated, damages for mental or physical pain, anxiety or distress, or degradation, which actually resulted from the act. But in the rulings of these courts which uphold the system of exemplary or vindictive damages, a radical difference is made between ordinary torts, and cases where there is fraud, willful negligence, or actual malice on the part of the defendant—the rule not confining the jury to simple compensation, but allowing them to give such further damages "as will mark their sense of the injustice and insult done to the plaintiff, as punishment upon the defendant, and as a wholesome example to the community." We find these words in substance used again and again by the courts of this country, until their continued repetition, unaccompanied by explanation, tries the ear. The judges seemingly endeavor to evade the responsibility and inconsis-

ency of the doctrine, by parroting the expression of others. The position taken by those who, like Mr. Sedgwick (*Sedgwick on Damages* 573, note, 6th ed.), and Dillon J. (*Berry v. Fletcher*, 1 Dillon 67), have the vigor to assert an open opinion is, that it is only just to the outraged sense of the community, that the defendant should be assessed such a farther sum, beyond compensation, in proportion to his wealth as will relieve the sting of insult, and deter the defendant from a repetition of the offence. The fact, that the assessment goes to the plaintiff is incidental, and subservient to the necessity of giving an example to the community and of punishing the defendant.

This, in a few words, is the principle of the doctrine of exemplary damages. To us it seems to have arisen under a mistaken idea, and as a result of unadvised dicta and incompetent reasoning. It is quite well established in this country, though the tendency of some modern decisions is to repudiate it altogether. Some courts recognize the inconsistency, while they yield to the authority of precedents. *Brown v. Swineford*, 44 Wis. 282; *Smithwick v. Ward*, 7 Jones. L. R. (N. C.) 84.

The difficulty of estimating compensation by intangible injuries, was the cause of the rise of this doctrine; the hardship of particular cases was the pretext; and without comprehending the extensive consequences, the judges of our courts have, perhaps unintentionally, allowed their sympathy for mental distress to overpower the principles of the law. There can be no doubt, that there are cases arising, which require extraordinary remedy beyond the mere money loss; and when the early judges allowed the jury discretion to assess beyond the *pecuniary* damage, there being no apparent computation, it was natural to suppose that the excess was imposed as a punishment. The courts in subsequent cases took this view, and in many instances were, no doubt, deceived by the indignation expressed in terms so strongly against the defendant, as to give rise to the idea that the damages were punitive.

In spite of the dicta of the courts and the able views of Mr. Sedgwick (*Law Reporter*, April and June 1847) and other jurists, I do not think such damages can be sustained on principle. The arguments of Judge Nelson of New Hampshire (*Fay v. Parker*, 53 N. H. 842), and Mr. Greenleaf (2 Gr. on Evidence, 235, note, 13th ed.), are more conclusive; and it must become more and more evident to careful thinkers, that the doctrine is unsound, and if carried to its legitimate results, that it would be very disastrous. It might seem at first sight (and some writers have taken this view: *Hilliard on remedies for Torts* 440, note a; *Field on damages* 70), that the distinction between exemplary damages, and damages given as special or extraordinary compensation, is one of words merely; and the effect of allowing the former, is the same as that produced upon the theory of compensation, when this is extended to cover injury beyond the pecuniary

loss. If this is true, which I believe it is very far from being, the terms "exemplary" and "punitive" damages, are certainly very ill chosen; for it leads the jury, however much restrained in theory, to make the estimate of damages, with a view to punish the defendant rather than compensate the plaintiff: *Hendrickson v. Kingsbury*, 21 Iowa 379.

But the distinction is more than one of words. The jury under the one instruction, would be liable to go beyond the ends of justice. Under the system of exemplary damages, they are instructed to give not only compensation, but are allowed to punish the defendant with a further sum; and it is expressly held, that evidence of his pecuniary ability, is admissible to guide the jury in estimating what sum must be assessed against him to make the punishment effective: *Guenegrech v. Smith*, 34 Iowa 348; *Buckley v. Knapp*, 48 Mo. 152.

Under the principle that damages should never be given beyond compensation, the jury is instructed to estimate the entire injury, taking into consideration the mental anxiety and distress, as well as pecuniary loss, and to give full compensation for all the injury which defendant's malicious act has caused; and beyond this, not one cent. The result is very different. The jury in the latter case deal with the question as one of remedy, and not of criminal fine.

And it is difficult to see how, under the established system, any reasonable restraint can be on principle imposed on the jury. It is said that the court may set aside the verdict, if it is unreasonably large; but in such cases it is found, that when the judge comes to consider the verdict, he practically looks to the doctrine of actual compensation, which is supposed to be for the time being discarded. The conclusion is, that if the verdict is allowed to stand, it is because it corresponds to the theory of the advocates of compensation, and that of exemplary damages has been practically disregarded. *Nelson J.*, in *Fay v. Parker*, before cited, shows, that under the latter doctrine there is no inconsistency in compensating the plaintiff four times over.

In the case of *Markham v. —*, reported in 2 *Erskine's Speeches*, p. 9, the great barrister Erskine shows, that the words of Lord Kenyon have been misinterpreted, and never authorized the incorporation of criminal remedies into civil procedure. It seems to me, that the mingling of the criminal principles with the civil, which the doctrine necessitates, is altogether wrong. And even if it be allowable to fine the defendants in a civil court, there seems no reason why plaintiff should be the recipient. It is difficult to see why a man should receive a fine, to which he is not entitled in right as compensation. If the plaintiff is entitled to damages as a matter of right, let him receive them in the proper character of indemnity; if he is not so entitled, there is no power in any government which can justly deprive another of his property for plaintiff's ben-

est. Judicial procedure ought not to be made a cover for the confiscation of private property.

The attempt has been made to bring the doctrine within the constitutional provision, "that no person shall be subject for the same offence, to be twice put in jeopardy of life or limb;" and though according to the strict rules of interpretation, the objection is not well made, yet the spirit of our institutions would seem to forbid a civil fine for an offence which could be punished criminally (*Austin v. Wilson*, 4 Cush. 275). As to its being a matter which public benefit justifies, Lord Commissioner Adam of Scotland, has said, "a civil court in matters of civil injury is a bad corrector of morals; it has only to do with the rights of the parties." *Beattie v. Bryson*, 1 Murr. R. 317.

If the theory of punishment is to be carried out, consistency would require, that the amount charged to the defendant should be divided into two parts—the one to be awarded to the injured party as compensation, the other to be paid to the state as in cases of criminal fine. And, moreover, there never was the necessity for this doctrine which eminent judges have supposed. There is indeed this much of justice in it, that in particular cases it furnished a means of redressing wrong, when there seemed no other expedient at hand; and which, though contrary to principle, was sufficiently effectual. A good result has been often obtained by it, but a comprehensive application of the theory of compensation, would accomplish every purpose in a more rational manner: *Meagher v. Driscoll*, 99 Mass. 281; *Fillebrown v. Hoar*, 124 Id. 580. There is no impracticability in calling upon a jury to estimate the damages with reference to the full injury sustained, taking into consideration not only direct and indirect pecuniary loss, but also the hurt done to the finer instincts of human nature, if an insult is contemplated, the injury is greater on that account. If the act proceeded from *mala mens* or malice, this fact has caused mental anxiety and vexation, perhaps disgrace, which can be accounted for in money.

And, as is undoubtedly the truth, if in many cases any pecuniary compensation is, from the nature of things, essentially inadequate, the courts should not be either deterred thereby from coming as near as possible to complete compensation, or be made the means of inflicting a criminal fine for injury which the defendant has not caused. The maxim "*causa proxima, non remota spectatur*," should apply here as elsewhere, and the defendant be made liable to the extent that the injury is the result of his wrong, and no further.

There is no doubt extensive authority in this country to sustain the doctrine of exemplary damages, but I question very much whether it is as overwhelming as is generally supposed. Dicta will be found probably in every state which seem to support the principle; but we are apt to be misled by mere words. Mr. Greenleaf criticises with considerable success, the authorities chiefly relied on by Sedgwick, and his reasoning

will apply to a great many other and later cases, which he has not touched: *Greenleaf on Evidence* 235, 13th ed.

There is a large class of decisions supporting the doctrine superficially, which upon analysis, really go no farther than to authorize extraordinary compensation. The courts speak of "damages beyond compensation," but by the latter word or "actual compensation," as some have called it, they mean to cover simply the pecuniary loss proved at the trial. That something beyond this should in certain cases be given, every one acknowledges; they call it "*exemplary damages*," but it is compensation, in spite of the misnomer.

The spirit of these decisions, however ill-chosen the words may be, is undoubtedly not in favor of "punishing" the defendant beyond full indemnity. When the courts speak of giving damages "as compensation to the plaintiff, and an example to the community," it is a ridiculous misuse of words and goes no farther. Compensation is given because the plaintiff is entitled to it, independent of the effect upon the public. That the assessment often does operate as a punishment, and an example is purely incidental. Yet the courts have followed the letter rather than the spirit of decisions, and have deceived the judges in after cases by their misuse of terms; while the latter conceive themselves more bound by authority, than reason. This, in a word, is the history of exemplary damages in nearly every state where they can be said to be established.

Of the class of cases above spoken of, *Linsley v. Bushnell*, 15 Conn. 225, is a fair illustration. In that case, the court elaborates upon the necessity of full and adequate compensation, in distinction from the mere taxable costs. *Malone v. Murphy* 2 Kan. 262, decided in Kansas, is another similar case; and the dictum is for exemplary damages, as long as they do not conflict with the theory of actual compensation.

A careful review of authorities shows, that of the states commonly considered as adhering to the doctrine, there are several where a vigorous decision in favor of simple compensation would be justifiable in view of precedent, as following the spirit rather than the words of the decisions. This was the condition of things in New Hampshire, before the case of *Fay v. Parker* fixed the position of that state beyond question.

Among the states which now stand in this middle position, I think I can with reasonable certainty name California (*Wilson v. Middleton*, 2 Cal. 54; *Dorsey v. Manlove*, 14 Id. 553; *Selden v. Cushman*, 20 Id. 56), in this state the subject is now regulated by statute; Connecticut (*Linsley v. Bushnell*, 15 Conn. 225, 267); Indiana (*Millison v. Hoch*, 17 Ind. 227, but contra *Shafer v. Smith*, 1 Cent. L. J. 271; Iowa (*Hendrickson v. Kingsbury*, 21 Iowa 379); Kansas (*Malone v. Murphy*, 2 Kan. 262; *Hefly v. Baker*, 19 Id. 9; *Titus v. Corkins*, 21 Id. 722); Michigan (*Welch v. Ware*, 32 Mich. 77; *Daily Post v. McArthur*, 16

Id. 447); Maine (*Pike v. Dilling*, 48 Me. 539); and Texas (*Cole v. Tucker*, 6 Texas 266.)

On the other hand, there are several states where there seems no fair opportunity for doubt, that they are completely committed to the doctrine. Of these are New York, Alabama, Illinois, Kentucky, Maryland, Vermont and Missouri. The position of the Federal Courts is hard to define. Most of the cases usually cited, do not touch the point. The strongest United States dicta are in *Day v. Woodworth*, 13 How. 363; and *Berry v. Fletcher*, 1 Dillon 67.

There are some states which clearly and satisfactorily limit damages to compensation. It is a relief to find a healthful practical view, among the many vacillating and contradictory decisions. Massachusetts (*Barnard v. Poor*, 21 Pick. 378; *Austin v. Wilson*, 4 Cush 273) and Nevada (*Johnson v. Wells, Fargo & Co.*, 6 Nev. 224; *Quigley v. C. P. Railroad Co.*, 11 Id. 350), have consistently taken this stand; and New Hampshire is now, as we have seen, classed with them.

The preponderance of authorities is, however, in favor of exemplary damages. It is a great mistake which should be corrected, either by legislative enactment or the law-making power of the courts. For the doctrine is productive of positive evil. "It has demoralized an honorable profession by the prizes held out to the litigious and unscrupulous, and their advocates in court expecting to share in the promised confiscation of another man's property:" (6 Cent. L. J., p. 74). There would be fewer damage suits filling up the dockets of our courts with useless, or else unrightful litigation, if plaintiffs could recover only what they have suffered; and the courts would not be obliged to resort to the thin fiction of "public example," in order to make reparation for the ruin of character and destruction of homes, brought about by slanderers and seducers. The reproach upon our law, that it compensates for the loss of the slightest *service*, but not for the severance of the dearest ties, or the ruin of human happiness, would not exist.

In a late Nevada case, *Quigley v. Central Pacific Railroad Company*, 11 Nev. 350, the consideration of the question is thorough and satisfactory; and the words of Beatty, J., therein reported, accord so closely with my views of what is right upon this subject, that they may be taken as an appropriate conclusion, and apt expression of what it has been the aim of this article to establish: "As to the question whether a jury in awarding vindictive damages, can go beyond a full compensation to the plaintiff for his pecuniary loss, and bodily and mental suffering, and add a further sum by way of punishment to the defendant, for the sake of example, I think the weight of reason and the best considered cases are in favor of restricting the award to compensation to the plaintiff. Of course the amount of compensation to which he will be entitled, will depend, in every case, upon the circumstances of the injury; and in cases of gross and wanton outrage, heavy damages should be allowed, which, while they would go to the plaintiff as a com-

pensation, would operate incidentally as a severe punishment to the defendant. In this sense and in this sense only, in my opinion, is it proper to say that a defendant may be punished in vindictive damages."

EDW. C. ELIOT.

Am. Law Register.

SUPREME COURT OF PENNSYLVANIA.

LYNCH'S APPEAL.

MARCH 21, 1881.

A decree of a court of equity rescinding a contract for the sale of land, should be made only on the ground of mutual mistake or misrepresentation and fraud; unless the evidence of these be so clear as to leave no room for hesitation or doubt in the mind of the court, the parties should be remitted to their legal remedies.

A chancellor may refuse to enforce the execution of a contract on the ground of improvidence, surprise or hardship; but should rescind a contract only for fraud, illegality or mistake.

If an agent of the vendor attempt to impose on the vendee by representations which he ought to have known to be false, and which he did not know to be true, and the vendee falsely state the object of his purchase, in order to get a better bargain, neither of the parties act fairly, and a chancellor should refuse to interfere either to execute or rescind the contract, but should leave the parties to any legal remedies they may have.

Appeal of I. V. Lynch, J. C. Miles and John W. Miller from a decree of the Court of Common Pleas of Luzerne county.

Bill in equity, filed by Victor Koch against I. V. Lynch, J. C. Miles and John W. Miller, praying that certain articles of agreement for the sale of land by defendant to complainant be rescinded, and the moneys paid thereon be returned, on the ground of the misrepresentations of W. H. Stanton, the agent of the defendants.

By the articles of agreement the defendants sold to the complainant for \$6,000, to be paid in installments, "the coal in and upon and under the (described) tract of land, with all the privileges of mining and transporting the same, with the full and free right to enter upon said land, sink shafts," etc.

The answer alleged misrepresentations on the part of the plaintiff, and denied the authority of Stanton.

George R. Bedford, the Examiner and Master, after hearing the case made his report, concluding as follows:

It being determined that the defendants were bound by the representations of Stanton; that they were not true; that the plaintiff had a right to rely upon them, and in fact did rely upon them, and purchased, believing them to be true, it follows that the plaintiff is entitled to have his contract with the defendants rescinded, and the Master, therefore, in conclusion, reports that, in his opinion, it is proper to decree that, so far as said contract remains unexecuted by the actual payment of the purchase moneys, the same be rescinded and delivered to be cancelled; but that the prayer for the re-payment of the five hundred dollars be denied.

To this report the defendants filed various ex-

ceptions of law and of fact, which were dismissed by the court; whereupon they took this appeal, assigning for error the dismissal of their exceptions, and the confirmation of the Master's report.

GORDON, J.

This is a case where the court below in the exercise of its equity powers has undertaken to rescind a contract under seal between the defendants Lynch, Miles and Miller of the one part, and the plaintiff, Victor Koch, of the other part, for the sale of all the coal lying under one hundred acres of land therein described. This could be done only on the ground of mutual mistake, or misrepresentation and fraud, and of these the evidence should be so clear as to leave no room for hesitation or doubt in the mind of the court. If there be any such hesitation or doubt the bill ought to be dismissed, and the parties turned over to their legal remedies. Herein it is, that we think both the Master and the court below fell into a mistake.

The decree was based on certain representations, alleged to have been made by W. H. Stanton, who, as the Master found, was acting as the agent of the defendants in the sale to Koch, but he has not found that these representations were, at that time, known by either Stanton or his principals to be misrepresentations. The Master says: "Arrived upon the ground, Stanton, claiming to be familiar with coal lands, asserted that there were three underlying veins of coal, though it was apparent there was no development of the land, or evidence of its having been subjected to any test to determine the existence, or non-existence, of coal. Koch, however, was evidently impressed with Stanton's sagacity, and put entire faith in the latter's opinion."

It is thus quite obvious that Stanton's representations were not and did not profess to be of known facts, but were expressions of opinion only. It is true he may have impressed Koch with the idea that he was an expert, and thus may have given to his opinions a weight which they otherwise would not have had, nevertheless they were but opinions, and were not represented as facts. Indeed such could not well be for Koch was upon the land, and could and did see for himself that the land was not developed. He, therefore, knew certainly that Stanton's representations were merely the expressions of his opinions. Then when he met with the defendants in person, they dealt with him at arm's length; they made no representations whatever; they had what they believed to be a coal reservation to sell; to them Koch professed to be utterly indifferent whether it contained coal or not, representing that his object was to acquire their right for the purpose of relieving the surface, which he alleged he was about to buy, from intrusion by those who otherwise might enter to prospect a mine. Under such circumstances as these, a chancellor might well hesitate about the rescission of a solemn contract of the parties. It may be admitted that the agent of the de-

fendants did attempt to impose on the plaintiff by representations which he ought to have known to be false, and which he certainly did not know to be true; on the other hand it is an uncontroverted fact that the plaintiff approached the defendants with a falsehood in his mouth in order to conceal his true purpose, and get their claim for as low a price as possible.

Here then is more than doubt; neither of the parties is acting fairly with the other, hence a chancellor will interfere for neither. Under such conditions he will interpose neither to execute nor rescind their contract, but will leave them to their legal remedies, if any such they have.

But there is another principle involved in this case, which seems to have been overlooked by both Master and court, and that is the wide difference between the facts and circumstances necessary to move a chancellor to refuse the execution of a contract, and those necessary to induce him to rescind it. In the one case interposition will be refused on the ground of improvidence, surprise or even mere hardship; in the other a court will act only on the ground of fraud, illegality, or mistake: *Graham v. Pancoast*, 6 Cas., 89; *Edmond's Appeal*, 8 P. F. S., 220; *Yard v. Patton*, 1 Har., 278; *Stewart's Appeal*, 28 P. F. S., 88; *Rockafellow v. Baker*, 5 Wr., 319.

The Master confesses "that during the whole process of the case, his impressions on this point were all against the plaintiff, and with the defendants, and that the rule of *caveat emptor* applied." He furthermore says that he reached the conclusion that the plaintiff had a right to rely on the statements made by Stanton as to the existence of coal with much hesitation. This hesitation was overcome by what he supposed the binding authority of *Fisher v. Worral*, 5 W. & S., 478; and *Smith v. Richards*, 13 Peters, 26. But the former was a case of specific execution, and the latter one of plain misrepresentation and fraud, so that neither was in point. On all authority then this very hesitation should have led him to a different result. It might well be, especially if the testimony of Vanhooser is to be believed, that neither a chancellor nor a court and jury would enforce this contract against Koch, but under all the circumstances, especially in view of the fact that Koch himself approached the defendants with falsehood and misrepresentation, though perhaps they were not deceived thereby, yet as it may have induced them to deal with him differently from what they would otherwise have done, a chancellor will refuse his interposition to relieve him by the rescission of his contract.

The decree is reversed, and bill dismissed at the costs of the appellee.

A sea captain was brought before a justice and mercifully attacked by his opponent's lawyer. When at length he was suffered to speak, he said: "Your Honor, I ask a delay of one week in the proceedings, so that I may find a big enough liar to answer that man." His request was granted.

SUPREME COURT OF MINNESOTA.

McCORMICK v. KELLY.

July 15, 1881.

An action upon a general warranty of an article sold, will not lie for defects known to the purchaser at the time of sale. He must be misled and induced to purchase by the warranty.

An agent to sell harvesting machines is presumed to have authority to warrant the same.

Action upon a promissory note given for an agricultural machine. The opinion states the facts. From an order denying a new trial after verdict for the plaintiffs, defendant appealed.

DICKINSON, J.

This action was brought to recover the amount of a promissory note made by the defendant to the plaintiffs for part of the purchase-price of a harvester purchased by the former from the latter. The making of the note is not in issue; the only defense asserted being in the nature of a counter-claim for damages from an alleged breach of warranty, on the part of the plaintiffs, in respect to the harvester.

By his answer the defendant avers that he first took the machine on trial, and upon the trial it proved to be unsatisfactory and would not do good work, and that he notified the plaintiffs to take the machine away; whereupon the plaintiffs promised and agreed with the defendant to put the machine in good order; to furnish certain parts of the machine new, and warranted the machine to be well made, of good material, durable, and not liable to break or get out of order; that it would cut and elevate grain as well as any other machine, and was in all respects a first-class machine, and capable of doing first-class and satisfactory work as a harvesting machine; relying upon which promises, agreements and warranties, defendant purchased the machine giving the note in question.

The answer further alleges that the plaintiffs refused to put the machine in good order, or to furnish new parts for the machine, and sets forth a breach of the terms of the warranty.

By a reply the plaintiffs put in issue the making of a warranty, as well as the agreement to furnish new parts for the machine. The evidence on the part of the defendant tended to prove that he got the machine for trial before the commencement of the harvest of 1878; that it did not work well, although he used it to cut about seventy acres of grain; that he often made complaint to the agents of the plaintiffs, who urged him to keep the machine, and do the best he could with it; and that after harvest the agents of the plaintiffs represented that it was as good a machine as there was in the market, and he would make it so; that it was all right, and would do as good work as any machine in market, and it should be fixed up in first-class order, with the new parts referred to in the answer; that the defendant purchased the machine then, and gave the note, relying, as he testifies, upon the representations made. The evidence

tends to show that at this time the defendant knew the defects in the machine of which he now complains.

At the request of the defendant the court instructed the jury as follows: "If the jury find, from the evidence, that the plaintiffs expressly warranted the machine for which the note in suit was given, and that the defendant was induced by such warranty to execute and deliver said note, the plaintiffs are liable for all damages which the defendant has sustained by reason of the breach of such warranty, and this liability is not affected by the fact that the defendant tried said machine before the making of said warranty." To this the plaintiffs excepted.

At the request of the plaintiffs the court instructed the jury as follows: "I charge you that where a general warranty is given on the sale of a machine, defects that were apparent at the time of making of the bargain, and were fully known to the purchaser, cannot be relied upon as a defense to a note given for such machine, when the purchaser has such knowledge at the time of giving the same. (2) If you find that the machine was taken on trial under a contract to purchase, and that after having fully tried it the defendant gave his note therefor, he cannot offset against any such note damages arising from any alleged breach of warranty against defects known to the defendant at the time of settlement and giving of the note."

The court further instructed the jury in the following language: "A vendor may warrant against a defect that is patent and obvious. * * * You sell me a horse, and you warrant that horse to have four legs, and he has only three. I will take your word for it. [The court then read in the hearing of the jury the following from Addison on Contracts: 'When a general warranty is given on a sale, defects which were apparent at the time of the making of the bargain, and were known to the purchaser, cannot be relied on as a ground of action. If one sells purple to another and saith to him, 'This is scarlet,' the warranty is to no purpose, for that other may perceive this; and this gives no cause of action to him. To warrant a thing which may be perceived at sight is not good.' Gentlemen, that is not the law of this State.]"

The court erred in these instructions to the jury. It has always been held that a general warranty should not be considered as applying to or giving a cause of action for defects known to the parties at the time of making the warranty, and both the weight of authority and reason authorize this proposition, viz: that for representations in the terms or form of warranty of personal property no action will lie on account of defects actually known and understood by the purchaser at the time of the bargain. *Margetson v. Wright*, 7 Bing. 603; *Dyer v. Hargrave*, 10 Ves. Jr. 506; *Schuyler v. Russ*, 2 Caines 202; *Kener v. Harding*, 85 Ill. 264; *Williams v. Ingram*, 31 Tex. 300; *Marshall v. Drawhorn*, 27 Ga. 275; *Shewalter v. Ford*, 34 Miss. 417; *Brown v. Bigelow*, 10 Allen, 252; *Story on*

Cont., §830; Benj. on Sales (2d ed.), 502; Chitty on Cont. (11th Am. ed.) 644.

A warranty, for the breach of the condition of which an action *ex contractu* for damages can be maintained, must be a legal contract, and not a mere naked agreement. It must be a representation of something as a fact, upon which the purchaser relies and by which he is induced, to some extent, to make the purchase, or is influenced in respect to the price or consideration. *Oneida Manuf. Society v. Lawrence*, 4 Cow. 440; *Lindsey v. Lindsey*, 34 Miss. 432; *Blythe v. Speake*, 23 Tex. 429; *Adams v. Johnson*, 15 Ill. 345; *Ender v. Scott*, 11 id. 35; *Hawkins v. Berry*, 5 Gil. 36; 2 Add. on Cont. 626 (Morgan's ed.)

In the nature of things one cannot rely upon the truth of that which he *knows* to be untrue; and to a purchaser fully *knowing* the facts in respect to the property, misrepresentation cannot have been an inducement or consideration to the making of the purchase, and hence could have been no part of the contract. It has often been said that a general warranty may cover patent defects, and it has led to some misapprehension of the law. The proposition is strictly true, but as was said by the court in *Marshall v. Drawhorn*, *supra*, it is "confined to those cases of doubt and difficulty where the purchaser relies on his warranty and not on his judgment." It has no application to a purchaser who *knows* the defects in the property and the untruthfulness in the vendor's representations. We do not, however, mean to say there may not be a warranty against the future consequences or results from even known defects. The fact that a portion of the charge given at the request of the plaintiffs stated correctly the legal principle under consideration, cannot affect the result. In fact, that the instructions to the jury were thus inconsistent, and calculated to mislead or confuse rather than inform or guide the jury, is in itself sufficient reason why the verdict should not stand. *Vanslyck v. Mills*, 34 Iowa, 375; *C. B. & Q. R. Co. v. Payne*, 49 Ill. 499.

For the reasons already indicated, a new trial must be awarded, and it is unnecessary to consider whether the verdict is supported by the evidence presented in this case; nor is it necessary to consider some other alleged errors involving no doubtful questions of law, and which are not likely to recur upon another trial. Anticipating, however, upon the retrial, as in the former one, the question may arise as to the authority which an agent empowered to sell machinery of the kind in question may be presumed to possess in respect to the warranting of the property, in the absence of any proof of express authority we will pass upon the question as it is presented by the facts in this case. For the purposes of this case it is sufficient to say that an agent engaged for his principal in the business of selling personal property is presumed to be authorized to sell with warranty. It may be, however, that if the property be of a kind not usually sold with warranty, no such presumption will be exercised. *Nelson v. Cowing*, 6 Hill, 336;

Smith v. Tracy, 36 N. Y. 79; *Schuchardt v. Alless*, 1 Wall, 359; *Upton v. Suffolk, Co. Mills*, 11 Cush. 586; *Boothby v. Scales*, 27 Wis. 626; *Ahern v. Goodspeed*, 72 N. Y. 108; *Murray v. Brooks*, 41 Iowa. 45. In the case of such an agent engaged in selling harvesters without proof of express authority to warrant, the court will presume such authority.

The order refusing a new trial is reversed and a new trial is awarded.

SUPREME COURT OF MINNESOTA.

FLYNN v. MESSENGER.

JULY 29, 1881.

The common-law rule, that a married woman living with her husband is presumed to have authority from him to order such goods or services as are ordinarily required for family use, is not changed by the statutes regulating the rights and liabilities of married women. If the party dealing with the wife knows she is a married woman living with her husband, and the order is of a character to indicate that it is for the benefit of her husband's family, he is bound to presume that she is acting for her husband, and cannot hold her personally liable unless she especially agrees to become so. The employment of a seamstress for ordinary domestic service in and for the benefit of the husband's family, held, *prima facie*, to be within the rule respecting the presumptive agency of the wife.

Appeal from judgment of municipal court, city of St. Paul.

CLARK, J.

By the common law, a married woman living with her husband is presumed to have authority from him to order such things as are ordinarily required for family use. The rule is laid down by Lord Abinger, in *Emmett v. Norton*, 8 Car. & P. 506, in these words: "Where a wife is living with her husband, and where, in the ordinary arrangements of the husband's household, she gives orders to tradesmen for the benefit of her husband and family, and these orders are proper and not extravagant, it is presumed that she has the authority of her husband for so doing. This rule is founded on common sense, for a wife would be of little use to her husband in their domestic arrangements if she could not order such things as are proper for the use of a house and for her own use without the interference of her husband. The law, therefore, presumes that she does this by her husband's authority."

There can be no doubt (especially under the statutes of this State, conferring upon a married woman the power to transact business, and make contracts which shall bind her) that it is perfectly competent for the wife to bind herself personally to the payment for such orders; but if the party dealing with her knows she is a married woman, living with her husband, and the order is of a character to indicate that it is intended for the benefit of the family, he is bound to presume that she is acting for her husband, and not on her account, and cannot hold her personally liable unless she expressly agrees to become so.

The principle is laid down in *Powers v. Russell*, 26 Mich. 179, in the following language: "Now, if he (the tradesman) knew that she was a married woman, living with her husband, and the goods were not of a character to indicate that they were bought for other than family use in the husband's family, and she did not claim affirmatively to be purchasing them on her individual account, the natural inference would be that she was purchasing them on her husband's account, and for the use of his family; and she could not be made individually liable without an express agreement to become so, or that the goods should be charged or the credit given to herself."

We do not think the statutory provision regulating the rights and liabilities of married women, have changed the obligation of the husband to support and maintain the family, nor taken away from the wife the presumption of authority, arising out of the marital relation to act in his behalf in supplying the ordinary wants of his household. We have been referred more especially to section 3, c. 69, Gen. St. 1878, as changing the common law so as to make the wife individually liable for goods ordered by her for domestic use, unless she has express authority from her husband and makes the purchase expressly on his account; but we do not think its scope is so broad. If it was intended to make so important a change in the law and the usages of society, it is to be presumed that the legislature would have declared it in express terms, and not left it to be brought about by implication from other provisions not directed to the rules of evidence connected with the marital relation, or the presumption of the common law arising therefrom.

These principles apply with equal force to the employment by the wife of servants for ordinary domestic service in and for the benefit of the husband's family, and dispose of this case. The plaintiff's case rested exclusively upon her own testimony. She testified, in substance, that the defendant engaged her as a seamstress to sew at her residence, where she lived with her husband and their children; that she went there in pursuance of such engagement and sewed for twenty-four days upon clothing for the children; that she knew at the time of the employment the defendant was a married woman, living with her husband and family; that the defendant agreed with her as to the amount of her wages, but did not mention her husband or state who would pay her; that while she was at work in the family the defendant told her she had property of her own, and her husband had property, and that she was going to sell some land, and when she did she would pay her, and that two months after the completion of the service she paid her four dollars on account thereof.

It does not appear from the evidence that, at the time of the employment, any express agreement was made that the defendant should be responsible, as principal, for the wages, or that anything occurred to take the case out of the ordinary presumption that the employment was

in behalf of the husband; nor does it appear that the husband disputes his liability on the contract. What was said with reference to the ownership of separate property by the defendant, and the payment of the plaintiff from the proceeds of the sale, after the contract of employment was made, (which was, for reasons already stated, binding on the husband,) and while it was being performed, was not, we think, sufficient to shift the obligation of payment from the husband to the defendant, or to render her liable. It is to be regarded, under the circumstances, as a mere voluntary promise. We also think it is to be assumed, *prima facie* at least, in the absence of anything in the proceedings or proofs to the contrary, on grounds of common knowledge, that the service performed by the plaintiff was an ordinary domestic service, such as the wife might reasonably employ for the benefit of the family.

It follows from these views that the motion to dismiss, when the plaintiff rested, should have been granted, and it is, therefore, unnecessary to consider alleged errors in the instructions to the jury. The judgment appealed from is reversed, and a new trial granted.

SUPREME COURT OF VERMONT.

SQUIRES v. SQUIRES.

An agreement of separation, signed by the husband and the father of the wife, as her agent, is a good defense to a petition for a divorce, alleging intolerable severity, brought two years after the said agreement, and after it had been substantially complied with by the husband, the same being entered into after the alleged cause had accrued.

Although strictly the deed of separation is not a condonation of alleged wrongs, yet under the circumstances, the court think the parties should be held to their own settlement.

Libel for divorce. The libellee moved to dismiss the petition. The motion was in writing, claiming that the written agreement signed by the libellee and the father of the libellant, acting as her agent, was a good defense, especially as he had performed his part of the contract, in paying all that he agreed to, and delivering the property, etc., to the libellant. The petition was dated April 24, 1879; the deed of separation, September 17, 1877. This agreement, in effect, was that the said husband and wife had mutually contracted to live separate and apart; that the libellee was to give up and surrender all property to the libellant which belonged to her before marriage, and pay her \$500 in money, and \$100 for the benefit of her daughter. The wife was to release all her right or interest in the homestead, dower or thirds; and to support herself. The agreement was sealed. The other parts of it sufficiently appear in the opinion of the court. It was conceded that the libellant had paid over the money according to the contract; but it was claimed that he had not delivered all the furniture. The parties had not lived together after the accruing of the alleged

cause. The county court held that the deed of separation was a defense to the petition.

VEAZEY, J.

This is a libel for divorce on the ground of intolerable severity, and was dismissed by the county court, that court holding that the contract entered into between the libellee and the father of the libellant, acting in her behalf, after the separation, operated as a defense to the petition for the cause alleged, which had accrued before the contract was made.

The point is made in behalf of the libellant that the question should have been raised by plea instead of motion, as it was based on matters *dehors* the record. This would be a correct view, except that it appears that this contract was treated on the hearing in the county court as though properly in the case for consideration, and that there was no material dispute about it, and that the decision of that court was invoked by both parties as to the legal effect of that contract upon the petition. Under these circumstances we think the case should be treated here as the parties treated it in the county court, and be decided upon the merits, no technical question of pleading or practice appearing to have been raised in that court.

The question, as before stated, is as to the effect of this contract, under the circumstances disclosed upon this petition for divorce. It will be noticed that this contract was entered into after the separation and through the intervention of a person acting for the wife. It is not the policy of the law to encourage separations between husbands and wives. The rule as established in many cases is that articles calculated to favor a separation which has not yet taken place will not be supported. *Durant v. Titley*, 7 Price, 577; *St. John v. St. John*, 11 Ves. 526; *Westmeath v. Westmeath*, Jac. 126.

But as stated by Cooley, Ch. J., in *Randall v. Randall*, 37 Mich. 563; "When a separation has actually taken place, or it has been fully decided upon, and the articles contain a suitable provision for the wife and children, or on equitable and suitable division of the property, the benefits of which both have enjoyed during the coverture, no principle of public policy is disturbed by them; on the contrary if they are fair and equal, and are not the result of fraud or coercion, reasons abundant may be found for supporting them, in their tendency to put an end to controversies, to prevent litigation, and to give the wife an independence in respect to her support which without some such arrangement she could not have under the circumstances." Among the numerous cases that have settled the law as stated, may be found the following: *Compton v. Collinson*, 2 Bro. Ch. 377; *Worrall v. Jacob*, 3 Meriv. 266; *Jee v. Thurlow*, 2 B. & C. 547; *S. C.*, 4 D. & R. 11; *Baker v. Cooper*, 7 Serg. & R. 500; *Hutton v. Ducey*, 3 Penn. St. 100; *Dillinger's Appeal* 35 id. 357; *Nichols v. Palmer*, 5 Day 27; *Baker v. Barney*, 8 Johns. 73; *Shelthar v. Gregory*, 2 Wend. 422; *Carson v. Murray*, 3 Paige, 483; *Chapman v. Gray*, 8 Ga. 341; *Wells v. Stout*,

9 Cal. 494; *Gaines v. Poor*, 3 Metc. (Ky.) 503; *Walker v. Walker*, Exr., 9 Wall. 743. This contract is therefore one of a character that the court may recognize for some purposes. It is not necessarily and utterly void. In this case it is not invoked by the defendant as a bar to the restitution of the libellant to any of her conjugal rights. The separation grew out of trouble between the husband and wife. The alleged cause of divorce then existed in her favor, if it existed at all, and was known to her. In this situation, and after the separation, she, through the intervention of a trustee, agreed upon the terms as to property upon which she would live separate from her husband. This property (including the money specified in the contract), except, as is claimed, a portion of household furniture, was delivered or paid to and accepted by the trustee in her behalf. After all the other provisions as to what property and money she was to have, it was further provided in the contract as follows: "And the said parties further agree to and with each other that they will not molest, disturb or trouble each other, or in any way publish or speak or circulate slanderous matter of or concerning each other, but live separate and apart in a quiet and peaceable way, according to the true intent of these presents." He has substantially performed on his part, and she has received the benefits. The question about the household furniture seems to be one of difference as to what the contract covered in that respect, not a refusal to perform by the husband. The contract was not strictly a condonation of alleged wrongs. The wife instead of forgiving her husband upon promise of better treatment, agreed with him upon terms of separation, which were satisfactory, and no complaint is now made in regard to them. Nearly two years afterward this petition was brought.

In the English Ecclesiastical Courts, it is held that a voluntary deed of separation between husband and wife is not *per se* a bar to a suit for restitution of marital rights or to a petition for divorce. *Durant v. Durant*, 1 Hagg. 733 (3 Eng. Ecc. R. 310); 1 Bishop, § 634. and n. 3. But there are other cases where the deed, taken in connection with the circumstances under which it was given, and under which the application for divorce was made, and with the conduct of the parties, was held to constitute a defense, and the application was denied. *Matthews v. Matthews*, 1 Swabey & Trist. 161; *Williams v. Williams*, 35 Law J., decided in 1866. We think this case belongs to that class where the parties should be held to their own settlement; and that the deed of separation, under the circumstance, is a good defense to this petition. See *Brown v. Brown*, 5 Gill, 249; *Hunt v. Hunt*, 32 Law J., Rep. 168; *J. G. v. H. G.*, 33 Md. 401.

The judgment of the county court is affirmed.

"What is your occupation?" asked the magistrate, as he beamed at the burglar through his spectacles. "Wot hom I, yer washup?" replied the burglar in his most silvery tones, "why, a house cleaner, in course!"

UNITED STATES CIRCUIT COURT, D.
MASSACHUSETTS.

IN RE WALL.

JULY 2, 1881.

1. *Federal Enlistment—Minor—Validity.* The contract of enlistment of a minor, who is old enough to understand the contract, and who was accepted in good faith as being of full age, is voidable only and not void.

2. *Ibid.—Ibid.—Trial by Court-martial—Habeas Corpus.* A minor under enlistment by virtue of a voidable contract of enlistment may be arrested for the military crime of desertion, and if a court-martial has been ordered to try the offence, he ought not to be discharged on habeas corpus.

Wall enlisted in the United States Marine Corps, taking the usual oath that he was upwards of twenty-one years old. He deserted from the navy-yard at Charlestown, and was arrested as a deserter. An order was issued for his trial by court-martial, and was received May 11, 1881, at nine A. M. At noon of the same day a writ of habeas corpus was served on the officer commanding the marines at Charlestown. Upon the hearing before Judge Nelson, in the district court, it appeared that Wall was under eighteen years of age when he enlisted, and was under twenty-one years when the trial took place. On appeal from the decision of the district court.

LOWELL, J.

The district judge decided that the enlistment of a minor who was old enough to understand the contract, and who was in good faith accepted as being of full age, was voidable only and not void; and that if he had committed the military offence of desertion, and was under arrest for that crime, and the court-martial had been ordered to try him, he ought not to be discharged on habeas corpus. This view of the rights of the parties is sustained by the authorities cited. See *Commonwealth v. Gamble*, 11 S. & R. 93; *Ex parte Anderson*, 16 Iowa, 596; *McConologue's case*, 107 Mass. 154, 170, per Gray, J.; *Re Dee*, 25 Law Rep. 538; *Re Beswick*, 25 How. Pr. 149. It is true that *Commonwealth v. Gamble*, 11 S. & R. 93, is doubted in a later case in the same court (*Commonwealth v. Fox*, 7 Penn. St. 336), but in this case the judges found that the statute made such an enlistment absolutely illegal, and for that reason held it to be void. I have not found a corresponding statute applicable to this case. It is illegal to enlist a marine between eighteen and twenty-one years old, without the consent of his parent or guardian, if any he have; and if an officer does this knowingly, he is liable to punishment; but this minor had neither parent nor guardian. His contract was voidable at common law; but I do not see how I can hold it to be void. *McNulty's case*, 2 Low. 270. If not, it seems to follow that if he commits a military offence, and is actually arrested and in the course of trial before the contract is duly avoided, he may be tried and punished. I do not mean to be understood as deciding that it would be desertion in a

minor to leave the service openly after demanding his release, nor that he could be tried and punished after a court had released him.

It appeared upon the cross-examination of a witness that Wall was actually tried and sentenced while in the constructive custody of the district court, the officer who had him in charge not thinking it worth while to inform the court that the proceedings in the district court were pending. This conduct was highly reprehensible. Whether the sentence is a valid one, under these circumstances, is a question not brought here by the appeal, which is merely for a review of the decision by the district court. If Wall or his friends should be so advised, they may probably be able to try this question upon new and independent proceedings.

Appeal dismissed.

UNITED STATES CIRCUIT COURT, D.
KENTUCKY.

PEPPER v. LABROT.

JULY, 1881.

Trade-mark—Name of Factory—Sale of Factory. When a trade-mark consists merely in the name of the establishment where the manufacture is carried on, and becomes attached to the manufactured article only as the product of that particular establishment, a sale of the establishment will carry with it to the purchaser by operation of law the exclusive right to use the name it had previously acquired, in connection with his own manufacture at the same place of a similar article.

Bill for injunction and account and cross-bill for injunction. The complainant in 1874 was the owner of land on which his father, in his lifetime, had carried on a distillery, manufacturing whiskey which was known as "Old Crow Whiskey," and the distillery was known as Oscar Pepper's Old Crow Distillery. Complainant erected a new distillery and manufactured whiskey, branding the barrels: "Old Oscar Pepper Distillery; Hand-made Sour Mash; James E. Pepper, Proprietor, Woodford County, Ky.," and used the same as a trade-mark in circulars, bill-heads, etc. The complainant became bankrupt, and his premises, machinery, etc., were sold by his assignees as the "Old Oscar Pepper Distillery," and became the property of defendants, who manufactured whiskey there, and used the trade-mark adopted by complainant, substituting their own name as proprietors.

MATTHEWS, J.,

In delivering the opinion of the Court, said: The construction of the complainant is, that the words "Old Oscar Pepper," and the abbreviation of them, "O. O. P.," constitute a brand or mark originally adopted by him to designate whiskey as made by him, without reference to the place of manufacture; and that by use and recognition it has become associated in the minds of dealers and the public with the article manufactured by him, so as to constitute its name in the trade, whereby to distinguish it from a similar article made by any and all

others. On the other hand, the defendants claim that the words in question were originally used, and their use subsequently continued, merely to designate the fact that the whiskey contained in the packages so marked or spoken of in advertisements, circulars, signs, etc., on which the mark was burned or printed, was made at the distillery so designated; and that that was done because the distillery, or its predecessor on the same site, had acquired a reputation in connection with the manufacture of whiskey which was sufficient to recommend any article made at the same place.

The clear result of the whole evidence seems, in our opinion, to be that the complainant adopted the name of "Old Oscar Pepper Distillery" as the name of his distillery, in order that the whiskey manufactured by him there might have the reputation and whatever other advantages were to result from that association. That distillery having now become the property of the defendants by purchase from the complainants, can they be denied the right of using the name by which it was previously known in the prosecution of the business of operating it, and of describing the whiskey made by them as its product? Can the complainant be permitted to use the brand or mark formerly employed by him, to represent whiskey made by him elsewhere as the actual product of this distillery? Both these questions, in our opinion, must be answered in the negative. *Amoskeag Manuf. Co. v. Trainer*, 101 U. S. 51; *Canal Co. v. Clark*, 13 Wall. 311; *Amoskeag Manuf. Co. v. Spear*, 2 Sandf. (Sup. Ct.) 599. It would seem that the trade-mark claimed by the complainant cannot be sustained as a designation of whiskey manufactured by him without reference to the place of its production, and that it is not, therefore, a lawful trade-mark at all, in the proper sense of that term. It is rather the trade-name of the distillery itself, of which he was at one time the proprietor, but which now is the property of the defendants. Neither by its own meaning, nor by association, does it indicate the personal origin or ownership of the article to which it is affixed. It does not seem to give notice who was the producer. It could be applied by him, with truth, to his goods only while he was the owner of the distillery named, and then only, not to all whiskey of his manufacture, but only to that actually produced at that distillery. It can now be used without practising a deception upon the public only by the defendants. It points only at the place of production not to the produce. If a trade-mark at all, in any lawful sense, it is only in its use in connection with the article which it truthfully describes; that is, whiskey which is actually manufactured at the Old Oscar Pepper Distillery, in Woodford County. *Hall v. Barrows*, 4 De G., J. & S., 157; *Kidd v. Johnson*, 100 U. S. 617. It is a fair inference from these authorities that when, as in the present case, the trade-mark consists merely in the name of the establishment itself where the manufacture is carried on, and becomes attached

to the manufactured article only as the product of that particular establishment, a sale of the establishment will carry with it to the purchaser the exclusive right to use the name it had previously acquired, in connection with his own manufacture at the same place of a similar article, by operation of law. *Congress Spring case (N. Y.)*, *Cox's Trade-Mark Cases*, 599; *Manuf. Co. v. Hall*, 61 N. Y. 229; *Carmichael v. Lattimer*, 11 R. I. 407; *Booth v. Jarrett*, 52 How. Pr. 169.

Decree for defendant.

SUPREME COURT OF PENNSYLVANIA.

PHILADELPHIA & READING RAILROAD Co. v. SCHARTEL.

MAY 23, 1881.

In a suit against a railroad company for damages for injuries caused by defendant's negligence, the court should take the case from the jury if there is no evidence of negligence.

Error to the Court of Common Pleas of Schuylkill county.

PAXSON, J.

This was an action brought by the widow and minor children of George ScharTEL, deceased, to recover damages for injuries resulting in his death. The declaration alleges that said injuries were occasioned by the negligence of the Philadelphia and Reading Railroad Company, defendants below. The jury having found the negligence, the cause has been removed to this court, and several errors have been assigned to the rulings of the court below. As the seventh and last assignment, if well taken, renders a discussion of the others unnecessary we will consider it here.

By the defendant's ninth point, the court was called upon to pass upon the sufficiency of the evidence, the point being: "That under all the evidence in this case the plaintiffs cannot recover." The learned judge declined to so instruct the jury upon the ground that it would withdraw the case from their consideration. This was the object of the point. It was not error to refuse it if there was sufficient evidence of the negligence of the defendant company to submit to the jury. On the other hand it is equally clear that if there was no evidence, or at most a scintilla, it was the duty of the court to withdraw the case from the jury and give a binding instruction to find for the defendant. The authorities upon this point are numerous; it is sufficient to refer to a few of the later ones: *Howard Express Co. v. Wile*, 14 P. F. S., 201; *Hoag v. The Railroad Co.*, 4 Norris, 293; *Pennsylvania Railroad Co. v. Fries*, 6 Id., 234, and *Mansfield Coal and Coke Co. v. McEnery et al.*, heretofore decided by this court.

I have looked in vain through this record for any evidence of negligence on the part of the defendant company. There is not even a scintilla. The deceased was at the time of the accident, and had been for years prior thereto, a

brakeman in the employ of the company. On the night of the injury, which unfortunately resulted in his death, he was engaged in coupling and uncoupling the cars of a freight train. While so engaged, in some manner unexplained to the jury, he fell under the wheels of the tank or tender of the locomotive, which passed over one of his legs, producing the injury complained of. As to how he fell, or the cause of his falling, there is not a word of evidence. The theory of the plaintiffs was that his fall was occasioned either by reason of the roughness or inequalities of the track, or in an attempt to get on the tank; the allegation being that the step was defective and that he missed his footing because of such defect. It appears from the evidence that the track at the particular point where the accident occurred was in the course of being repaired; that it had been raised a few inches, and the space between the ties had not been ballasted or filled in; that as regards the step, it was not defective in its construction, but as plaintiffs alleged, was not in the position it should have been to insure the greatest amount of safety. Yet even as to this point, the plaintiff's own evidence was entirely balanced, while it was not denied that the deceased had used the step for a year without complaint to the company, and that if he had made objection to it, the rule or practice of the company required it to be changed to suit the crew operating the engine, of which the deceased was one.

Had there been evidence to show that the deceased came to his death by reason of the condition of the track, or of the step, it would, notwithstanding, have been too weak and inconclusive to establish negligence on the part of the defendant company and to base a verdict for damages upon. There certainly was no duty to ballast the track for the safety of its employees, and, except perhaps at a crossing, no such duty to the public. Besides, the inequalities were occasioned by necessary repairs to the track, of which repairs the deceased as an employee of the company must be presumed to have had knowledge.

There was not, however, as before stated, a particle of proof that either the track or the step had anything to do with his death. For aught that appeared he may have fallen in a fit, or from some cause wholly disconnected with either. The case was submitted to the jury without evidence, and the verdict has no better foundation than a guess, or at most mere possibilities. This will not do. The practical effect of the judgment below is to take the property of the defendant and give it to the plaintiffs. This is not allowable, even in the case of a corporation.

Judgment reversed.

Frank Walworth, of New York, who shot his father, will, it is said, soon marry an heiress who has passed several summers at Saratoga. If you want to marry an heiress shoot your father, and then her father won't dare make a fuss.

SUPREME COURT OF PENNSYLVANIA

HOME INSURANCE CO. v. TIGHE.

MAY 2, 1881.

When an insurance company, after due notice, effect a cancellation of the policy, in order to extinguish the liability of the company for the insurance, actual payment of the sum to be refunded must be made.

When a due bill or certificate of indebtedness is given for the return premium it is properly left for the jury to decide whether such instrument is accepted as payment or only as an evidence of indebtedness.

Error to the Court of Common Pleas of Wayne county. Mary Tighe, an illiterate woman, insured her house with the Home Insurance Company. The company, through its agent, undertook to cancel the insurance. Due notice was given and Mary Tighe met the agent and signed the cancellation of the policy. The agent then handed her a kind of due bill or certificate of indebtedness on the part of the company for the portion of the premium returnable to her. The court below left it to the jury to find whether Mary Tighe had accepted the due bill as an actual payment, or as only an evidence of debt.

MERCUR, J.

The company had a right at its option to terminate the insurance at any time, on giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy. The company gave the necessary notice, and the insured delivered the policy to the agent of the company without his paying her any money for the unexpired portion of the term. He gave to her a writing called by him a due bill, stating the sum due her. The main contention is whether she accepted that in payment. If she did not then she was not repaid, and the insurance was in force at the time of the loss. It is claimed on her part that she did not voluntarily and understandingly surrender her policy. The first assignment is that the court erred in submitting that question to the jury without evidence. She died before the trial and her evidence is not in the case. It is contended, however, that the evidence given by the plaintiff in error was sufficient to justify the submission.

The evidence of the agent of the company does not fairly indicate that he drew and had her sign the cancellation of the policy before he said any thing to her indicating that he would not pay her the refunding money at the time. She had a right to exact the payment, and may reasonably have supposed she was then to be paid. When he handed her the due bill, and explained in regard to its payment, she made no reply. As bearing on the presumption that she did not understandingly surrender her insurance without the payment of any money the character of the paper given must be considered. He calls it a due bill, but it is more like a certificate of indebtedness. It is a writing signed "E Killam, agent," declaring there is due Mary Tighe from the Home Insurance Company of New York, the sum of \$10.66, the return premium on policy No. 558."

Thus the agent states the fact that the sum specified is due, not from him, but from the company. If thus authorized by the company it created an implied promise to pay it, but the time when is not stated. On its face it would be demandable at once. The agent says, he was to pay it over after he received it from the company. When that would probably be he did not state. The law would imply it should be in a reasonable time. It

could hardly be expected that she was obliged to go to New York to demand payment. In view of the fact that she was entitled to the money at the time she handed over the policy, it was proper to consider whether she could have understood it was to be withheld from her for an indefinite time in the future. The fire occurred thirteen days after the evidence of indebtedness was given, yet the money was not paid. Is it reasonable to assume that she understood there would be, or assented to, such delay? The length of time required for communicating between New York and Hawley is about five hours. Under all the circumstances shown in regard to the transaction we think there was enough to justify the submission of these facts to the jury. Whether Mrs. Tighe did in fact accept the due bill in payment was properly submitted to the jury. A clear distinction exists between taking it as a payment or as an admission of indebtedness. To extinguish the liability of the company for the insurance, actual payment of the sum to be refunded must be made. *Hathorn v. Germania Ins. Co.*, 55 Barb. 28; *Van Valkenberg v. Lennox Fire Ins. Co.*, 51 N. Y. 465; *Ætna Ins. Co. v. Maguire*, 51 Illinois, 242; *Holden v. Putnam Fire Ins. Co.*, 46 N. Y. 1. It is unnecessary to discuss the other assignments in detail, what we have said sufficiently covers them. We discover no error therein.

Judgment affirmed.

THE BURDEN OF PROOF OF CONTRIBUTORY NEGLIGENCE.

In an action for personal injury through negligence, the Federal courts put upon defendant the burden of showing contributory negligence of the plaintiff. In the courts of Iowa the plaintiff is required to show affirmatively his own freedom from negligence. Here are two rules very unlike each other. Which is the better of the two? Suppose a house to stand close by a narrow street. The owner, for the purpose of repairing the house, puts a pole across the street. Another man comes riding along on horseback at a violent speed and runs against the pole without seeing it. He is injured and sues the owner of the house.

Now it is evident that both are to blame. If the plaintiff had been riding carefully, he would have seen the obstruction and avoided the injury. If the defendant had not put up the pole the accident would not have happened. Since both contributed to the injury, it would seem unjust that one alone should bear the damage. In strict justice the defendant ought to compensate the plaintiff and so share the damage resulting from their joint negligence. Thus each would suffer for his wrong.

If there is no compensation, the defendant does not suffer for his wrong, and he may even profit by that which was the occasion of the injury. But, from the difficulty of determining to what extent the negligence of each party was instrumental in producing the injury, it has become a well-settled rule that the law will not apportion the damages.

Hence the doctrine that in order to maintain an action in such a case, two things must concur: 1. Negligence of the defendant causing the injury. 2. No want of ordinary care on the part of the plaintiff.

How, then, shall these two essentials be determined? All agree that the burden of proving the first should be upon the plaintiff. But must he go still further and assume the burden of showing his own freedom from negligence? In applying the rule that the plaintiff cannot

recover, if his own want of care has contributed to the injury, some courts overlook the reason of the rule. They quote the maxim "No one shall profit by his own wrong," or the maxim "*Volenti non fit injuria*," and then attach the entire blame to the plaintiff. They require him not only to show the fault of the defendant, but also to anticipate a possible defense; and if he fail in this, they compel him to bear the whole damage.

By the rules of pleading the plaintiff should not be required to set up that which would more properly come from the other side. Even just defenses are left for the defendant.

Much more, then, should we leave for the defendant the unjust defense which is to excuse him from compensation, not because he deserves to be excused, but because the law is inadequate to apportion the damages. If we analyze a cause of action in tort, we find but two elements: a wrong by one person, resulting in a damage to another person. To make out these two elements *prima facie*, is all that should be required of the plaintiff in the first instance. "But," it is said, "the casual connection between defendant's negligence and the injury is broken by the intervention of plaintiff's negligence, and hence the latter can not make out a *prima facie* case without showing his own due care." How can it be said that the casual connection is broken as to either party, when the fault of both contributed to the injury.

But suppose it were broken. Suppose plaintiff saw the obstruction and ran against it willfully. The burden should still be upon the defendant to show this fact; and if plaintiff, without showing his own fault, could show the negligence of the other party, and an injury to himself apparently resulting therefrom, he would have a good *prima facie* case. The burden of proof rests upon the party maintaining the affirmative. A negative is notoriously hard to prove. Yet, when we require the plaintiff to show no want of ordinary care on his part, we require him to establish a negative. "But," some will say, "this is an essential element in the case." If that were true, the law has already established this negative before the suit began. The common law presumption is that everyone does his duty, until the contrary is proved. Every person is presumed innocent of crime, or fraud, or trespass; why not negligence? These things are presumed because they occur in a majority of cases. They are in accordance with the natural order and general state of things. It is a contradiction in terms to say that the majority of men do not use ordinary care. Ordinary care is just that care which the majority of men do use under like circumstances to avoid injury and preserve life. All the instincts of his nature lead him to do this.

Now, the presumption of ordinary care is always recognized in favor of the defendant. Considering the great strength of the motives for care on the part of the plaintiff, since the personal injury threatens him alone, how much more should the presumption of care exist in his favor.

But what do we presume when we require him to allege and prove ordinary care on his part? Such a rule can proceed only on the presumption of plaintiff's negligence. This is contrary to all reason and common sense. We presume defendant's care, and compel the plaintiff to show the contrary. Then we presume plaintiff's negligence in excuse of defendant's negligence and compel the plaintiff to rebut this presumption. There is no principle of law or justice on which to ground such a rule. If the presumption of ordinary care exists in favor of the defendant, it exists also in favor of the plaintiff, and he must

be allowed to rest upon it until the contrary appears without effort on his part.

Logically, then, the rule in Iowa is unsound. Historically, too, it is without foundation. In the leading case to which the authorities refer, the question of the burden of proof was not raised at all; and had it been raised the case would offer no ground for the rule, for the plaintiff's own evidence disclosed his want of care.

But the effect of the rule condemns it more than anything else. It cannot fail to cause hardship to the plaintiff, except in a few cases where all the circumstances attending the injury can be put in evidence. The owner of a threshing machine fails to box the tumbling rods according to law. One of the workmen is caught by the rods and suddenly meets his death. No one sees him at the time of the accident. The wife, bereft of her support, sues for damages. She proves the negligence of the defendant, but nothing can be shown for or against the due care of the deceased. By the rule in Iowa she cannot recover.

A merchant in the city makes an excavation for a coal vault in front of his building, and leaves it without a railing. At night a man walks into it and is made a cripple for life. Here, by our rule, the very darkness which increases the danger protects the author of it by cutting off all possibility of showing the conduct of the plaintiff at the time of the injury.

A drunkard lies down in the street. The driver of the horse-car sees the danger in time to stop the car, but carelessly runs over the man. Even in such a case, one court has intimated that the plaintiff could not support an action without showing that the deceased was in the exercise of ordinary care. This is carrying the rule to an extent which is inhuman, unchristian and unbecoming to our age and civilization.

But let some courts once make a blunder, and they seem bound at all hazards to follow it as a rule in subsequent cases. As tailors follow fashions, with little attention to comfort or good taste, so these courts follow precedents without the exercise of reason or justice.

So long as the rule in question is followed, the courts must either do injustice or put themselves in the absurd position of saying that a man will be deemed to have proved a thing by failing to prove it.

Surely the rule of the Federal courts is by far the better of the two and should prevail.—*Western Jurist*.

SUPREME COURT OF INDIANA.

STATE v. MORIARTY.

June 21, 1881.

Criminal Procedure—Intoxication in Public Place—Indictment. An indictment against defendant for being "found intoxicated in a public street, highway and sidewalk," is sufficient to charge that the offence was committed in a public place.

Defendant was indicted for being found intoxicated "in a public street, highway and sidewalk," and a motion was made to quash the indictment upon the ground that it did not charge that the offence was committed in a public place. The motion was granted, and the State appealed.

ELLIOTT, J.

The ruling of the court was based upon *Williams v. State*, 64 Ind. 558, where it was held that, in an indictment for notorious lewdness, it was not sufficient to allege that the unlawful act took place in a public highway. In the case of *State v. Waggoner*, 52 Ind. 481, a

different doctrine was declared, and it was held that a public highway was a public place. The former case is not sustained by authority, while the latter is well supported. We think that the case of *Williams v. State* asserts an erroneous doctrine, and it is therefore overruled. Even if the case of *Williams v. State* should be held to declare the correct rule, we should still be bound to hold the present indictment sufficient. It is charged that the offence was committed "in a public street, highway and sidewalk." A street is, it is true, a highway, but all highways are not streets. *Common Council v. Cross*, 7 Ind. 9. A street is not only a public highway, over and upon which all the citizens of the land have a right to pass and re-pass at pleasure, but it is a public highway of a city, town, or village. There can be no reasonable presumption that there are secret or secluded places in streets; on the contrary, the presumption is that streets are public thoroughfares, open and free in every part to the public. It is the duty of the municipal authorities to keep them reasonably safe for travel; it is not sufficient to make a part of a street safe for travel; the whole street must be made so. This consideration would of itself preclude the presumption that there may be secluded places in public streets. *Prima facie* a public street is a public place. In one case it was said: "A street is *per se* public." *Carwile v. State*, 35 Ala. 393; *McCauley v. State*, 23 Ib. 135. The term "street" does not mean private ways, nor does it apply to wards or ways owned by private corporations. *Wilson v. Allegheny City*, 79 Penn. St. 273; *Quinn v. Patterson*, 27 N. J. L. 35. The indictment, in charging that the offence was committed in a public street, shows at least a *prima facie* case. The State was not bound to anticipate defences, and negative their existence. If there existed any facts stripping a public street of its ordinary character they should be shown by way of defence.

Judgment reversed.

SUPREME COURT.

Judges Johnson, Okey and McIlvaine, of the Supreme Court, were on hand yesterday, to open the court, after the summer vacation.

The court commences its fall labors with a calendar of 1024 cases on the docket undecided. At the opening of the present term there were 898 cases on the docket. Thus far the court has disposed of 166 cases. The advance on the docket having been 126.

The court on May 3rd, last, called the docket up to number 175. Numbers up to 120 have been reached for discussion.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Sept. 23, 1881.]

1178. David K. Dietrich v. Elias Folk et al. Error to the Superior Court of Montgomery County. Boltin & Shauck for plaintiff; Craighead & Craighead for defendants.

1179. Joseph M. Jackson v. Andrews & Hitchcock et al. Error to the District Court of Mahoning County. Moses & Jackson for plaintiff; Anderson & King and T. M. Sanderson for defendants.

1180. A. M. Kuhn, Trustee v. Theodore Nieberg. Error to the District Court of Anglaise County. Marshall & Brotherton for plaintiff; S. R. Mott and F. C. Layton for defendant.

1181. C. C. C. & I. Ry. Co. v. Arthur Naylor. Error to the District of Richland County. Jenner & Tracy and H. H. Poppleton for plaintiff; Dirlam & Leyman for defendant.

1182. Thomas Hogg v. John Beerman et al. Appeal—Reserved—In the District Court of Ottawa County. E. B. Sadler for plaintiff.

1183. Franklin B. Abbott, Adm'r. v. Peter Wells et al. Error to the District Court of Muskingum County. E. E. Evans and Chas. A. Beard for plaintiff.

Ohio Law Journal.

COLUMBUS, OHIO, : : : OCT. 6, 1881.

A SUPREME COURT COMMISSION.

To this possible relief, long suffering litigants turn with strong hope that it will be speedily created and will be soon at work. At the present rate of filing cases and of disposing of them, the rights of persons wronged, are as effectually buried, and the punishment of those who have committed wrong, as certainly delayed for a long term of years, at least, as though courts of justice were all closed and judges all in a Rip Van Winkle sleep. The parties who filed their cases to-day, can have but a faint hope that five years hence that case will have been reached, and those who are now in the agony of a common pleas contest cannot hope for a termination of their trouble within a half score of years, if the case should be taken to the highest tribunal of the State!

But the apathy of our law-makers is undisturbed, and our word for it, will remain undisturbed through all the coming session, notwithstanding all this crying need. No impulse can stir the soul of the average law-maker, unless it be a dog law or a law to pay a bounty for the scalps of chip-monks, or bald eagles. They are paralyzed by the fear that if they pass a law giving relief to the people, that their public life will be blasted; that they cannot be re-elected!

The plan submitted last winter, as the best that could be devised, by the State Bar Association, was ignored without a thought, even by the bright intellects which evolved only forty-seven dog laws from their inner consciousness and spread the same upon the broad tablets of solemn enactment.

The people all over the State are clamoring for relief. Will they get it?

The Constitution provides that.

"The General Assembly may, on application of the Supreme Court, duly entered on the journal of the court and certified, provide by law, whenever two-thirds of such, [each] house shall concur therein, from time to time, for the appointment in like manner of a like commission with like powers, jurisdiction and duties; provided, that the term of any such commission shall not exceed two years, nor shall it be created oftener than once in ten years."

But it is claimed that the limitation, one commission in ten years, does not apply to the commission of 1875. In other words, that the expression "in like manner of a like commission, with

like powers, &c.," cuts off the first from all that might succeed, and, that therefore, the way is clear for a new commission.

Whether this be true or not, the need of relief is so urgent and the ability of *one* court to clear the dockets in a thousand years, so utterly out of the question, that a point might be strained and something done. But if the coming legislative body is no better than that of last winter (or a majority of that body we should say, for there were some royal good men therein), the outlook is dreary indeed. We would suggest a day of fasting and prayer that God would move the hearts of the careless ones, and put brains in the pans of the brainless members, of that body, just long enough to get some plan of relief adopted to free the wheels of justice, and oil their long unused and rusting axles. The judges of the Supreme Court are doing all they can to dispose of the cases on the docket, but it is beyond the shadow of a possibility for them ever to clear the docket of its eleven hundred cases, in the face of the vast number of new cases continually coming in.

NEW BOOKS.

Baylies on Sureties and Guarantors. A Treatise on the Rights, Remedies and Liabilities of Sureties and Guarantors, and the application of the Principles of Suretyship to persons other than Sureties, and to property liable as Surety, for the Payment of Money, by Edwin Baylies, Counselor at Law, New York: Baker, Voorhis & Co., 1881. pp^o 600, \$5.00 net.

Mr. Baylies is favorably known to the legal profession by his connection with several other successful books. This, together with the fact that the subject of the book before us is not a hackneyed one, that, in truth, the demand for just such a work has been really pressing for many years, will favorably commend this book to the profession and a kindly greeting. But the manner in which the questions of guaranty and suretyship is treated, will be found of great value to the practitioner.

Questions involving the laws of guaranty and suretyship have lately arisen with unusual frequency, and have demanded of the courts a re-examination of the principle underlying that law and the decisions upon which that law was based. As the result of this examination, questions, before undetermined or in doubt, have been determined and settled; decisions of doubtful authority have been limited or overruled; and doctrines before resting in the *dicta* of the judges have in many instances been expressly

re-affirmed and established by authoritative decisions.

The courts have in many cases returned to the theories of the old courts of equity, and hold that the rights of sureties and guarantors are in many instances mere equities, to be regulated, redressed, and determined by the application of equitable principles, and have repudiated the more modern theory of the common law, that such rights rest in implied contract, and are to be measured and determined by the rigid rules of laws.

The preparation of this work has been evidently prosecuted in the belief that a volume which should present clearly the rights, remedies, and liabilities of guarantors and sureties, as declared and defined by the recent statutes and decisions, would be of special value to lawyers throughout the country.

In this the author is not mistaken. The book will be a welcome addition to the library of every practicing lawyer.

The mechanical execution is of course unsurpassed. The name of the publishers is a sufficient guaranty of that fact.

THE HISTORY OF THE DEVELOPMENT OF THE ROMAN LAW AND ITS LITERATURE.

BY ORLANDO W. ALDRICH, LL. D.: D. C. L.

In nothing is the originative genius of the Roman people more clearly shown than in their law, and in no other field has the influence of Roman civilization been so widely extended and so durable.

In art, philosophy, poetry, and even in religion, the Romans had but little originality, and seem to have been but little more than mere copyists from the Greeks, and in oratory they were greatly indebted to the same source. But although a few of their first laws may have been copied from the laws of Solon, yet the body of the Roman laws was an indigenous product of the Italian soil, and shows forth the character of the Roman people as a great nation, as it has been shown in no other way. Rome has also had a wider and more lasting influence through her system of laws than through her arms, her arts, science or literature, and though the Roman influence in religion has become widespread and permanent, yet it is very probable that much of that influence may be traced to the effect of the rules of the canon law, of which many of the principles were derived from the civil law. Even when Rome was conquered by the barbarians, they were subdued by her law, and to-day, in nearly every part of the continent of Europe, which formed a part of the old Roman empire, the civil law prevails as the basis of the various

codes and systems, and a knowledge of the Roman law is an absolute prerequisite for the practice of the law in nearly all those countries.

While the common law of England is a system *sui generis*, yet the Roman law has not been without its influence upon the English law. Some of the earliest writers on the English law copied largely from the civil law writers, and the influence of the civil law upon the equity system, and the laws of marriage and probate, can hardly be overestimated. To the lawyer who aspires to a knowledge of jurisprudence and is not contented with being a mere practitioner, the Roman law will always be regarded with interest and he will be specially interested in comparing it in its history and method of development with the system of English law. I propose in this article to give a short sketch of the historical development of the Roman law and of its literature to the time of Justinian. The history of the Roman law in its development naturally divides itself into four periods. The first is from the foundation of the city to the expulsion of the Tarquins. The second from the secession of the Plebs, to Mons Sacer, to the time of Augustus. The third from the time of Augustus to the beginning of the reign of Justinian, and the last the reign of Justinian, although a number of constitutions of later date are found in the "Corpus Juris."

The history of the Roman law after the time of Justinian is rather a history of the effect of this law, upon the laws of other nations, than a history of the law itself.

The sources of the history of the Roman law during the first period, are those Greek and Roman historical writers, who treat of the general history of Rome, and we have no remains of any of the early law literature, nor any authors who treat especially upon that subject. The laws of this period were called "*leges regie*," and are quoted by some of the old authors sometimes literally, but generally by reference to their meaning. Nearly all were ascribed to Romulus and Numa; but some are said to have been passed by Servius Tullius. Dionysius Halicarnissus mentions it as a fact that Servius Tullius made a collection of those laws, and added some of his own, but he says that those laws were not only abrogated by Tarquinius Superbus, but that even the tables upon which they were written, were destroyed.

It is related by Livy that in the year 573 U. C., two stone chests were exhumed in the field of Janus, one of which was empty and the other contained seven books written in Latin, on the pontifical law and seven in Greek, on philosophical subjects. These were destroyed by the Prætor, on account of their being opposed to the laws of the pontifical religion, and it is not at all probable that they were genuine. There was a collection of laws of this period which is cited by later writers, and among them Pomponius who calls it "*Jus civile Papirianum*, from Papirius who lived in the time of the last Kings, but whether they were really genuine is a very

doubtful question. The laws of that date were chiefly concerned with religious observances and customs, and it is not probable that any of the compilations survived the destruction of the city by the Gauls, and while the Pontiffs may have preserved the usages and customs, and may have been able to give the substance of those laws, yet it is not at all likely that the laws were preserved in their original form.

The second period which may be said to commence about the time of the first Plebeian secession, has but few if any authentic documents yet surviving. The most important of all the laws of this period, and in fact those from which the Roman law in its later form developed itself, were what are called the laws of the twelve tables, or "*lex decemviris*." Considerable discussion has arisen as to the origin of these laws. Some, as Mommsen in his Roman history have looked upon them as mere copies of the laws of Solon. Others, that they were first promulgated by the decemvirs who either obtained them from foreign sources, or else originated them from their own views of right; while still others believe that they were merely compilations of the laws already existing, and in force. It seems to me that the opinion of Puchta is more likely to be correct than any of the former. He says that it is probably true, that a few of the laws may have been of Greek origin, quoting Cicero who speaks of the law of obsequies, as being derived from the laws of Solon; and Gaius who, in an extract in the Pandects, speaks of the law *De Collegiis* as of the same origin. He thinks that the greater part of the other laws, were merely a codification of laws till then unwritten, and of customs which had become of acknowledged force, while the rest which were most probably public laws, were new in part at least, consisted of those rights which had been granted by the Patricians to the Plebs as the price of their return from Mons Sacer. These laws were intended to form a code embracing all the law, public and private, and religious as far as was thought proper to make it known. There exist now only a few fragments of the laws of the twelve tables, and they are mostly upon the subject of private rights, neither the original, nor any copy is now extant. It is very probable that the original tablets were destroyed by the Gauls, though it is said by Cyprianus, that they were preserved in the forum in the year of the city 300. It seems that they were still extant in the time of Cicero, and that in his younger days the youth were obliged to learn them. This code which was peculiarly the law of the Quirites became the foundation of the Roman law, and this law was developed during this period in various ways. This was called the "*lex scripta*;" but there was a large number of customs, which prevailed among the people and were so general as to have the force of law, and these customs were equally valid with the written law. The twelve tables show the fundamental principles of the law, and the rest of the law seemed to be deduced or grow from them.

There were also other sources from which the civil law was developed, and which are given by Cicero, as, "*leges*," "*Senatus consulta*," "*res judicatae*," "*Juris peritorum auctoritas*," "*edicta magistratum*," "*mos*," "*aequitas*." Equity is the inner sense of all law, and must be used in determining all cases under the law, and may in time materially modify the letter of the law, when it would work injustice, and "*mos*" stands very near to equity in modifying the strict law. The "*res judicatae*" held about the same relation to the Roman law of that age, that they do in our own. A decision was only binding in the particular case, but the principles which were decided were recognized, and if they had been repeatedly affirmed they gained the force of law. The other sources of the change of the law in this period, were peculiar to the system of Roman law, though some of them have their counterparts, in the systems of nearly all modern nations. One source of the modifications of the law was by the enactment of the *leges*, and *Senatus consulta* which have their counterparts in the statute law of modern times. The *leges* were of two kinds, those which were properly so called, the *populiscita* which were passed by the *curiae*, and *centuriae*, and the *plebiscita* which were the decrees of the Plebs assembled in their *comitia*. The greater part of the *leges* which affected the former laws were *plebiscita*. The most of them were of a public character, although some had an indirect effect upon private rights, and some were entirely upon the subject of private rights. Many of these *leges* are cited by law writers by their names, and by their subjects, and a few extracts are preserved in various authors. There was no subsequent compilation as comprehensive as that of the twelve tables, and generally a *lex* was very limited in its scope.

As the right of the Senate to bind the whole people by its decrees, was a disputed political question among the Romans themselves, it is hardly worth while for me to touch the subject of private civil rights. The next method by which the law was developed, was by the writings and opinions of those who were learned in the law, the "*prudentes*, *juris periti*," or "*juris consulti*." In Rome these were generally of the higher order in society, and at first appeared before the judge to assist their clients or dependents. This profession was afterwards used to bring persons before the public, when they expected to ask office at the hands of the people. At first the judge was under no obligation to accept their expositions, and of course, when two of equal ability or reputation gave opposing opinions, the judge was at liberty to adopt that view which seemed to him the most reasonable. At first, their office was that of interpreters of the law, but hardly in the sense in which we usually make use of that term. They would not only construe a law, or the law of the twelve tables, from the language of the law itself, but they must know the unwritten, or customary law, and be able to give the meaning of the *lex*,

as applicable to the whole system of laws. It was in the same way as courts now frequently construe statutes, not merely for the words of the statute themselves, but by reference to the former state of the law, in order to see the effect they have in modifying the law as a whole, and are compelled to fit the statute into the body of the law, to form an organic whole. They had also to interpret the law, by deducing the principles which underlie it, and applying those principles to a state of facts, not exactly those specified in the law, but which are similar in principle, to those already admitted, and we see that in this way, the Roman law passed through a process of development, very similar to that of the English common law. It was a system of gradual growth, and only reached the state of a modified system at the late age of Justinian.

The last method of changing and developing the law was by the means of the edicts of the magistrates. At first this change consisted in extending the class of remedies when the actions given by the twelve tables called "legis actiones," did not apply. They were obliged to do this at first in an indirect manner, for if they had drawn up a formula which was not warranted by the law, it would have been dismissed by the judge before whom the case was to be tried. They first made a decree by which they ordered the person charged with a wrong for which no "legis actio" was provided, to enter into a "sponsio," with plaintiff, upon the condition that the money was to be paid if he was guilty of the act. This would be something in the following form: "Do you promise, (Spondes) to give me ten marks if you did such a act; and the reply would be. (Spondeo), I promise." Upon this Sponsio a "legis actio" would lie, and the judge decided whether the money was due upon the Sponsio. So when the occupant of land was threatened with violence by the adverse claimant, and asked the protection of the Praetor, it would be granted only upon the condition of his entering into Sponsio with his antagonist, upon which an action could be brought. The power of the Praetor was extended to an almost unlimited degree, in the first part of the sixth century, by the Lex Aebutia. By this law was introduced the practice of having the complaint and answer of the parties submitted in a written formula, and this formula needed not to be in the words required by the old law.

By this means the Praetor could give new actions which were not based upon the old civil law, and in many cases where the old law gave an action, the Praetor gave a new one, in order to avoid the strictness of the formality of the old proceeding, or to give a more efficient remedy, as in many cases the chancellor has sustained bills in equity where there was a remedy at law, when it was inadequate. There were also introduced, actions based on fictions, as in our common law we have the action of trover based upon a fictitious finding, that of ejectment, upon a pretended lease, entry, and ouster, and actions in the court of exchequer, whose jurisdiction would

be based upon the allegation that the plaintiff is the debtor of the king. The Praetor acted upon the principle that it is the part of a good judge to amplify his jurisdiction, even though they may never have heard of the maxim.

When a magistrate entered upon his duties, in order that the people might know what rules he proposed to be governed by in his administration, it was the custom from an early date, to publish those principles. They were at first declared orally, and afterward were written and hung up in the forum.

It was necessary that the principles by which any Praetor was to be governed should be made known, and this was the more especially so after his discretion was so greatly extended, by the Lex Aebutia; and when one Praetor had taken the step of making known these principles by publishing his edict, it would hardly have been possible for his successor to get along without following his example, and thus it soon became the practice of publishing the edict upon the accession of each new Praetor. These edicts in which general rules were announced, were at first called "edicta perpetua," in distinction to those which only applied to a particular case.

While at first no Praetor was bound to republish the edict of his predecessor, yet he would not change without necessity, and would generally accept that of his predecessor, only making such changes and additions as seemed necessary; but we find, that in the time of Cicero, the practice of adopting the edicts of the former officer, had become so general that he makes it the ground of one of his accusations against Verres, that he had made new edicts about old things. In the use of the edict, lay the guarantee against arbitrary individual acts, and against partiality in the decisions of the magistrate; and it finally became necessary to pass a law called "Lex Cornelia," by which a Praetor was compelled to issue his perpetual edict upon his accession, and then to leave it unchanged during his whole term of office. The perpetual edicts had a great effect in modifying the civil law. For a time no edict had of itself any binding force upon the success of him who promulgated it, nor upon any other Praetor who held office at the same time, and it had not by any means the same force as a lex. We see this expressed in the maxim, "Praetor jus facere non potest." (The Praetor can not make law.) But as the edict of one Praetor was generally adopted by his successors, and as the Praetors had the means of enforcing their decisions, by their decrees, interdicts, actions and exceptions, these edicts gradually acquired the force of law, and the body of the praetorian law was called the "Jus honorarium," in opposition to the "Jus civile." This similarity of the relation of the praetorian law to the civil law, with the relation of our system of equity jurisprudence to the common law, will readily be perceived by the following words of Papinian, L. 7, § 1, D. "Jus praetorium est quod praetores introducerant, vel adjuvandi vel supplendi vel corrigendi juris civilis gratia, propter utilitatem publicam." (The

Praetorian law is what the Praetors have introduced for the purpose of assisting, or supplementing, or correcting the civil law on account of public utility.)

Thus far I have considered the Praetorian law upon its formal side, but it also varied greatly in its content from the old *Jus civile*, and this leads to a very brief consideration of the sources from which those modifications were derived. As our chancellors went to the Roman law for many of the leading principles of equity, so the Roman Praetor was greatly indebted to what was called the "*Jus gentium*" for the principles to govern him where the old *Jus civile* needed supplying or correcting. The term *Jus gentium* is not to be understood as having the same meaning as our phrase "The law of nations" in the sense of a collection of rules or principles which govern nations, in their intercourse with each other. As far as the Romans had any rules of this kind, they were included under what they called the "*Jus faciale*." It was rather a term expressing the principles of natural right and justice, which are admitted in every civilized nation, and the term was used in opposition to that technical body of customary or municipal law of any particular people which has arisen from the peculiar circumstances of that people. When Rome, by her conquests, had become the center of the world, the population of the city was of course largely composed of foreigners, who were not familiar with the practice or precepts of the old technical *Jus civile*, and in suits between such parties, it became necessary to consider the laws which might govern in the place where the contract was made, "*lex loci contractus*," and this class of cases became so numerous that it became necessary to choose a magistrate to take jurisdiction of this class of persons. This officer who was called "*Praetor peregrinus*," in distinction from the "*Praetor urbanus*," was compelled to take into consideration the principles of natural right and justice in rendering his decisions upon the questions submitted to him. Gaius defines the natural law as follows: "*Quod naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque consistitur, vocaturque jus gentium.*" (That which natural reason has established amongst all men, is guarded among all people without distinction and is called *jus gentium*.) This "*Jus gentium*," had its influence in two ways. The first was its effect upon the peregrine praetor, who applied it to cases between persons to whom the rules of the civil law did not apply, and the other was in the effect of the application of the principles of natural right to the varied condition of things caused by the advancing civilization of the country, and the changes in the institutions of the country, added to the tendency of all technical rules to become absolute, when they become oppressive. It was by the praetorian edict that this *Jus gentium* was introduced into and became part of the law of Rome. Probably this was gradually done, at first in the edicts of the peregrine and provincial praetors, but was finally adopted by the Urban

Praetor, and effected the whole people. The time when the *Jus honorarium* became a part of the Roman law is still an unsettled question.

In the third period, that of imperial Rome, there was added to the sources of the law, another, which was that of the decrees or constitutions of the Emperor, promulgated either through the senate or in orders sent to the governors of provinces in answer to special questions or upon general subjects. During this period there were a great number of jurists who wrote upon various subjects, the praetorian edict being frequently commented upon by them. The names of a large part of their authors have been lost, and of many we know nothing except the names. The earliest jurist of any note of whom we have any knowledge, was Q. Mutius Scaevola, who was counsel in 659. He was considered by Cicero, who frequently mentions him, as one of the ablest jurists of his time, and he had a great influence upon his contemporaries. His writings are lost, but there are a few extracts in the Digest from his work on Definitions. It is not worth while to speak of the names of the other jurists whose works are lost, and I will only enumerate the works which are yet extant, which are not incorporated in the Pandects. There is a collection of fragments called the Vatican Fragments, published in 1833, which contain several fragments from authors whose names are unknown, one upon the subject of "*Ex Emptio et Venditio*," one "*De Usufructu*," one "*De re Uxor et Dotibus*," one "*De Excusatione*," and three others. We have preserved in Hugo's "*Jus Civile Ante Justiniana*," fragments of twenty-nine titles from the works of Ulpian, the first books of *Sententiae* of Paulus, and epitome of the first two books of Gaius, from the *Breviario Alariciano*, a few fragments of unknown jurisconsults on manumission, and a consultation of an old jurist, whose name is lost. Since the publication of this compilation, the institutes of Gaius have been discovered, and have proved to be of great value in explaining many things in regard to the forms of actions which could not be understood before this discovery. These institutes are in the nature of an elementary treatise, and by some it is supposed they were composed for the use of students, but I should prefer the opinion of those who think it is too technical for a work for students, and that it was rather designed as a manual for the practicing lawyer. It is divided into four books, of which the last which treats upon Actions and Defenses, is of by far the most valuable to the student of Roman procedure, as in this book we find many forms and explanations which can be found nowhere else. Gaius was also the author of other works, now lost, but of which extracts are now preserved in the Pandects.

During this period the perpetual edict was the subject of various additions until the reign of Hadrian, when under the praetor Julius, it finally received the form which it retained until the reign of Alexander Severus. The effect to be given to the opinion of the Juris consults was

also the subject of change. During the reign of Augustus, he granted to certain of the Jurists, a privilege which was called the right of responding, and gave to their opinions the effect of legal authority, and where the opinions of this class were not conflicting the judge or praetor was bound by the opinion. Where there was a conflict of authority, the judge must be governed by the greatest number. At a later period it was decided that where there was a conflict of authority, the point should be determined by the number of jurists upon either side. Where the number was equal, if Papinian had written upon the subject, his opinion should decide the matter, and when the numbers were equal, and Papinian had not written upon the subject, the judge was to decide upon his own judgment.

With a few remarks upon the various codes before the time of Justinian, I leave this point. The first code of which we have any fragments, extant was called "Codex Gregorianus," from the name of its author, who is otherwise unknown. There is an extract from the thirteenth book, but it is likely that the number was greater. The date of this compilation was probably about the end of the reign of Diocletian. There was also another compilation which is generally mentioned in connection with the last, called "Codex Hermogenianus." The oldest constitutions which are ascribed to him are of the date of 290 to 291; and the rest of the date of the reign of Diocletian. The fragments of these two codes were preserved in the Breviary, and are few in number, making only ten octavo pages in the edition of Hugo, and with one exception, they are upon the subject of private law. In the year 488 the Theodosian code was published, and was to take effect on the 1st of January of the year following. This code contains a vast number of constitutions, which are divided into a large number of titles, and then into sixteen books. We have an epitome of the code in the breviary, and the last eleven books are preserved nearly in their original form. The code embraces public and private law, and the criminal as well as the civil jurisprudence, and it became the law of both the Eastern and Western empires. After this there were a large number of constitutions promulgated, of which we have now a collection of about one hundred and fifty pages called the novels of Theodosius, Valentinian, and others. Among the Burgundians there was also a book called the *Lex Romana Burgundiorum*, of which we have preserved about forty pages. With this I close my sketch of the third period, reserving a few remarks upon a few of the leading jurists of this age, for the sketch of the Pandects.

The fourth period in the history of the Roman law is that in which the works which are called the *Corpus Juris* or works of Justinian were compiled and arranged. It is not necessary to speak here of the character of Justinian, nor of his general history. The authorities of the law at the beginning of his reign were contained in the works of the jurists, which were then extant, and the constitutions in the codes and the vari-

ous rescripts which had been promulgated after the codes. When Justinian determined upon a revision of the laws, he selected a commission of ten jurists, among whom were Tribonian and Theophilus, who was professor of law at Constantinople. This commission was to revise the three codes and the later records, and reduce them to a single compilation. The single constitutions were to be arranged under their proper titles, and the code was to contain all the constitutions of general validity, and also the edicts and rescripts. Within less than one year the work was completed, and promulgated under the name of "Codex Justinianus," and the old codes were abrogated in the year 529. The code is in twelve books each containing from forty-five to seventy-two titles, a part of the constitutions are in Greek, with Latin versions, but the greater part are in Latin. The whole work in the edition of Spanenberg and Gebauer, 1776, comprises imperial quarto pages.

The next year after the compilation of the code, Tribonian was ordered to make a compilation of the private laws as the same appeared in the writings of the various jurists; and with the help of sixteen men who were partly high officers of the government, and partly jurists, the work was completed in about three years. The compilation was called the *Digest* or *Pandects*, and was originally divided into seven parts; the first containing the first four books, the second the next seven books, the third from the 12th to the 19th, the fourth from the 20th to the 27th, the 5th from the 28th to the 36th, the last was miscellaneous in its contents, the sixth containing the books from the 37th to the 44th and the seventh the rest. The digest is a compilation of citations from various text writers, rescripts, constitutions, and edicts, arranged with but little care. The citations number between 7,000 and 8,000, and are taken from thirty-nine different authors. Of these extracts 2,462, or nearly one-third are from the works of Ulpian 2,080, or nearly one-sixth from Pauls; and 595 from the works of Papinian, who was justly regarded as the ablest of the classical law writers.

We also find numerous extracts from the works of Gaius, Modestinus, Celsus, Julian, Marcian, and Pomponius. The names of the authors have been preserved by being placed above each extract. The work is Latin except a part of the extracts from Modestinus, which are in Greek with Latin versions. The work comprises 1141 imperial quarto pages, and while the construction of the Latin is not difficult, the words are so frequently used in a technical sense that the ordinary reader can not do much at the study of the work without the aid of the *Civil Law Lexicon*. I know of no such work in the English language, but for the German student we have a very valuable aid Humann's "*Hand Lexicon to the Sources of the Roman Law*." This digest was promulgated in the year 538, and this, with the institutes and code, were the only authorities to be consulted. No commentaries on them were to be published and all use of, and

citation from the old sources were forbidden. While the digest was in the course of preparation, Tribonian and the professors Theophilus and Dorotheus prepared an elementary book for students, which was called the Institutes. It consisted of four books, and was based upon the work of Gaius, and was finished a few days before the Digest, and is generally published with it in the editions of the Corpus Juris. After the publication of the above mentioned works of Justinian, it was found that there was still many points upon which the law was not clear, and hence it was necessary to pass many new constitutions. This series of constitutions which was called novels began in year 535, and continued at least to the year 575. There are in this collection in some editions one hundred and eighty-six novels, but a few may possibly be spurious. These novels were mainly written in Greek; Most of them have Latin versions, made at or near the time they were promulgated, but a few are in Latin alone. They make about 680 imperial quarto pages, and are divided into nine books, and each book into several titles. The above works of Justinian, with the imperial edicts of Justinian, the Constitutions of Tiberius, the Novels of Leo, one hundred and thirteen in number, with the Imperial Constitutions, the Canons of the Saints and Apostles, and also the book of Feudal Customs, constitute what is called the Corpus Juris Civilis, and form two very large imperial quarto volumes. It is not my design in this article to trace the history of the Roman law during the middle ages, nor to speak of the works of the glossators upon the Corpus Juris. Those who wish to follow this interesting subject will find it fully treated in "Savigny's History of the Roman Law in the Middle Ages," to which I would refer them.

SUPREME COURT OF OHIO.

GALLAGHER v. FLEURY.

A decree for divorce and alimony granted to a wife for the aggression of her husband, provided that there should be allowed to her, "as and for alimony, out of the plaintiff's (the husband's) real property, according to the statute in such case made and provided," certain real estate therein described. *Held*, that, under the act of 1853, 51 Ohio L. 377, § 7 (Rev. Stats. § 5699), she became vested, by force of the decree, with all the title which the husband had in the premises.

Error to the District Court of Franklin County.

Jane Fleury brought an action in the Court of Common Pleas of Franklin County against William Gallagher and James Gallagher to recover possession of two lots of land in the city of Columbus, described in the petition, of which real estate she is the owner in fee simple.

The defense to the action, as set forth in the answer, is, in substance, as follows:

That Patrick Laughlin filed a petition in the court of common pleas of said county against his wife Maria Laughlin, for a divorce. That she filed a cross petition in that case, asking for a

divorce and alimony. That in 1866 the court decreed to said Maria a divorce, on her cross petition, and in the same decree awarded to her alimony in these words: "This decree being based on the aggressions of the plaintiff, it is further ordered, adjudged and decreed by the court, that there be and is hereby allowed to the defendant, Maria Laughlin, as and for alimony, out of the plaintiff's real property, according to the statute in such case made and provided, the following described real estate." (Here the property is described as in the petition in this case.) It is further alleged in the answer, that since said decree was rendered Patrick Laughlin has died, leaving the plaintiff in this case, Jane Fleury, his sister and heir; and that in 1876 Maria Laughlin died, leaving William Gallagher and James Gallagher, sons by a former husband, as her only heirs.

In a reply it is alleged, among other things, that the real estate decreed to Maria as alimony was more than one-half in value of Patrick Laughlin's real estate, and that she took by the same decree all his personal property.

A demurrer to the answer having been overruled, and a demurrer to the reply sustained, the cause was submitted to the court on the petition and answer, and the court rendered judgment in favor of the Gallaghers.

In 1877, the district court reversed the judgment, and this petition in error was filed in this court to reverse the judgment of reversal.

Harrison, Olds & Marsh, for plaintiff in error.

Converse, Woodbury & Booth, for defendants in error.

OKEY, J.

The question presented in this case is whether, by the decree for alimony, Maria Laughlin obtained all the interest which Patrick Laughlin had in the premises in controversy. If she did, then the court of common pleas decided correctly in overruling the demurrer to the answer, sustaining the demurrer to the reply, and in rendering judgment in favor of the Gallaghers, and the district court erred in reversing the judgment; but if by the decree she took only a life estate, then on her death the estate passed to the heirs of Patrick Laughlin, and the judgment of the district court is correct. Independently of statutory provision, alimony in England and this country is the allotment of sums of money, payable at stated intervals, by the husband for the support of the wife. The whole subject is considered in the instructive cases of *Calame v. Calame*, 25 N. J. Eq. 548; *Burrows v. Purple*, 107 Mass. 428.

But in this state the matter is regulated by statute. By the seventh section of the act of 1853 (51 Ohio L. 377), which remained in force until it was incorporated into the revised statutes (5699), it was provided as follows: "That where a divorce shall be granted, by reason of the aggression of the husband, the wife shall be restored to all her lands, tenements and hereditaments, not previously disposed of, and to her maiden name if she so desires, and shall be al-

lowed such alimony, out of her husband's real and personal property, as the court shall think reasonable, having due regard to the property which came to him by marriage, and the value of his real and personal estate at the time of said divorce, which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or by installments, as the court may deem just and equitable; and if the wife survive her husband, she shall also be entitled to her right of dower in the real estate of her husband, not allowed to her as alimony, of which he was seized at any time during the coverture, and to which she has not relinquished her right of dower; but if the divorce shall arise by reason of the aggression of the wife, she shall be barred of all right of dower in the lands of which her husband shall be seized at the time of the filing of the petition for divorce, or which he may thereafter acquire, whether there be issue or not, and the court shall order to her restoration of the whole of her lands, tenements or hereditaments not previously disposed of, and also such share of the husband's real or personal property, or both, as to such court may appear just and reasonable.

In *Broadwell v. Broadwell*, 21 Ohio St. 657, it appeared that the court below had allowed to the wife, as alimony, a portion of her husband's lands, and it was stated in the decree, in terms, that her title should be in fee simple. This court held in that case that such decree was not erroneous. It was unnecessary, however, to express an opinion whether the words, "in fee simple," or any equivalent words, were necessary in the decree to transfer the fee, and no opinion on the question was expressed. But in this case a decision of that question becomes necessary.

In the absence of statutory provision, the decree of a court of equity, directing the conveyance of lands, does not operate as such conveyance, but must be enforced by attachment and sequestration. *Shepherd v. Ross Co.*, 7 Ohio pt. 1 271. Under this statute, however, no conveyance is contemplated, but on the contrary, when a decree is made allowing lands to a wife as alimony, under the above section, the title she receives passes to her *co instanti*. That such title is all the interest of the husband in such property, where the words, as here, are general, we entertain no doubt. The rule which still requires the word *heirs* in a deed, in order to pass a fee, has no just application to a statute like the one under consideration; nor has the rule—no longer in existence here—that a fee in the lands will not pass by devise unless the intention of the testator to that effect is apparent on the face of the will. We do not doubt the power of the court, in awarding to the wife a portion of her husband's lands as alimony, to so limit her interest that it will be less than the whole estate of the husband; as, for instance, where he has a fee, her interest by the decree for alimony may be limited to a life estate; but such limitation, to be effectual, must be found in the decree,

and, as already stated, in the absence of such limitation, the whole interest of the husband passes to the wife.

It is further urged, on behalf of the defendant in error, that the real property of Patrick Laughlin, awarded to Maria Laughlin as alimony, was more than one-half, in value, of all the real property owned by him; that by the same decree all his personal property was awarded to her, and hence that the court could not have intended she should take a fee in the lots. But the decree must be construed by its words, in the way already stated. Besides, none of the evidence upon which the divorce and alimony were decreed is before us. We are aware that some attempts have been made to lay down rules for the guidance of courts in awarding alimony; but every case must, in a large degree, depend on its own facts for a proper disposition of it, and, without deciding that the question is properly before us, it is perfectly clear that the circumstance relied on, that is, the large proportion of the property awarded to Maria Laughlin as alimony, cannot, properly, control us in determining the interest which she took in the lands in question.

Judgment of the district court reversed and that of the court of common pleas affirmed.

[This case will appear in 36 O. S.]

SUPREME COURT OF OHIO.

KENT v. PERKINS.

1. The act of 1868 (65 Ohio L. 155), in relation to making and widening ditches, is a valid enactment, as applied to cases in which damages are not claimed; and a proceeding for the purpose of widening any such ditch might be instituted by one petitioner, though the ditch was confined to his own lands.

2. A report or a finding of a jury under that act is invalid, where such report or finding was not unanimous.

3. Lands in an incorporated village may be assessed by the trustees of a township in which the village is situated, for the cost of widening a ditch within the township, but outside of the village limits; and the fact that the village has a board of health will make no difference.

Error to the District Court of Portage County.

On September 4, 1873, John Perkins filed in the office of the clerk of Franklin township, Portage county, his petition, asking that a certain ditch and drain in that township be cleaned, widened and deepened; in which petition it was stated that the public health and convenience required that such improvement be made, and that cross drains and ditches from the lands of Marvin Kent and Henry A. Kent empty their waters into the first-mentioned ditch and drain, thereby greatly benefiting their lands.

At the time the petition was filed the petitioner gave bond to the acceptance of the township clerk, and also gave notice to the persons sought to be affected by the proceeding, as required by statute.

No damages were claimed by any person.

After an order had been made by the township trustees to the effect that it would be conducive to the public health to have the ditch

cleaned, and that the work should be done and expense borne equally by Perkins and Marvin Kent, the proceeding was appealed to the probate court, in which court a jury was impaneled and trial had. On such trial (March 13, 1874,) it was found that the lands of Marvin Kent and Henry A. Kent were wholly within the corporate limits of the village of Kent, which village is within said township of Franklin; that the ditch to be cleaned is confined to the lands of Perkins; that no part of the ditch is within the corporate limits of the village, and that the village had a board of health. Thereupon the court charged the jury that the lands of Marvin Kent and Henry A. Kent could not be assessed for any part of the cost of the improvement, for the reason that said lands were situated wholly within the village; and Perkins excepted.

A verdict was rendered, finding that it would be conducive to the public health, convenience and welfare to have the ditch cleaned and widened, and that no compensation is due to any person, but the verdict was concurred in by only ten of the twelve jurors. A motion for a new trial was overruled; and thereupon the proceeding, so far as it related to the Kents, was dismissed by the court.

The judgment of the probate court was reversed in the court of common pleas on a petition in error filed by Perkins; the cause was remanded to the probate court for further proceedings; the judgment of the court of common pleas was affirmed in the district court, and a petition in error was filed on leave in this court by Marvin Kent and Henry A. Kent to reverse the judgments of the district court and court of common pleas.

H. B. Foster, for plaintiffs in error.

Rockwell & Hatfield and M. Stuart, for defendants in error.

OKEY, J.

The act of May 6, 1868, "to provide for locating, establishing and constructing ditches, drains and water-courses, and to repeal a certain act therein named," (65 Ohio L. 155), as amended April 13, 1872 (69 Ohio L. 45), and January 27, 1873 (70 Ohio L. 14), was in force when the proceeding, mentioned in the statement of this case, was pending before the township trustees, and also while it was pending in the probate court. See Rev. Stats. § 4511 *et seq.*

The act in question, as amended, provided, among other things, that township trustees of any township should have power, whenever the same was demanded by, or would be conducive to the public health, convenience or welfare, to cause to be established, located and constructed, "any ditch, drain or water-course within such township." They had the same power to cause any such ditch to be cleaned. A condition precedent to the exercise of this power was that a petition should be filed with the township clerk, "by one or more persons owning lands adjacent to the line of any such proposed ditch," or ditch to be cleaned. An appeal from the order of the trustees to the probate court, "by any

person or persons interested in the location of such ditch," or in cleaning the same, was provided for. Provision was made for a jury of twelve men in the probate court, to whom the probate judge was required to administer an oath. The oath required the jury to view the premises along the route of such ditch, and faithfully and impartially report in writing to said court: "First. Whether it will be conducive to the public health, convenience or welfare to cause said proposed ditch, drain or water-course to be established or located," or cleaned. "Second. The amount of compensation due to each person in case of the location (or cleaning) of the same; and, Third. The amount of labor to be performed by each person interested in the opening and constructing (or repairing) of the same." And, unless all the jurors concurred, the verdict was invalid. *Work v. State*, 2 Ohio St. 296.

The act and the amendments thereto have been repealed, and the most serious objection to those enactments has been removed. This opinion will, therefore, be confined to a statement of the conclusions at which we have arrived.

The ditch in question is confined to the lands of John Perkins, and it is said the legislature could not have intended to provide for such a case, as a man has a right to make or clean a drain on his own land. Furthermore, it is said that the petition must be filed by a person owning lands "adjacent" to the proposed ditch or the ditch to be cleaned, and that Perkins' lands are not "adjacent." But this legislation had for its foundation the public health, welfare and convenience, which may be promoted as well where the drain is confined to one owner as where it extends to the lands of several owners, and by the terms of the act one owner may petition. And the word "adjacent" was properly used as including lands through which a ditch passes as well as those lying near the ditch. But if the word had not been accurately employed, still the intention of the legislature, as manifested in all that it has said on the subject, is what we should endeavor to ascertain, and regard being had to that, the objection is clearly untenable. True, the ditch seems to have been constructed by private enterprise; but it has long been treated as a public ditch, and the owner of the land to which it is confined consents that it may be so regarded.

Again, it is urged that the act is invalid for the reason that it makes no provision for assessing damages to the owners of lands injured by the location of such ditches, and for the further reason that the provisions in respect to the jury and the mode of trial are not in accordance with the organic law, and the plaintiffs in error rely on *Smith v. Atlantic, &c. R. Co.*, 25 Ohio St. 91, and *Teagarden v. Davis*, decided at the present term. But here all claims for damages were waived. In many cases an act may not be wholly void, but void in part and valid in part. In such case it is incumbent on one asserting its invalidity, to show that, if enforced, it will have

an unconstitutional operation as applied to him. That such statute would, if enforced, be unconstitutional in its operation under a different state of facts—as where such damages had not been waived—affords no ground for holding it to be invalid in another case where the damages were waived. This is in accordance with *Bowles v. State*, decided at the present term.

Finally, it is said that there was no power to assess lands within Kent, which is a village having a board of health, for any part of the expense of the proposed work. But Kent is wholly within Franklin township. The trustees, by the terms of the state, had power to cause the construction or cleaning of "any ditch, drain or water-course within the township," and to impose on the adjacent lands the cost of the work. The lands of the Kents, though within the village, are adjacent to the ditch, and benefitted by it. The health, comfort and convenience of the citizens of a village may largely depend on the proper drainage of lands lying beyond its territorial limits, and there may be no power to compel the draining of such lands except through the action of township trustees or county commissioners. Why should not any lands adjacent to such drain, and benefitted thereby, be assessed for the cost of such work? The statute makes no such limitation on the power of township trustees as is claimed by the plaintiff in error, and therefore we hold that this objection is also untenable.

Judgment affirmed.

BOYNTON, C. J., dissented from the third proposition of the syllabus.

[This case will appear in 36 O. S.]

SUPREME COURT OF OHIO.

THE CINCINNATI AND SPRINGFIELD RAILWAY
COMPANY

v.

THE INCORPORATED VILLAGE OF CARTHAGE.

1. Where a village council and a railway company agree, under the statute, as to the terms upon which the company may use the streets of the village for its road, whereby the company bound itself to grade and gravel the streets so used, in a manner "to the acceptance of the council," *Held*, that a subsequent ordinance repealing the contract ordinance, passed with intent to rescind the entire contract, being inoperative, without the assent of the company, to rescind the grant of the right of way, is also inoperative to release the company from its obligation to grade and gravel streets.

2. That upon the failure of such company within a reasonable time to grade and gravel the streets as per contract, a right of action accrues to the village without special notice, request or demand on the company to perform its contract.

3. It is not essential to the right to maintain such action that the city should have established, by ordinance, other than the contract ordinance, the permanent grade of such streets.

4. Where such contract provides for the improvement of a dedicated street which had not been previously accepted by the council, such contract for its improvement constitutes an acceptance of the dedication on the part of the village.

5. Under the statute, the exclusive control of the streets is in the council of villages, and directions by the

mayor, concerning their improvement, are wholly without authority.

6. The measure of damages for the breach of such contract on the part of the company, is the reasonable cost of doing or completing the work, and upon such breach, a right of action accrues for full damages, although the work has not been done or completed by the village.

Error to the District Court of Hamilton County.

On May 2, 1871, the incorporated village of Carthage granted to the Cincinnati and Springfield Railway Company the right of way through the village on Lebanon street, by ordinance, which contained the following *proviso*:

"*Provided*, however, that the cuts and fills for said railway shall not be greater than shown in the accompanying plan or profile, and that in constructing said railway through said Lebanon street or across any other streets in said village, the said railway company shall be required to construct, whenever the same may be needed, suitable culverts and gutters for the passage of water, and shall cause to be made easy and convenient crossings for all streets crossing said railway, and that said Lebanon street be so graded and gravelled by said railway company as to permit the portion thereof not occupied by said tracks to be used as other streets are used, to the acceptance of the village council."

The company accepted the grant and constructed their road through said street.

The original action was brought by the village against the railway company, in the Court of Common Pleas of Hamilton County, to recover damages for an alleged breach of the stipulations contained in the *proviso*.

The defendant claimed, in the first place, that said stipulations had been performed by it, and, second, that said ordinance had been repealed. Verdict and judgment were rendered for plaintiff. This judgment was affirmed by the district court.

Upon a bill of exceptions taken on the trial in the court of common pleas, several matters are alleged for error, which are sufficiently stated in the opinion.

M. C. Shoemaker and Stallo & Kittridge, for plaintiff in error.

Jordan, Jordan & Williams, for defendant in error.

McILVAINE, J.

The ordinance of May 2, 1871, and the acceptance of the grant by the railway company, constituted a valid contract between the parties. The 12th section of the corporation act of May 1, 1852, as amended April 15, 1857, provided that "If it shall be necessary in the location of any part of any railroad to occupy any road, street, alley or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied." The contract for the right of way having been

thus entered into by the parties, it was not within the power of the council of the village to rescind or modify it without the consent of the railway company. The ordinance of October 3, 1871, purporting to repeal the contract ordinance of May 2, 1871, was not intended to operate merely as a discharge of the railway company from its obligations to perform the stipulations of the contract on its part, but to rescind the contract entirely; and as it cannot have the operation intended by the council, the railway has no right to insist that it shall have an operation not intended by the council.

It is claimed by the company, that, although the stipulated work was not performed, a right of action did not accrue to the village until refusal or neglect to do the work by the company, after special notice or demand on the part of the village. On this point it is sufficient to say, that, under the contract, the company was bound to do the work within a reasonable time. No provision was made for notice or demand. Hence, after the lapse of reasonable time, the work not being performed, a right of action accrued to the plaintiff. It is true, that this work was to be performed "to the acceptance of the village council." And as to such portions of the work as were assumed to be done, but not to the satisfaction of the council, there would be some reason for requiring notice of non-acceptance, if the work as done had been tendered for acceptance. But in the case before us formal acceptance was not solicited, and the court charged the jury on this point, that they should ascertain whether or not the village council were in fact satisfied, or ought, as a reasonable body of men to have been satisfied with such portions of the work, and if they were, or ought to have been satisfied, then there could be no recovery on account of such portions. This statement of the law was as favorable as the defendant had a right to ask.

It is also contended that inasmuch as no grade for Lebanon street had been established by the village council, there was no means for determining the extent or nature of the work to be done by the company, or the amount of damages for failing to perform it. It appears to us that the non-existence of an established grade of this street did not effect the right of recovery. The grade of the railroad track had been fixed by the company, as was shown by a "plan or profile" referred to in the contract; and this grade being fixed, the undertaking of the company was to so grade and gravel the street as to permit it to be used as other streets were used. The street was to be improved with reference to the grade of the railroad track, so that the extent and nature of the work were sufficiently defined. We see no objection to the council making such a contract for the improvement of a street under its care and control.

The southern terminus of Lebanon street was originally at Second street, but previous to this contract one French had laid out an extension of this street southward three hundred feet and

had sold lots abutting on the extension, upon which buildings had been erected. In respect to this extension, the defendant below requested the court to charge the jury as follows:

"The defendant was under no obligation, by the terms of the contract set forth in the petition, to grade and gravel any part of Lebanon street, as shown on said plat of T. French, which lies south of Second street."

The court refused so to charge, but did instruct as follows:

"The ordinance set forth in the petition dated May 2d, 1871, included all of what was then known as Lebanon street, between the points for which the proposed cuts and fills were marked on the plan and profile accompanying said ordinance, which had been and then was dedicated to public use as a street, and over which said council had control as such; there is no dispute that this was the case with all of said street from the south line of Second street to Sixth street, the evidence of plaintiff to that effect not being contradicted, and being sufficient to establish the fact.

"As to the part south of Second street, being a *cul de sac*, extending three hundred feet from Second street, it is claimed that it was dedicated as a street by T. French, no dedication thereof having been made according to the statute in such case provided. Three things are necessary to be shown to establish its dedication. The owner must have intended to dedicate the property for a street, and to give up his private rights in it, which are inconsistent with its use as a street by the public at large. And he must have evidenced and carried out his intention by some unequivocal act, such as throwing it open to the public, fencing it out, making or recording a plat, showing it marked as a street, selling lots upon such plat, and conveying them by deeds referring to the plat. If you find that the owner so intended to dedicate it as a public street, and carried out such intentions by acts necessary for that purpose, then the village council must have accepted the dedication, there being no evidence of any acceptance by the public before plaintiff's incorporation, and I charge you that the passage of the ordinance of May 2d, 1871, accompanied by the plat or profile referred to in the ordinance, and offered in evidence therewith, recognizing the street as extending three hundred feet below Second street, and providing for its occupancy and improvement by defendant, is a sufficient acceptance of the dedication of that part of the street by the village council, if you find that before that time the owner on his part had done all that was necessary to its dedication as aforesaid."

We see no error in refusing to charge, or in the instruction given.

It is also alleged for error that the following testimony was rejected by the court. R. M. Shoemaker, president and superintending engineer of the defendant, was offered by defendant as a witness to prove that while the work of grading Lebanon street by the defendant was

progressing under the witness's charge, that Mr. Morton, the mayor of plaintiff's corporation, instructed the witness not to grade and gravel any of the street south of Second street; that Lebanon street, as recognized by the village, did not extend south of Second street.

To which plaintiff objected, and the court sustained the objection and excluded the testimony (it not being shown, nor proposed to be shown, that said mayor had any authority from council in the premises), to which the defendant excepted.

The exclusion of this testimony was not error. The exclusive care and control of the streets of an incorporated village are placed, by statute, in the village council. And any direction in respect to the improvement of streets, assumed to be given by the mayor of the village, without authority from the council, is wholly without authority.

The last ground alleged for error against the judgment below, which we propose to consider, relates to the measure of damages. On this point the court charged as follows:

"If you find the plaintiff is entitled to a verdict, the measure of damages for such work, if any, as the defendant ought to have done and failed to do, within a reasonable time, and the plaintiff did do, is the cost to plaintiff of the work done by it, and interest thereon to the first day of this term, provided such was the fair and reasonable cost thereof at the time when it was so done. And for such work, if any, as the defendant agreed to do and failed to do, within a reasonable time, and which the plaintiff has not done, the plaintiff is entitled to recover what it would fairly have cost the plaintiff to have it done after the defendant had failed for a reasonable time to do it."

The measure of damages in such cases is compensation. and, of course, corporate compensation must be limited to the corporate injury; but, where the injury resulting to a corporation by the breach of a contract is the same that would have resulted to a natural person from a like breach, the rule of compensation is the same. This case is wholly unlike *M. K. & T. R. R. Co., v. City of Fort Scott*, 15 Kan. 490, where the city had granted the right of way through its streets in consideration that the company would build its repair-shops in Fort Scott, which the company failed to do. By the failure of the company the injury to the city in its corporate capacity was not equal to the cost of the improvements contracted for. If the shops had been built, they would not have become the corporate property of the city. Nor is this case like one where the right of way is granted upon conditions, by an ordinance operating as a law merely, and the way is occupied in violation of the conditions. We need not stop to discuss the nature of penalties in such cases. Here we have a violated contract entered into by parties authorized to contract; and made, though by a municipal corporation, in relation to its corporate affairs. We cannot, therefore, see why the ordinary rule of

damages should be departed from, or why the municipal corporation should be required to perform the work contracted for before instituting an action for damages for the breach of the contract. Should a tax be collected to pay for the work, and an action then brought for the purpose of reimbursing the tax-payer? Surely not. Nor does it matter at all, to the delinquent contractor, whether or not the work which he contracted to do, but failed to perform, should ever be accomplished. Whether the damages realized in such action should be devoted to the improvement contracted for, or to other purposes, is a question between the village and its citizens, with which the railroad company can have no concern.

Judgment affirmed.

[This case will appear in 36 O. S.]

SUPREME COURT OF OHIO.

ELEVATOR COMPANY

v.

SAMUEL S. BROWN.

1. Lessees brought suit against their lessor, under a clause in their lease which entitled them, at the end of their term, to payment for improvements placed by them on the premises. The lessor defended on the ground that by a clause in the lease the lessees were required to renew, if the lessor should, during the term, "purchase the title in fee simple to said premises," in which event the lessees should not be entitled to payment for improvements until the expiration of the term in renewal; and that he had, during the original term, purchased such title in fee simple, and given the lessees notice that he required them to renew: *held*, that in such action it is not sufficient for the lessor, in proving his title, to show that he had, during the term, made an agreement with the owners of the fee for the purchase of the premises, the evidence further showing that he had not, during the term, paid the purchase-money or received a conveyance.

2. Whether temporary and partial occupancy of premises by lessees, after the expiration of the term mentioned in the lease, should be regarded as consent to or in effect a renewal, under a clause in the lease by which the lessees agreed to renew in case the lessor purchased the title in fee during the term, is to be determined, not merely from proof of such occupancy, but from the facts in connection with such occupancy.

Motion for leave to file a petition in error to reverse the judgment of the Superior Court of Cincinnati.

Samuel S. Brown and James M. Schoonmacker, administrators of William H. Brown, brought suit in the superior court of Cincinnati against the Canal Elevator and Warehouse Company, a corporation, to recover \$2,799, with interest from September 1, 1879, being the cost of certain improvements made by said William H. Brown and one Murphy while in possession of certain real estate under a lease from said corporation, Murphy having sold his interest in the claim to Brown.

The cause was heard in special term on petition, answer, reply and testimony. The court, finding difficult questions of law and fact to be involved, reserved the cause for decision in general term. In the general term, judgment was rendered in favor of Brown's administrators for \$3,023. This application for leave to file a peti-

tion in error in this court is made on behalf of the corporation.

There is no dispute about the facts. So far as it is necessary to state them, they are as follows: April 21, 1871, the corporation leased to William H. Brown and Samuel B. Murphy, partners, as Brown & Murphy, coal dealers in Cincinnati, the privilege of occupying and using two parcels of real estate, to be used by them in their business, from May 1, 1871, until September 1, 1879. The lessees were to furnish money, not exceeding \$2,500, for the erection of coal bins on the premises, and pay certain rents, taxes, &c.

One of the parcels of real estate was held by the lessor by perpetual leasehold. With respect to the other parcel, it was agreed, in the lease to Brown & Murphy, "that in case the said lessor shall, during said term, purchase the title in fee simple to said premises, the said lessees hereby agree to bind themselves and their legal representatives to renew this lease, at the expiration of said term. * * * for the further term of eight years from said 1st day of September, 1879, upon the same terms, conditions, covenants and agreements as above set forth." And it was further stipulated, "that at the expiration of the term of this lease, or, in case of renewal, at the expiration of such term of renewal, the said party of the first part shall pay to the said parties of the second part the amount so furnished and paid by them as aforesaid for the said bins and improvements, without interest."

On August 30, 1879, the lessor gave notice to the lessees that it had purchased the title in fee simple to the parcel of real estate referred to in the clause of the lease above quoted, and the lessees were requested to renew the lease in accordance with the requirements of such clause.

The premises referred to in the notice had been owned by five persons as tenants in common. Two of them lived in Kansas, where their acknowledgment of the deed conveying the property to the corporation was taken September 8, 1879, and the deed was entered of record in Hamilton county, Ohio, on September 19, 1879. The consideration for the premises was \$6,000, of which amount the sum of \$1,000 was paid on delivery of the deed, and a mortgage on the premises was executed by the corporation to the grantors for the remaining \$5,000.

When the notice above mentioned was given by the lessor, the lessees immediately declined to renew the lease. On September 2, 1879, they vacated the premises, and within two days thereafter returned the keys to the office of the lessor. They left in one of the bins three hundred and seventy-five bushels of coal until September 18, 1879, being unable to dispose of and cause it to be removed before that time.

Stallo, Kittredge & Schoonmacker, and A. B. Huston, in support of the motion.

Sage & Hinkle, contra.

OKEY, J.

This suit to recover for the value of improvements would have been denominated, under our former practice, an action at law. Its nature is

not changed by the blending of suits at law and in equity under the general name of civil action. Nor is the distinctive character of the suit changed by the answer of the corporation, in which a recovery for rent is demanded upon the ground that there was a renewal of the lease. The only contingency upon which the lessees were required to renew, was that the lessor should, during the term mentioned in the lease, "purchase the title in fee simple to said premises." This condition was not satisfied by a mere agreement for such title, and the title acquired subsequently to September 1, 1879, was not available to the lessor in making defense to the action in the court below, on the issue there presented.

The lessor insists, however, that the lessees continued to occupy the premises subsequently to September 1, 1879, and hence must be regarded as consenting to such renewal. But whether temporary and partial occupancy of premises by lessees should be regarded as consent to and in effect a renewal, under such a clause in a lease, must be determined from the circumstances, and not merely from the fact of such occupancy. Looking to the terms of the notice to renew, given by the lessor on August 30, 1879, the refusal of the lessees to renew, their removal from the premises on September 2, 1879, and the return of the keys to the office of the lessor shortly thereafter, we are led to the conclusion that there was no act of the lessees which should estop them to deny such renewal. The fact that a small quantity of coal was permitted to remain in one of the bins until September 18, 1879, is explained in the testimony, and cannot properly lead to any other conclusion than the one already stated, for the intention not to renew had already been manifested in unmistakable form.

There is no error in the record.

Motion overruled.

[This case will be in 36 O. S.]

SUPREME COURT OF MINNESOTA.

KRIPPNER v. BIEBL.

July 15, 1881.

Negligence—Setting Fire on One's Premises—Injury to Another. One who negligently, sets a fire on his own land, and keeps it negligently, is liable to an action for an injury done by the spreading or communication of the fire, directly from his land to the property of another, whether through the air or along the ground, and whether he might or might not have reasonably anticipated the particular manner and direction in which it is actually communicated.

The defendant set a fire in his grain stubble, after ploughing around the field to prevent the spreading of the fire, but the fire "jumped" the ploughing and spread over the prairie. The defendant attempted to put it out the same day. The evidence tended to show that the fire was not actually extinguished, but that it continued to burn smolderingly in the dry soil of a slough for two days, when by reason of an ordinary change in the direction

and force of the wind it burned afresh, and running upon plaintiff's land, two miles from where the fire had been set, destroyed property thereon belonging to him. The action was for negligence. The answer admitted the kindling of a fire by defendant, but denied negligence. The defendant appealed from an order refusing a new trial.

DICKINSON, J.

The defendant presented several propositions to the court, with the request that the same be given to the jury as the instructions of the court, among which was the following: "Fourth. If you find that the fact of the fire remaining in the slough as testified, for two nights and one day, and then starting again, could have been foreseen by a man exercising ordinary prudence, under the circumstances, then the defendant is liable; but if it could not have been foreseen by ordinary carefulness, then he is not liable. The defendant is only responsible for the natural and proximate, and not for the remote, consequences flowing from his acts. If a subsequent and distinct cause, intervening after that for which the defendant is responsible, has caused the act, has been productive of the injury, and if that was the immediate cause of the injury, and but for that no injury would have occurred, the defendant is not responsible." To the refusal of the court to give this charge the defendant excepted. The court was right. Assuming, as we may, that the latter half of the request correctly states the rule of law in such cases, yet the first part of the charge proposed involves the error of leaving out of consideration the setting the fire, as a ground of liability, which might properly be found by the jury to have been an act of negligence, and the proximate cause of the injury. It makes the defendant's liability to depend only upon the determination as to whether a prudent man could have foreseen that event which might have been regarded by the jury as a mere incident attending the fire; that is, lingering and smouldering in the slough, and its subsequent bursting out afresh. If, under the circumstances, the setting of the fire was negligence, which directly produced the injury, the defendant might be held liable, although the staying of the fire in the slough, and its revival, might not have been anticipated by a prudent man. "A man who negligently sets fire on his own land, and keeps it negligently, is liable in an action at common law for any injury done by the spreading or communication of the fire directly from his land to the property of another, whether through the air or along the ground, and whether he might or might not have reasonably anticipated the particular manner and direction in which it is actually communicated." *Higgins v. Dewey*, 107 Mass. 494.

It is to be observed that the original act of the defendant, claimed to have been the wrongful cause of the injury, was continuously in operation from the time of setting the fire until the injury occurred, two days afterwards. No other independent responsible agency intervened, nor, indeed, any other change in natural conditions than an ordinary change in the wind from south or south-east to south-west, with perhaps some increase in its force. Under these circumstances it cannot be said, as a conclusion of law, that the injury was too remote. *R. R. Co. v. Stanford*, 12 Kan. 354; *Higgins v. Dewey*, *supra*; *Fent v. R'y Co.* 59 Ill. 349; *Kellogg v. R. R. Co.* (U. S. C. C. per Miller, J.); *Cent. L. J.* June 4, 1874, p. 278; *Griggs v. Fleckenstein*, 14 Minn. 81; 2 Greenleaf on Ev. 268; 1 Bouvier Law Dict. tit. Cause Proxima, etc., and cases cited.

Order affirmed.

SUPREME COURT OF CALIFORNIA.

MORAN, RESPONDENT,

v.

ABBAY AND HEFFNER, APPELLANTS.

August 23, 1881.

Action on Note—Evidence—Cross-examination. To an action upon a promissory note, one of the makers (A) pleaded a discharge in bankruptcy, and the other (H) pleaded payment. It appeared that plaintiff got possession of the note under suspicious circumstances; that he was intimately acquainted with A's business affairs; that he knew H was in fact only the surety of A; that before the maturity of the note A had been declared a bankrupt; that plaintiff had a mortgage crop on all of A's crops. At the suggestion of A, plaintiff paid the note at a bank, where it had been left for collection, without the knowledge of the payee, took it unendorsed by the bank, and over two years thereafter procured the endorsement of the payee, "without recourse," for the purpose of bringing suit. Upon cross-examination of plaintiff, defendant, H, offered to prove that, through a large course of dealings between plaintiff and A, plaintiff, without having consulted with the payee of the note, took A's money to the bank and paid the note; and that he held at that time all of the property of A in his hands; and that the payment of the note, though nominally made by plaintiff, was in fact made by A: *Held*, the testimony should have been admitted.

The fact of payment of the note was provable, not only by the circumstances attending the taking up of it from the bank, but by those of the relations existing between A and the plaintiff, and their course of dealings with each other in their business, and with reference to the property of A.

A note once paid cannot be subsequently revived by endorsement of the payee.

The meaning of the word relevant, as applied to testimony, is that it directly touches upon the issues which the parties have made by their pleadings, so as to assist in getting at the truth of it.

It will be presumed that a demurrer was waived or overruled by the Court—it not appearing to have been disposed of—the defendants, after demurring, having answered separately to the merits of the action.

Appeal from Superior Court, Butte County.

McKEE, J.

Action upon a promissory note. On December 30, 1875, Daniel Abbey and Phillip Heffner made and delivered to George Hancock their joint and several promissory note for the sum of \$900, payable one year after date, to the order of George Hancock, at the banking house of Rideout, Smith & Co., in Oroville, with interest thereon at the rate of one and a half per cent. per month from date until paid. The note was left in the banking house of Rideout, Smith & Co. for collection.

In November, 1879, the payee endorsed it "without recourse," and immediately thereafter the plaintiff commenced this action upon it. To the complaint in the action the defendants filed a demurrer, which does not appear by the record before us to have been disposed of; but the presumption is that it was waived by the defendants or overruled by the Court, as the defendants, after demurring, answered separately to the merits—Abbey pleading payment by a discharge in bankruptcy, and Heffner the general denial and payment. Upon these issues the case was tried by the Court with a jury. Plaintiff had verdict and judgment against Heffner alone for \$1,738.42, from which, and the order denying his motion for a new trial, he appeals.

In the course of the trial of the case, after the plaintiff had testified to the circumstances of getting the note from the bank, and of its subsequent endorsement by the payee, counsel for the defendant, in cross-examination of the plaintiff, asked him the following question,

viz: "Now, during these years, from 1875 up to this time, have you been holding all Abbey's property? What property has Abbey owned that you did not hold?" This was objected to on the ground that it was irrelevant and immaterial. Upon which counsel for defendant rose and made the following offer: "We offer to show that, through a large course of dealings between Moran and Abbey, Moran, without having consulted with Hancock, takes Abbey's money to the bank and pays the note; and that he held at that time all of the property of Abbey in his hands, and that the payment on that occasion, though nominally made by Moran, was in fact made by Abbey, growing out of the nature of the transactions of the parties." The same objection was made to the offer, and the Court sustained the objection, to which the defendants excepted, and the same is assigned as error.

The fact in the issue made by the defendant, Heffner, was payment. That fact was provable not only by the circumstances attending the taking up of the note from the bank, but by those of the relation existing between Abbey and the plaintiff, and their course of dealing with each other in their business, and with reference to the property of Abbey.

It appeared by the testimony of the plaintiff, in his examination-in-chief, that he had got possession of the note in 1877 under very suspicious circumstances. As a money-lender he was intimately acquainted with all of Abbey's business affairs. He knew that the note had been given by Abbey to secure payment of money borrowed by him, and that Heffner was, in fact, only the surety of Abbey, although he had signed the note with him as a principal. He also knew that, before the maturity of the note, Abbey had become insolvent, and had been declared and adjudged a bankrupt by the judgment of the United States District Court for the District of California; and he had a "crop mortgage upon all of Abbey's crops. It was under those circumstances that Abbey one day informed the plaintiff he had heard Heffner was trying to borrow money to take up the note in question, and suggested to him "if he had the money, he could take the note out of the bank and hold it himself, as it was drawing good interest." Solely upon that suggestion, the plaintiff, without seeing the owner of the note, or having any negotiations with him, or any one else, for purchasing it, went to the bank, where the note had been left for collection, told the managing agent of the bank to figure up the principal and interest due upon it, and, when the amount was ascertained, he counted it out on the counter. The agent took the money and passed the note unendorsed to the plaintiff, who made no request for a transfer of the note by endorsement or otherwise. But he took it and "put it away in his safe among the balance of his papers," where it lay for over two years, when he took it out to bring suit upon it. On taking it to his lawyer, he was advised that it ought to be endorsed by the payee. For that purpose he took the note to Hancock, to whom it had been given, who, after many objections and much reluctance, finally consented to endorse it "without recourse."

And not only did the plaintiff obtain possession and endorsement of the note under suspicious circumstances, but his testimony as to the nature of the transaction itself was equivocal, as is apparent from his answers to the following questions, asked him by his own counsel:

"Q.—Did you pay the note at the request of Abbey?"

"A.—I paid it at the request of Mr. Abbey."

"Q.—Did you pay it or buy the note?"

"A.—I bought it out of the bank."

"Q.—Did you satisfy or buy the note?"

"A.—I bought the note right out of the bank."

But from whom did he buy? Not from the owner or any one authorized to sell; not even from the agent of the bank. In his examination-in-chief he declared: "I took the note up at Abbey's request, without seeing the owner or making any trade with him at all. I knew Hancock, to whom the note was given. I never spoke to him about buying the note. * * * I never had a conversation with him about it until I was going to commence suit upon it."

After such evidence from the plaintiff, the defendant certainly had the right, in cross-examination of the plaintiff, to show that, before and after the bankruptcy of Abbey, and at the time of the transaction with the bank, by which the plaintiff got possession of the note, the plaintiff had the charge and control of all the property of Abbey, and that, by course of dealings between them, he had held and used the property by the sanction of Abbey, as security or otherwise, for his assumption of payment,

or payment of Abbey's debts or bills. These circumstances in connection with the circumstances attending the transaction with the bank, would have tended to establish the truth of the fact, which was already rendered probable by the testimony of the plaintiff in his examination-in-chief, viz: Payment of the note by the plaintiff for Abbey, and at his request. If the note was then paid it could not have been revived in two years afterwards by endorsement. A transaction which amounts to payment of a note, cannot be transformed into a transfer of it by a subsequent endorsement. Such an attempt would be a fraud upon the makers of the note, and, as defendants to an action upon it, they should be allowed great latitude in proving their defense. When, therefore, the plaintiff, in testifying as a witness, admitted that he received the note in controversy after maturity, and under circumstances of suspicion, great latitude should have been allowed the defendant in cross-examining him as to all the circumstances or collateral facts which were capable at all of affording any reasonable presumption or inference of the fact of payment. If the facts offered tended in any way to constitute a link in the chain of proof which the plaintiff himself had forged, they were admissible, although alone they might not have been persuasive of the truth of the fact in issue. But, even alone, and as affirmative evidence by defendant, we think they were relevant, because they tended to prove the issue. The meaning of the word relevant, says the Supreme Court of New York, as applied to testimony, is that it directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it. It comes from the French *relieve*, which means to assist. Whatever testimony was offered which would assist in knowing which party spoke the truth of the issue was relevant; and when to admit did not override other formal rules of evidence, it ought to have been taken. (*Platner v. Platner*, 78 N. Y. 95.)

Judgment and order reversed, and cause remanded for a new trial.

SUPREME COURT OF OHIO.

JANUARY TERM, 1881.

Hon. W. W. BOYNTON, Chief Justice; Hon. JOHN W. OKEY, Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Judges.

TUESDAY, October 4, 1881.

GENERAL DOCKET.

No. 115. Emanuel O. Cralghed et al v. Elizabeth Houston et al. Error to the District Court of Brown County. Judgment affirmed. No further report.

No. 123. R. M. Bishop & Co. v. Marvin B. Gates. Error to the District Court of Lawrence County. Judgment affirmed. No further report.

No. 124. Ohio Coal Company v. Leonard Craig. Error to the District Court of Noble County. Judgment affirmed. No further report.

No. 125. Thomas F. Wright v. Wm. McConnell and Scott Kerr. Error to the District Court of Highland County. Judgment affirmed. No further report.

No. 127. Lucinda B. Gray v. Austin Harmon et al. Error to the District Court of Ashtabula County. Judgment affirmed. No further report.

MOTION DOCKET.

No. 154. Sadie Cavan v. The State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Erie County. Motion overruled.

155. German Aid Society v. Anna Kummer. Motion to dismiss cause No. 1028, on the General Docket, for want of printed record. Motion passed for new notice of time of hearing.

156. Ohio ex rel Brackney et al v. Commissioners of Fayette County. Motion to take cause No. 579, on the General Docket, out of its order for hearing. Motion granted.

157. Charles Geyer et al v. Francis Wagner, Treasurer, &c. Motion to take cause No. 685, on the General

Docket, out of its order for hearing. Motion granted.

154. *Francis Wagner v. John D. Loomis et al.* Motion to take cause No. 1118 on the General Docket, out of its order, for hearing. Motion granted.

155. *Ferdinand Bergman v. The City of Cleveland.* Motion to take cause No. 858, on the General Docket, out of its order for hearing. Motion overruled.

160. *Robert M. Underwood v. Malinda Andrews.* Motion to dispense with printing of the record in cause No. 1131, on the General Docket. Motion granted, and it is ordered that the cause, No 1131, on the General Docket, be advanced and heard with No 761, same docket, which involves the same question.

161. *Cincinnati House of Refuge v. Patrick H. Ryan.* Motion for leave to file a petition in error to the Superior Court of Cincinnati. Motion granted and cause taken out of its order for hearing.

162. *John Clermont v. Irish Building Association, No. 1.* Motion for leave to file printed record in cause 1087, on the General Docket. Motion granted and record filed.

164. *Josephus Martin et al. v. Orson Lapham et al.* Motion for leave to file printed record in cause No 977, on the General Docket. Motion granted, and the rule for filing printed record extended for 30 days.

165. *Jeremiah Williams v. T. O. Little, Sheriff, &c. et al.* Motion to strike certain parts of the bill of exceptions in cause No. 549, on the General Docket, therefrom. Motion overruled.

166. *West Liberty Building Association v. Nicholas Jungkuntz.* Motion for leave to file a petition in error to the Superior Court of Cincinnati. Motion overruled.

167. *Ohio ex rel., Attorney General v. Rollin C. Powers.* Motion to take cause No. 1036, on the General Docket, out of its order for hearing. Motion granted.

168. *President and Trustees of Montgomery County Childrens' Home v. Superintendent and Trustees of the O. S. and S. O. Home.* Application for writ of mandamus. Alternative writ allowed.

169. *Charles Schneider v. The State of Ohio.* Motion to take cause 1071, on the General Docket, out of its order for hearing. Motion granted, and cause set for hearing October 4, 1881.

170. *Matilda P. Hart, Administratrix v. J. H. Devereaux, Receiver, &c.* Motion to dispense with printing in cause 1184, on the General Docket. Motion passed for notice.

171. *Jarvis Postlewait et al. v. Trustees, Pleasant Township, &c.* Motion to take cause No. 1021, on the General Docket, out of its order. Motion granted.

172. *Samuel A. Van Fossen v. The State of Ohio.* Motion for leave to file a petition in error to the Court of Common Pleas of Muskingum County. Motion granted, and cause taken out of its order for hearing.

174. *Samuel T. Billingsley v. The State of Ohio.* Motion to take cause No. 1168, on the General Docket, out of its order. Motion granted.

James R. Hulse et al. v. Enoch T. Coffland et al, Trustees of Jackson Township, Pickaway County. Application of plaintiffs for a restraining order in No. 495. on the General Docket. Application refused.

The court called cases Nos. 176 to 225, both inclusive. Counsel must see that these cases are prepared by the time they are reached, otherwise they will be dismissed.

SUPREME COURT.

Judges Okey, Johnson, White and McIlvaine, of the Supreme Court, reported promptly for duty last week, after the summer vacation, and entered earnestly at work, hearing and disposing of motions and examining cases on the General Docket. On Tuesday morning their report disposed of five cases on the general docket and over twenty motions.

Tuesday morning, forty-one candidates for admission, were present for examination. Their applications were passed upon by the court and a favorable report made on all of them. The examining committee consisted of Hon W. J. Gilmore, Hon. J. D. Burnett, E. L. Taylor,

Esq. and S. F. Marsh, Esq., of Columbus; Judge Buckingham, of Newark; and P. H. Bright, of Logan. The class was one of the finest looking that has ever appeared here for examination.

The court, Judge Okey presiding, called fifty cases on the general docket, commencing with number 176. Those not responded to were marked submitted.

After the call of the docket, the court heard oral argument in the case of *Charles Schneider v. The State of Ohio.* Error to the Court of Common Pleas of Hamilton County. Major C. H. Blackburn, representing the plaintiff in error; George K. Nash, appearing for the State.

Chief Justice Boynton expected to sail from Europe, homeward bound, last Thursday, in which event, he is expected in New York the latter part of this week.

NEW ATTORNEYS.

The following applicants were admitted to practice yesterday, by the Supreme Court:

Charles L. Boyle, Springfield.
Frank E. Bliss, Cleveland.
William Hurris, Danville.
Robert Shackleton, Jr., Cleveland.
F. L. Richardson, Cardington.
Francis S. Romig, New Philadelphia.
William L. Mackenzie, Lima.
Warren F. Noble, Tiffin.
Augustus Summers, Springfield.
Charles E. Spencer, Somerset.
Owen Yost, Somerset.
John L. Zimmerman, Springfield.
Isaac S. Motter, Lima.
David J. Cable, Lima.
John B. McNamee, Cleveland.
Edward Myers, Warren.
Walter Francis, Little York.
George Benham, Norwalk.
Charles A. Leland, Caldwell.
Charles J. Estep, Cadiz.
C. L. Weems, Caldwell.
Thomas H. Shaw, Lima.
James H. Platt, Tiffin.
E. W. Waybright, Dayton.
Moses P. Leaverton, Hillsboro'.
J. C. Royer, Tiffin.
Henry E. Lee, Toledo.
George W. Romspert, Dayton.
John Z. Mansfield, Ashland.
Charles C. Brotherton, Piqua.
W. W. Sharpe, Jefferson.
F. E. Drummond, St. Clairsville.
E. D. Scofield, Newark.
Stanley K. Wilnot, Chardon.
S. R. Gotshall, Mt. Vernon.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Oct. 5, 1881.]

1184. *Matilda P. Hart, admr'x. v. J. H. Devereaux, Receiver.* Error to the District Court of Trumbull County. Hutchins & Tuttle for plaintiff; L. C. Jones for defendant.

1185. *Townsend Reed v. Michael Radigan.* Error to the District Court of Licking County. J. B. Jones for plaintiff; Dennis & Dennis for defendant.

1186. *Simon Sherman et al. v. James H. Pierce et al.* Error to the District Court of Wood County. J. B. Dunn for plaintiffs; Tyler & Meehan for defendants.

1187. *Frederick Holtz et al. v. James Dick.* Error to the District Court of Richland County. A. J. Mack and Thomas McBride for plaintiffs; Dirlam & Leyman for defendant.

1188. *John M. Bankhardt v. Johanna E. Freeborn.* Error to the District Court of Cuyahoga County. Willson & Sykora for plaintiff; Foster & Carpenter for defendant.

Ohio Law Journal.

COLUMBUS, OHIO, : : : OCT. 13, 1881.

THE NATIONAL REPORTER.

The announcement of this forthcoming periodical—to be issued by the proprietors of the OHIO LAW JOURNAL—which appeared in No. 49 of the latter paper, was sent to forty thousand lawyers, including all in good practice in the United States. The expression of concurrence with our own ideas as to the desirability of such a publication has been so universal and so unexpected, indeed, that all doubt of its ultimate and complete success has given place to a firm faith that the first number will mark a most important epoch in the history of legal publications.

We therefore take our first steps, with such caution as the importance of the enterprise demands, and in so doing modify our original purpose by changing the time of the issue of the first number of the NATIONAL REPORTER to January, 1882. By this modification we will commence with the new year, and will publish *in full* all the decisions of all the Courts of last resort in all the States and Territories of the United States—rendered after January 1st, 1882. The terms will remain unchanged. The great number of orders now in our hands will receive the proper attention at the proper time, and the wishes of each of our many correspondents will be fully complied with.

The NATIONAL REPORTER is copy-righted and its appearance and continuity a foregone certainty.

CONTINGENT FEES.

It has become exceedingly fashionable for law journals to discuss the legality and morality of Contingent Fees. The opponents of this very common method, of paying attorneys, may perhaps derive some comfort from the fact in the case of *Chester Co. v. Barber*, just decided in the Pennsylvania Supreme Court, it was held, "that a contract by county commissioners to pay counsel a contingent fee out of a fund sought to be recovered from the State Treasurer, is *ultra vires* and therefore void; that the power of county commissioners would not extend in such a case, further than to allow them to contract to pay a reasonable compensation, and that an agreement for any more than this is against public policy and void." The court avoids any consideration of the legality of contingent fees in general, or as to whether the English acts against champerty were ever extended to Pennsylvania. In this case, the point made by the court was, that the compensation agreed to be paid as the attorney's fee was *unreasonable*. That certainly cannot affect the legality or otherwise, of the contingent fee. The court could hardly say whether the fee must be paid out of a fund in hand or out of a fund to be recovered by a suit at law. And we feel confident that to that point courts will not soon proceed.

The fact of the matter is, that a contingent fee in a proper case, is precisely as legal and as righteous as any other fee. And the ability of a lawyer to pay in advance or the willingness of the employee to wait for his pay, until the work is done, is purely a private matter and courts and public writers as well, who attempt to meddle, would do well to remember the eleventh commandment. Champerty and contingent fees are not necessarily combined or related to each other in any way whatever. It might as well be said that Col. Bob Ingersoll, when he received his one thousand dollar retaining fee for the defence of the Star Route Thieves, became the receiver of stolen goods or an accessory after the fact, because the one thousand dollars was a part of the stolen property. Why do not these sticklers for high morality go to the length of saying, that the money paid to an attorney by any thief is of necessity stolen money, and that the attorney becomes *particeps criminis* in receiving it and making a defence. There would be more sense and more plausibility in that, than in the wholesale denunciation of contingent fees. The whole matter may be summed up briefly:

No righteous cause can be made wrong, and a contract therein for the payment of attorney's fees can not become champertous by simply making the time of payment or size of the fee contingent upon the success of the party in the right. And no unrighteous cause can be made right and proper, legally and morally, by the payment of a fee in advance or absolutely free from any contingencies. If any reasoner or heavy law-writer can change these plain propositions let him speak.

In this connection we may say that the largest single fee we have ever known to be paid, in this State, was a contingent fee earned by and paid to Judge Johnson of the Cincinnati Bar. The facts in that case were peculiar and interesting. The plaintiff was the widow of a contractor for supplies to the Federal army in the war of 1812. By the terms of the contract the contractor had agreed to furnish to the government a certain number of rations at twenty-five cents per ration. Payment was to be made upon the delivery of the rations to the quartermaster. When the British invaded the country and burned the capital a panic ensued and the price of flour and bacon ran up to such a high figure that the contractor was unable to continue the supply *unless* the government paid him a large amount of money *then due*. This the government could not do, and the contractor was not bound to go forward—the government having failed to perform its part. The secretary of war sent for the contractor and told him that there was no money in the treasury, and no provisions for the army, and things were in a very bad condition indeed; that if he could or would make an extra effort, that the government would allow him forty-five cents per ration for all he would furnish to the army. The contractor *did* make extra efforts and did supply to the close of the war. When a settlement was reached however the government refused to pay but twenty-five cents per ration—confronting the claim for more, with the written contract, and settling upon that basis. The government claimed that the verbal agreement made by the secretary of war was not good in law, and although not denied, was not considered as binding. The result was bankruptcy to the patriot and his speedy death. His widow exhausted her own private fortune, which was small, in feeing high-toned lawyers who held that contingent fees were not christian-like or proper, and who like all others of that highly moral class, took the fee

and slighted the work. After years of litigation she found her money all gone and her wrongs no more nearly righted than when she began. She then consulted Johnson, than whom no more honest man ever lived, and offered him a certain per cent. of all he could recover. He took the case and fought it bravely and successfully. His fee when paid, as it was in one check, amounted to the nice little sum of *thirty-three thousand three hundred and thirty-three dollars*. Had this poor widow consulted an honest lawyer at the start and contracted for the payment of a contingent fee, she would have saved many long years of agony and the loss of many thousand dollars paid to lazy scoundrels with sham honesty and no ability beyond a clamor for fees in advance, and a holy horror of any contract by which they would be compelled to succeed or get no fee whatever.

THE SUPREME COURT.

No report was made by the court this week, owing to the Judges having gone to their respective homes to exercise the privilege of voting. The judges have been busily engaged, having this far, this month, disposed of some eleven cases on the general docket, and twenty-nine cases on the motion docket.

Before the court took its summer vacation, all cases up to No. 120, on the General docket, had been disposed of. Cases up to and including No. 137, are in the hands of the court for disposition. In many cases, defects are apparent owing to the absence of printing, filing of briefs, &c., in which event, when reached they will be dismissed. Although cases on the docket from 176 to 225 were called last week, they will not be reached for consideration for some weeks yet. However, attorneys should see to it, that their cases are fully prepared for the court, for if not so, they will be dismissed.

Chief Justice Boynton is expected on the bench at its open session next week.

OBITUARY.

Hon. Thomas W. Ewart died at Granville, Licking County, Friday last, October 7th, in his 66th year. Judge Ewart was formerly a member of the Washington County bar at Marietta. Last winter he came to Columbus, and established his office in the Converse building, where he remained but a short time, owing to growing feebleness, which compelled him to return to Granville, where he remained until his death.

THE Pennsylvania Supreme Court has recently decided the somewhat famous case of *Stack v. O'Hara*, from the Lycoming judicial district. This was the well known action brought by Father Stack, of the Catholic Church of Williamsport, against Bishop O'Hara, for damages for being wrongfully and unlawfully removed by the Bishop and interdicted from preaching at Williamsport. The court below decided adversely to the plaintiff. The plaintiff held that the letter of the Bishop removing him was an accusation, and that it was the duty of the court to insist that the vague and implied charges in the letter should be made definite. Justice Trunkey, who delivered the decision, did not favor this idea, holding that inasmuch as the Bishop has the right to make removals under the Church law, he need not make specific charges. He may dismiss a priest without assigning any cause. He further said that the plaintiff was not deprived of his priestly functions, as he was only prohibited from exercising them in Williamsport, and therefore was not entitled to damages on that behalf. Judgment of the court below was affirmed, Sharswood and Gordon dissenting.

VOLUME 36, Ohio State Reports will be ready for delivery to the profession about October 20. The OHIO LAW JOURNAL will deliver this volume to any part of the State free on receipt of \$1.75.

THE U. S. Supreme Court convened at Washington, Monday last, with Chief Justice Waite, and Justices Miller, Bradley, Harlan, Woods and Matthews, on the bench.

A ROMANCE IN REAL LIFE.

AN OHIO TICHBORNE CASE.

[Correspondence Ohio Law Journal.]

MARYSVILLE, OHIO, OCT. 1881.

The old-fashioned clock standing in the hall of the old American House in this unromantic village was striking eleven on Saturday night the 27th of November, 1832, and the landlord strode to the wide hall door, flung it open, and peered out as was his custom before putting up the bars and the shutters for the night. But the good host started back in amazement, for before him on the threshold stood a stranger tall and powerful, and quaintly dressed. From beneath his buckeye hat long black hair fell in waves and curls over his broad shoulders, almost concealing even in front the wide collar of spotless white, which was turned back over the neck bands of his coat and vest. White duck breeches and top boots with soles fully an inch in thickness completed the attire of this unex-

pected guest who stepped within—shaking the snow from his hat and hair by a toss of the head like a huge dog—and in a word demanded lodging. The landlord accustomed to the brusque manners of that day took a candle and showed the new-comer to a room on the second floor. His guest remained longer than guests usually do: *He occupied that same room for nearly forty-two years!* He gave his name as Robson Lovett Broome, but of his history, his family or his business, he gave nothing. He lived the life of a hermit although in a public house. He never allowed a living soul to enter his room after he took possession on that night—in 1832. He was his own chamber maid, bell boy, boot black and porter. His locks were proof against all prying parties, and during his frequent journeys to—no one knew where—which often consumed weeks or months, his room remained untouched. He bought lands, loaned money, and made his irregular trips to the unknown country, and this was all his employment, nearly. He would walk up and down the reception room of the hotel for hours, days, and weeks, only stopping to eat and sleep. He volunteered no information concerning himself, and answered no questions.

In 1873 he died, while on the eve of a marriage with a widow in the neighborhood. He left no will and no writing to guide to any discovery of his relations or family. The proper authorities took charge of his effects. An administrator was appointed, and his notes, mortgages and lands were found to aggregate between \$50,000 and \$60,000. All efforts, however, to find who or what he had been, failed disastrously. The Broomes of New York City attempted to establish a line of descent from one branch of that family to one John Broome who had resided in Ohio, near Marietta, and who, they claimed, had two children, a son and daughter, both of whom, however, had disappeared and were supposed to be dead; and that this son of John Broome was R. S. Broome, the intestate eccentric of Marysville, Ohio. Pending these attempted genealogical patchings, Col. Robinson, of the law firm of Robinson & Piper, became the attorney for the administrator, and, in looking over some notes and mortgages found pencil memoranda as follows:

"Levi Brewster, b. 1793, N. L. Ct."

"Lemuel Bruce, Posey Co. Ind., 1818."

"Lot Bene, Butler Co., O., 1822."

"Lemuel Brown, N. Y., 1830."

And on a separate slip the following:

"1820, Woodsfield, O., Lydia Watterman."

"1828, Rochester, Nancy Gray."

It must be confessed that this was not much of a clue. Yet by following it up persistently and shrewdly Col. Robinson discovered the facts which follow and which constitute the framework of a romance in real life, as remarkable as any on record.

Levi Brewster was born in New London, Connecticut, in 1793, went from home in his early young manhood and appeared at Woodsfield, Ohio, about 1819, where he married Lydia Watterman in 1820. In 1827 he abandoned his fam-

ily and a year later made his appearance at Rochester, New York, where after a short time he, as Lemuel Brown, married a Miss Nancy Gray.

This lady, however, did not live long, although the particulars of her life and death are shrouded in the mystery which envelopes so much of the life of this strange guest of the American House; the occupant for forty-one years of the room in which I am writing. Meantime it was found that a Lemuel Bruce was known in Posey county, Indiana, in 1818; that Lot. Bene was in Butler county, Ohio, in 1822, and that Lemuel Brown was known in Columbus, Ohio, in 1829.

The logic of events; the similarity of the initials; the identity of the description of the strange biped who thus disappeared and reappeared; the thread of discovery beginning with the memorandum made by R. L. Broome (or found with his effects), and running back to 1793, to the birth of Levi Brewster, justified the conclusion that Levi Brewster had simply changed his name a few times and died as R. L. Broome, and that the heirs of Levi Brewster were entitled to the snug fortune in Col. Robinson's hands.

He accordingly sought and found them. But this pretty and very romantic theory of the rise and progress of Levi Brewster did not satisfy the Broome claimants, who came forward with as convincing proof that the hero of the wide shirt collar and forty years endurance of hotel life, was really Robson Lovett Broome, the son of old John Broome, of Marietta, and accordingly courts and juries were brought in to settle the dispute.

Things began to look dark for the Brewster claimants, for there were so many breaks in the history of Levi Brewster that much must be left to fancy in the filling of it up; and fancy is not first-class proof as you well know; but at a most critical moment, Col. Robinson discovered the long lost daughter of old John Broome; and she testified that she never had any brother Robson Lovett Broome, nor any brother by any name. That spiked the Broome claimant's guns most effectually. But they rallied, and will prove, or attempt it—that the old lady—claimed to be the daughter of old John Broome is an imposter—a crank—who has not only deceived herself but Col. Robinson as well. And they will show also that Levi Brewster was married in 1816 to a lady in Berks county, Pennsylvania, and by her had one son who still lives, and who, if the Brewster claimants succeed in establishing the identity of R. L. Broome with Levi Brewster, will step forward as the lawful heir which of course he is, having his mother's marriage lines and the certificate of his own birth, and take possession of the estate.

But the Broome men also will prove that R. L. Broome and Levi Brewster became fast friends being fellow soldiers in the army of "Old Tippecanoe," and together during his memorable campaign. That they had many adventures and narrow escapes from the savages, then and in later years, and that Brewster finally was killed

by them, and that the loss of his friend made Broome the moody eccentric I have described.

Last week the case came on for trial here with "an imposing array of counsel" on both sides, Genl. Grosvenor, of Athens, conducting the Broome side of the case—the defense.

When the plaintiffs had got their evidence all in and rested, the defense allowed a decree to be entered for the former, and appealed to the district court. The defense thus gets the plaintiff's case and reveals nothing of the line of defense. Now if this is not a romantic case, you may withhold my salary for two months.

The very peculiar facts and fancies of this case makes it one of the most remarkable in the annals of jurisprudence in this country. The son of Levi Brewster was here during the trial, a man of about sixty, who remembers seeing his father when he was about ten years of age, he having returned for a few days before finally disappearing. The old lady presented as the daughter of old John Broome, of near seventy, was also one of the attractions of Court week.

COMMISSIONERS OF APPEALS OF TEXAS.

THE WESTERN UNION TELEGRAPH CO.

v.

BERTRAM AND MOELLER.

I. The correct rule for the measure of damages for breach of contract is, that a party is liable for all the direct damages which both parties to the contract would have contemplated as following from its breach if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts.

II. In the absence of evidence to sustain the judgment of the court below, sitting as a jury, this court will not let it stand.

III. A bill of lading occupies the same position as other private writing, and its execution must be proven before it is admitted in evidence.

Appeal from Travis County.

Appellee sued appellant in the County Court of Travis County for the recovery of alleged damages occasioned by failure, on part of appellant, to transmit a telegraphic message. Appellant demurred to the petition and pleaded a general denial. The demurrer was overruled and the case tried by the court, and judgment rendered for plaintiffs for \$271.88. The defendant appealed.

The petition alleges that on November 13, 1879, defendant was and long had been owner and operator of a line of telegraph connecting the cities of Austin, Texas, and New Orleans, Louisiana, and offered to the public to transmit correctly for hire such messages as might be presented and given them to be sent from said Austin to New Orleans, in each of which it had offices.

That on the 12th day of November, 1879, petitioners were engaged in business as wholesale grocers in said Austin, and desiring to purchase a large quantity of sugar in the New Orleans market, they did, on the morning of the 12th day of November, order from the firm of A.

Thompson & Co., sugar dealers in New Orleans, through their agent in Austin, one Charles Maillott, ninety-five barrels of sugar, to be shipped to petitioners as soon as said order should reach said A. Thompson & Co. in the course of mail; that at the time said order was given to said Maillott, as aforesaid, the price to be paid for said sugar was agreed upon by and between him and petitioners.

That said ninety-five barrels of sugar weighed 21,751 pounds; that in the afternoon of said 12th day of November, after said order had been given by petitioners to said Maillott, as aforesaid, petitioners received an offer from other and different dealers in sugar to sell them a like quantity and quality of sugar to that embraced in said order given to said Maillott at a price one and one-fourth cents per pound less than that agreed upon by them and the said Maillott.

That petitioners desiring to avail themselves of the decline in the market and of said second offer, at once ordered from said dealers in sugar a like quality and quantity of sugar to that embraced in the order given by them to said agent of Thompson & Co.

That after they had ordered said sugar at the lower price, desiring to countermand the order given to A. Thompson & Co., petitioners did, on the morning of the 13th day of November, 1879, deliver to defendant, at its office in Austin, the following message, to be transmitted by defendant without delay to said A. Thompson & Co., at New Orleans, viz:

AUSTIN, November 13, 1879.

A. Thompson & Co., New Orleans:

Cancel order given Maillott yesterday.

BERTHAM & MOELLER.

That message was written on one of the message blanks of defendants, furnished petitioners for that purpose; that when petitioners so delivered said message they paid in money the price charged and demanded by defendant for the transmission thereof; that defendant, after receiving said message from petitioners instead of transmitting the same to their office in the city of New Orleans, to be delivered to said Thompson & Co., as they had agreed and bound themselves to do, negligently, willfully and carelessly transmitted and directed said message to the office of defendant in the city of New York, which was not an office on the line through which said message should properly pass in transit from Austin to New Orleans.

That afterwards, to-wit, on the evening of the same day the defendants' agent in New York telegraphed to the agent of defendant in Austin that he was unable to find the firm of A. Thompson & Co., and requested a more particular address, which said message (from New York) was duly received by defendant at its Austin office on said day, and thereupon the agent of defendant at Austin being so apprised that a mistake had occurred in the transmission of said message, and that it had been sent to New York instead of New Orleans, at once tele-

graphed to the New York agent of defendant to destroy said message.

That defendant never did transmit nor attempt to transmit said message to A. Thompson & Co., as it had obliged itself to do, and that in consequence of its gross negligence and carelessness, as aforesaid, said message was never delivered to nor received by said A. Thompson & Co.; that had defendant transmitted said message as it agreed to do, it would have reached said A. Thompson & Co. before they received the order given by petitioners to said Maillott, as aforesaid, but as the said A. Thompson & Co. did not receive said message from petitioners cancelling said order, they filled said order for ninety-five barrels of sugar on the fifteenth day of November, 1879, and shipped same to plaintiffs.

That petitioners were compelled, by the negligence of defendants, as aforesaid, to receive said sugar upon its arrival, and pay therefor the sum of \$2,209, the price agreed upon by petitioners and A. Thompson & Co., whereby petitioners were damaged \$271.88, being the difference between the price paid for said sugar and the price for which petitioners could have bought the same in the New Orleans market at said time had the defendant delivered said message cancelling said order, as it agreed and undertook to do.

That petitioners have been further damaged \$100, being interest from November 15, 1879, to date of suit on said \$2,209, paid for said sugar, which amount petitioners were compelled to pay by reason of the gross negligence of defendant, as aforesaid. Prayer for \$371.88 and costs.

WATTS, J.

In the transmission and delivery of messages, telegraph companies must, from the nature of the business in which they are engaged, and their relations to the general public, be held to a strict rule of diligence. They accept benefits and franchises granted by law, including the extraordinary right of eminent domain.

The consideration that induces the public to confer these rights and franchises is, that it may thereby be furnished with a safe and speedy means for the prompt transmission of information between places remote from each other.

And as these corporations are, on the one hand, created for the accommodation and convenience of the public, and on the other organized and put in operation for the mutual profit of the members, the law assigns them a kind of dual position: In their relations to and with the public, they are deemed a kind of public institution, and in respect to their internal affairs, that is among the members, they are deemed strictly private. The law recognizes this two-fold character of these corporations and regulates and determines rights accordingly.

The almost instantaneous transmission of ideas to the greatest distance by means of a peculiar application of electricity to a wire whereby certain sounds are made to represent letters which are to be formed into messages, express-

ing with precision the ideas intended to be conveyed, requires great skill and unceasing care.

Often the most important matters financial and otherwise are dependent upon the correct transmission, reading and rendering of these signals or sounds so that the exact idea intended shall be communicated to the party to whom the message is sent.

The duties assumed by these companies in this respect are truly delicate, difficult and important. As a consideration for assuming these duties, the public grants to them corporate existence with its attending rights and benefits.

Besides, as a condition precedent to the assumption of responsibility, they are authorized to demand and receive full compensation, to be fixed by themselves, for the service to be rendered. Such being the case they should, upon principle, be held to the greatest care in the selection of the instruments to be used and the agents to operate them, and a failure in this regard will render the company liable to any person injured by reason of such failure. It is a well known fact, however, in the science of telegraphy, that owing to electric currents and the presence of unusual quantities of electricity occasionally found along the line, that although a message may be forwarded or rather started with the most exact precision, it may be entirely interrupted, or the sounds or signals so changed that a different message is received from that which was sent.

Therefore, it would be unreasonable to require these corporations to insure against causes which no amount of foresight or caution, upon their part, could overcome. But as they possess peculiar facilities for establishing the existence of these interposing and disturbing causes, the burden is upon them to do so when they seek to excuse upon that account. It is now the general and accepted rule that where it is shown that the message was received by the company and not delivered, or delivered in a materially altered or changed condition, that a *prima facie* case of negligence is made against the company, and the burden is upon it to show that the failure was the result of these unavoidable causes.

In the consideration of the case before us, these general principles will be kept in view, as the law of the case, so far as applicable to the points made and urged by the parties.

It is claimed that the court erred in overruling the general demurrer to the petition, and in support of this objection it is assumed that no cause of action is stated therein.

The pith or gravamen of the action, as shown by the petition, is, that the appellees delivered to the operator at Austin the message and paid to him the compensation for its transmission and delivery to A. Thompson & Co., at New Orleans; that the message was not delivered according to the contract, and by reason thereof the appellees were compelled to pay \$271.88 more for the sugar than they would have paid

had the message been delivered promptly, as was contemplated.

In the case of *Griffin v. Colver*, 16 N. Y. 480, Selden, J., treating of the measure of damages, said: The party injured is entitled to recover all his damages, including gains prevented, as well as losses sustained.

Chief Justice Earl, in the case of *Leonard v. New York Telegraph Co.*, 41 New York, 544, considering the same subject, said: It is not required that the parties must have contemplated the actual damages which are to be allowed, but the damages must be such as the parties may fairly be supposed to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be, as both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract which they have entered into.

I think a more precise statement of this rule is, that a party is liable for all the direct damages which both parties to the contract would have contemplated as following from its breach if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts. We are of the opinion that the rule thus stated by Chief Justice Earl is the law that should be applied in cases where damages are claimed on account of a breach of contract.

In this case the breach of the contract is distinctly and clearly stated, and that as a consequence of that breach appellees were compelled to pay \$271.88 that they would not have paid had appellant complied with the contract. And had the parties bestowed proper attention upon the subject, and had been fully informed of the facts as they are alleged in the petition, it is clear that, as a consequence of a breach of the contract, that the damages, as alleged, would have been in the contemplation of the parties.

The expenditure of money rendered necessary solely by a breach of contract, constitutes substantial damages for which an action may be had.

It is urged that the petition shows that the contract with respect to the purchase of the sugar had progressed so far between appellees and A. Thompson & Co., that it could not have been cancelled except upon the consent of the latter.

Assuming this to be true, still it must be remembered that it is, in effect, alleged that if the message had been delivered the sugar would not have been shipped to them.

We conclude that the court correctly overruled appellants general demurrer to the petition.

It is claimed that the court erred in admitting as evidence the bill of lading dated November

15, 1879, signed Fred Cook, over the objection of appellant. On the trial in the court below it was shown that appellees had, on the 12th day of November, 1879, accepted A. Thompson & Co.'s proposition and had given their order to Maillott, the agent of A. Thompson & Co., for the sugar, who testified that he immediately sent the order by telegraph. Appellants claimed that the message countermanding the order was delivered by them to the operator at Austin on the day after; that is, on the 13th day of November, 1879; there is no evidence outside the bill of lading found in the record that tends to show that the sugar was not shipped on the day before appellants delivered the message to the Austin operator. This was a material fact, and the burden was upon appellees to show that if the message had been promptly delivered to A. Thompson & Co., that it would have reached them before the sugar was shipped.

Stating the proposition in a different form, the burden was upon appellees to show an injury resulting from the non-delivery of the message to entitle them to recover in this action.

And it is certainly true that if the sugar was in transit before the message countermanding the order was delivered to the Austin operator, that no injury could have resulted in the particular matter asserted in the petition to appellants. Evidence to establish the fact was necessary, and while the bill of lading might not furnish very conclusive evidence that the sugar was shipped after the time the message should have been delivered, it does tend to show that fact, and constitutes the only evidence in the record with respect to that matter. Therefore, if the same was improperly admitted, it would be a material error and such as would likely work an injury to the appellant.

The bill of lading and accompanying letter did not, in whole or in part, form the basis of any pleadings in the case. They were private writings to which appellant was an entire stranger. And it is elementary law that private writings which do not constitute, in whole or in part, the basis of the pleading, is not admissible in evidence without first proving their execution. A bill of lading occupies, in this respect, the same position as any other private instrument, and if the same purports to be signed by a clerk or servant, the agency of such clerk or servant must also be proven. *Abbotts' Trial Evidence*, 564; *Rena v. Summers*, 33 Tex. 760.

It is our conclusion that the admission of this evidence constitutes such error as ought to reverse the judgment. To entitle appellees to recover in this case, the burden is upon them to establish the three following propositions:

1. That the appellants undertook to transmit and deliver the message.
2. That it failed to transmit and deliver the same as agreed.
3. That appellees were damaged by reason of the failure. *Abbott's Trial Evidence*, 604.

Appellants claim that the judgment of the court is not sustained by the evidence.

The finding of the court upon the evidence is entitled to the same consideration as would be given to the verdict of a jury.

This rule has regard in its application to the credibility of witnesses and the weight to be given to their testimony.

But it has no application, however, to the question here presented, which is, that there is not sufficient evidence in the record giving to it full weight to sustain the judgment of the court. It is not a question of preponderance, but an absence of evidence.

The record indisputably establishes the first of the three propositions stated above.

Appellant insists that the evidence fails to establish the second proposition, that is, it fails to show that the message was not delivered.

To establish the default, appellees proved that on the morning of the 13th day of November, 1879, they delivered to the operator at Austin the message in question and paid the charges for its transmission and delivery; that the same was immediately sent, properly addressed to A. Thompson & Co., New Orleans; that the message was sent to Galveston and repeated from that place; that soon afterwards, the same day, an office dispatch was received at Austin by the operator from the Galveston repeating office purporting to be from New York, to the effect that New York could not find Austin's A. Thompson & Co. The operator replied through the Galveston repeating office that it was a mistake and to destroy the message. The Austin operator made no further effort to send the message, and did not notify appellees, although well acquainted with them, of the receipt of the office message from New York.

This is all the evidence in the record tending to show that the message was not, in fact, delivered to A. Thompson & Co. The evidence of neither of the members of that firm is found in the record.

The operator testifies that when he received the New York message, that he replied that it was a mistake, that the message was intended for New Orleans, and to destroy the same.

The reasonable conclusion to be drawn from the evidence is, that all of the messages passed through the repeating office at Galveston, and that the mistake in sending that in question to New York instead of New Orleans, most probably occurred in the Galveston repeating office, and as the attention of that office must have been called to the mistake by the New York enquiry, it is most reasonable to suppose that the same would there be corrected.

We are not prepared to say but that, in the absence of proof, the presumption ought to be indulged that the repeating office corrected the mistake rather than presume negligence.

Appellant also claims that the evidence fails to show an injury by reason of the supposed default in delivering the message. In this, the evidence shows such a contract between appellees

and A. Thompson & Co., that it would not be subject to cancellation without the concurrence and consent of A. Thompson & Co.

As to this question the record shows that appellees had made a proposition to A. Thompson & Co. to purchase the sugar. This was made through Maillott, the agent of A. Thompson & Co. The proposition as made was declined and a different proposition, with respect to the purchase of the sugar, was submitted to appellees, which they accepted and the sugar was ordered accordingly by Maillott.

The evidence is conflicting as to the understanding between Maillott and appellees with reference to the latter's right to countermand any orders given for goods before the same were filled or the goods shipped.

And while the evidence shows a contract of purchase binding in law, we would not be authorized in holding that the court found without evidence upon this point. Moeller testifies that his firm had an understanding with Maillott that any order taken by the latter was subject to countermand by either party before filling or before the goods were shipped.

We award that the judgment be reversed and the cause remanded.

Award of Commissioners examined, opinion adopted, and the judgment reversed and cause remanded.

SUPREME COURT OF CALIFORNIA.

PEOPLE, RESPONDENT,

v.

J. R. FEILEN, APPELLANT.

August 22, 1881.

Bigamy—Proof of Former Marriage and Life of First Wife Necessary. In a trial on an indictment or information for bigamy, to make out a case on the part of the prosecution, the first and second marriage must be proved, and it must also be proved that the former husband or wife was alive when the second marriage was entered into.

Instruction as to Presumption of Continuance of Life from Proof of Prior Existence. It is error to instruct the jury upon the trial of a charge of bigamy that in determining whether the wife of the former marriage was living when the second marriage took place, they may act upon the rule of law that when a fact is once shown to have existed, the law presumes its continuance; and since it had been shown that the former wife was alive two or three or four years prior to the second marriage, the law presumes that she continues to live, upon which presumption of law they are authorized to act in determining whether the former wife was living at the date of the second marriage.

Presumption of Life of First Wife. In a bigamy case there is no presumption against a defendant, from the fact of proof of existence of former wife that such existence continued at the date of second marriage. The issue on such point must be left to the jury to be determined as a matter of fact, upon such reasonable inferences as the evidence supplies, free from any presumption of law.

Family. The word "family" does not necessarily include wife. Such word is frequently applied to children alone.

Arrest of Judgment—Demurrer. By failing to demur specially, a defendant is precluded from moving in arrest of judgment on grounds which are the subject of special demurrer.

Evidence of Existence of Life of Former Wife at Date

of Second Marriage. Case stated in which the testimony failed to show that the first wife was living at date of second marriage.

Appeal from Superior Court, Santa Clara County.

THORNTON, J.

The defendant was convicted of bigamy, moved for a new trial which was denied, and judgment was rendered and entered upon the conviction. This appeal is prosecuted from the order denying a new trial, and from the judgment.

On the trial, testimony of a witness was offered and admitted that defendant had stated to him in 1875 or in 1876 that he had left a wife with four or five children in Chicago; that she was sick and couldn't stand a voyage to California. Another witness testified that a person stated to him in 1875, in a conversation had in the presence of defendant, that he (defendant) had a wife and five children in Chicago, and that his wife was sick; that the defendant said nothing in relation to this statement made in his presence. That defendant told him several times that he had a family in Chicago; that "the last time defendant referred to his family in Chicago was—can't say exactly—about two or three years ago. Said his wife was sickly." A third witness testified that he saw defendant in his office in 1875. This witness proceeded to state: "He (referring to defendant's statements) said times were poor in Chicago; he had a wife and four or five children. He spoke of his family after that—showed me likenesses of children. He spoke of his family the last time about 1878. I couldn't place the date very well." This witness also stated that he introduced defendant to one Habisch; that "defendant explained to Habisch that he had a wife and family in Chicago, and wanted to raise money and bring them to California. This was in 1875." The officer who arrested the defendant was called and testified that defendant told him after the arrest that he had a wife and four children, but had not heard of them for four or five years; that he was not certain, but think he said in Chicago. Of this last statement as to the place he was not positive; that there was no threat or inducement offered him to make this statement. The above is all the testimony bearing on the issue as to the wife of the alleged first marriage being alive when the second marriage occurred.

As to the second marriage it was admitted at the trial that it took place in San Jose in this State, in the month of July, 1880, with Dora Max, the person named in the information, and that defendant and Dora Max had lived together as husband and wife since the date just above given, in San Jose.

In a trial on an indictment or information for bigamy, to make out a case on the part of the prosecution, the first and second marriages must be proved; and it must also be proved that the former husband or wife was alive when the second marriage was entered into. In this case it was necessary to prove that the former wife was

living in July, 1880, when it is admitted a marriage was celebrated between Dora Max and the defendant.

The court instructed the jury in accordance with the law as above laid down. On the issue of the first wife being alive, it directed the jury in these words: "It is claimed upon the part of the defendant in this case that there is no proof before the jury that this former wife, if wife she were, or if such relation did exist, was in fact living at the time the second marriage was contracted. It is for the jury to determine of that fact, as they do of the other, whether a marriage did in fact exist. The law presumes, when a fact is shown once to exist, its continuance under certain circumstances and for certain lengths of time. With reference to some matters it is made conclusive, and in cases of this character the absence of one of the parties to a marriage, unheard from for a period of five years, is a sufficient justification of a party entering into a new marriage relation, and will avoid the consequences of a criminal prosecution for bigamy. This knowledge and this absence must continue for this five years before the statute will protect him. Independent, however, of this particular and specific defense that the statute gives, it is for the jury to determine, from all the circumstances of the case, whether this woman, alleged to be the wife of the defendant, was in fact living at the time he contracted the alleged second marriage. That is a matter which you have to determine from those presumptions of law and of fact which characterize persons in that condition and situation which you find these parties to have maintained. It is a question of fact dependent entirely upon the probabilities and presumptions that may be before you as to character, condition and situation of this woman."

By this language the jury was in effect directed that in determining whether the wife of the former marriage was living when the second marriage took place, they might act upon the rule of law that when a fact is once shown to have existed, the law presumes its continuance; and since it has been shown that the former wife was alive two or three or four years prior to the second marriage, the law presumes that she continues to live, upon which presumption of law they were authorized to act in determining whether the former wife was living at the time of the second marriage.

The portion of the charge above quoted was excepted to. Did the Court err in so directing the jury? We proceed to examine this question.

In a prosecution for bigamy, the law presumes the innocence of the defendant until the contrary is shown. The law also presumes the existence of a person once established by proof to continue until the contrary is shown, or until a different presumption arises. "Thus where the issue is upon the life or death of a person once shown to have been living, the burden of proof lies upon the party who asserts the death. But

after the lapse of seven years, without intelligence concerning the person, the presumption of life ceases, and the burden of proof is on the other party." (1 Greenl. Ev., Sec. 41.)

Mr. Greenleaf states, in the same section, that this period of seven years was inserted, after great deliberation, in the British Statute of Bigamy and the statute of leases concerning lives, and has since been adopted from analogy in other cases. (See cases cited in note by Mr. Greenleaf.) The period of five years is inserted in our statute of Bigamy, and thus with us, in such a prosecution as this, the presumption of life ceases at the end of five years. The language in which the rule as to each presumption is stated shows that they are disputable.

Now, assuming that it was proven the first wife was living, five years not having elapsed, there are then two presumptions—the one of innocence operating in favor of defendant, and the other of the continuance of life from the proof of prior existence operating against him. Which should obtain and be adjudged superior?

Should one be held superior to the other? And, if so, which one? The rule as declared by Mr. Bishop (See Bishop on Stat. Crimes, Sec. 611) is that they should be held to neutralize each other; and the issue as to the continuance of life from the proof of prior existence should be left to the jury as a naked matter of fact, divested of any presumption of law.

The judgment in the *Queen v. Lumley*, 1 Law Rep., C. C. Res. 196, sustains this rule; and in fact goes further, and holds that the law makes no presumption that a person continues to live from the proof of his or her existence at a former date. In that case, which was a prosecution for bigamy, the facts were as follows: The prisoner married one Victor at St. Helier's, in the Island of Jersey, in the year 1836, and lived with him in England until the middle of 1843, when they separated, and she was taken by her parents back to Jersey, where she resumed her maiden name. On the ninth of July, 1847, she, describing herself as a spinster, married Lumley, with whom she lived until March, 1864. Nothing was heard of Victor from the time the prisoner left him in 1843. No evidence was given of the age of Victor, nor any of the age of the prisoner, except that a witness, who stated she was forty-eight years old, said that the prisoner was her senior. The learned Judge (Lush) before whom the trial was had, directed the jury that there being no circumstances leading to any reasonable inference that he had died, "Victor must be presumed to have been living at the date of the second marriage." The question whether this direction was right or not was reserved for the opinion of the Court.

LUSH, J., in delivering the opinion said:

"We are of opinion that the direction to the jury in this case [stating it as given above] was erroneous. In an indictment for bigamy it is incumbent on the prosecution to prove, to the satisfaction of the jury, that the husband or wife, as the case may be, was alive at the date of the sec-

ond marriage. That is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would in all probability find that he was. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way. The cases cited of *Reg. v. Twynning*, (2 B. and Ald. 386), *Reg. v. Harborne* (2 A. and E. 540), and *Nepean v. Doe d. Night*, (2 M. and W., 894), appear to us to establish this proposition.

Where the only evidence is that the party was living at a period which is more than seven years prior to the second marriage, there is no question for the jury. The proviso in the Act (24 and 25 Vict., c. 100 s. 57) then comes into operation and exonerates the prisoner from criminal liability, though the first husband or wife be proved to have been living at the time when the second marriage was contracted. The Legislature by this proviso, sanctions a presumption that a person who has not been heard of for seven years is dead; but the proviso affords no ground for the converse proposition, viz., that when a party has been seen or heard of within seven years, a presumption arises that he is still living. That, as we have said, is always a question of fact."

Our statute is substantially the same, as far as relates to the point under consideration, as the 24 and 25 Victoria referred to above.

In *re Phene's Trusts*, 5 Law R. Ch. App. cases, 139, the question whether there was any presumption of law that a person continued to live arising upon proof of prior existence was very fully discussed, and it was held that the law makes no such presumption. This was held to apply to civil and criminal cases alike. This question was also discussed at length by Field, J., in a case (*Montgomery v. Beavens*) tried before him in the United States Circuit Court for California. He reviewed several of the English cases considered in *In re Phene's Trusts*, as well as this case, and came to the conclusion that the law as declared in England in the case of *Phene's Trusts* was different from the law which obtains in this country; stating at the same time that when this presumption of the continuance of life conflicts with the presumption of innocence, the latter prevails. In the opinion delivered in the case referred to, the learned Justice says: "But the law as thus declared in England is different from the law which obtains in this country, so far as it relates to the presumption of the continuance of life. Here, as in England, the law presumes that a person who has not been heard of for seven years is dead; but here the law, differing in this respect from the law of England presumes that a party

once shown to be alive continues alive until his death is proved, or the rule of law applies by which death is presumed to have occurred—that is, at the end of seven years. And the presumption of life is received in the absence of any countervailing testimony as conclusive of the fact, establishing it for the purpose of determining the rights of parties as fully as the most positive proof. The only exception to the operation of this presumption is when it conflicts with the presumption of innocence, in which case the latter prevails." (*Montgomery v. Beavens*, 1 Sawyer, C. C. R. 666.) The rule thus stated as to these conflicting presumptions by Field, J., is sustained by *Reg. v. Twynning*, 2 B. and Ald. 386.

Whichever of the rules appearing from the foregoing is adopted, the portion of the charge above quoted is erroneous. By the portion of the charge referred to, the jury were told that in determination of the issue as to the continued life of the first wife, they might call to their aid the presumption of law indicated in the words quoted from the charge. The issue on this point should have been left to the jury to be determined, as a matter of fact, upon such reasonable inferences as the evidence supplied, free from any presumption of law.

It is further contended by appellant that the verdict is contrary to the evidence. This is one of the grounds on which the motion for a new trial was made. We do not think that a verdict of guilty on this evidence, in regard to the first wife being in existence when the second marriage was had, should stand. The evidence, taking the strongest view of it against defendant, proved that the first wife was living about three years prior to the day of the second marriage. We lay out of view what defendant is proved to have stated as to "*his family*." This expression may have only referred to his children, and he may have used this language in regard to a family of children surviving his wife. It cannot be fairly regarded as an admission by him that the first wife was then living. The word *family* in common discourse, is frequently applied to *children* alone. There is no testimony as to the age of the first wife, a most material circumstance to be considered in passing on this point. We cannot perceive that this evidence furnished a reasonable inference that the first wife was alive in July, 1880, so as to establish the guilt of the defendant beyond a reasonable doubt. In our judgment the verdict is not sustained by the evidence and a new trial should have been granted on this ground. We are also of opinion that the Court should have advised the jury when the prosecution rested to acquit the defendant.

We will add here what should have been before said, that the information in this cause is good on general demurrer. If it had been demurred to on the special ground that it did not substantially conform to the requirements of Sections 950, 951 and 952 of the Penal Code, we are not prepared to say that we should hold that the objec-

tion was not well taken. This ground was taken on the motion in arrest of judgment, but it was then too late to urge it. It had been waived by failure to demur specially. (Secs. 1004, 1012, 1185, Pen. C.)

Judgment and order reversed and cause remanded.

ROBBERY—CIRCUMSTANTIAL EVIDENCE —CHARGE OF COURT—NEW TRIAL.

COURT OF APPEALS OF TEXAS.

FELIX W. ROBERTSON v. THE STATE OF TEXAS.

Held error to charge the jury in a case of circumstantial evidence, that "if you can not account for nor explain the facts and circumstances detailed before you, upon any reasonable ground consistently with defendant's innocence, then if you can not do this you should convict."

Appeal from Williamson County.

WINKLER, J.

This appeal is from a judgment of conviction for an assault with intent to commit the offense of robbery, alleged to have been committed upon one A. C. Shamblin in Williamson County, on October 3, 1877. The trial in the court below commenced on January 13, 1881, and on that day a jury was empaneled and sworn and the defendant entered his plea of "not guilty." The jury returned their verdict on the 14th day of January, 1881, by which the defendant was found guilty of an assault with the intent to commit the offense of robbery, and his punishment assessed at confinement in the penitentiary for a term of ten years.

The principal witnesses relied on by the prosecution for a conviction, on the trial below, were A. C. Shamblin, John Bonner and Dick Ray. There were several other witnesses introduced on behalf of the State for the purpose of proving isolated facts and circumstances, or for certain specified purposes.

The main facts, however, which connect the defendant with the crime, charged against him, other than isolated circumstances upon which reliance is placed, is the testimony of the three witnesses, Shamblin, Bonner and Ray. The important features of the testimony of each of these three witnesses may be stated briefly as follows:

The witness, Shamblin, is the person upon whom the assault is alleged to have been committed. His testimony comes before the court, free from any taint of suspicion, that it is anything else than a truthful narrative of the transaction as seen by himself. This witness testified that on Wednesday, October 3, 1877, on the public road between Georgetown and Round Rock, and near the latter place, in Williamson County, Texas, a man attempted to rob him; it was a mile or two this side of Round Rock, where the road crosses a branch, where there is a thicket of timber and brush on one side of the road; that he had a wagon and team and four

bales of cotton, and was on his way to Austin; had also about five dollars in money with him; it was about one hour after sun up the man came out of the brush without any coat on and bareheaded, also had on goggles; told the witness that he had a sick friend there and asked witness to take him on his wagon to Round Rock; witness assented and started to help him bring the sick man when he (the man with goggles on, drew a pistol on the witness and said for him (witness) to lie down, that he was going to tie the witness and take his wagon and team and cotton to Round Rock and sell them; says he was frightened and thought at first that he might kill him and started to lie down, but raised up before he was entirely down and told him no one man could make him do that and bluffed him off, he began to back and said if he (the witness) would promise not to say anything about it he would let him alone, and the witness promised; witness then went back, got on his wagon and went on; says the man who tried to rob him was about the size of the defendant; the man had black hair; says he was working four horses; two of them were paints. On cross-examination this witness said, we quote his language as found in the statement of facts: "I do not say it was defendant who attempted to rob me, because I do not know; * * * the man that attempted to rob me had black hair and had no mustache; I do not recognize the defendant as the man."

The witness, Bonner, testified that he knew nothing about the commission of the offense except what the defendant told him, he then proceeds as follows: On Friday night of the fair week in Belton, October 5, 1877, the defendant came to my room and called me at the window, it was 12 o'clock at night; I knew him well for we were intimate; he told me that he had been to Austin and Round Rock, and that near Round Rock he attempted to rob a man who had a wagon and some cotton; defendant said he was disfigured, had on goggles, and had had his hair dyed by a barber in Round Rock; said he told the man he had a wounded friend and asked him to take him on his wagon to Round Rock; that the wagoner got down and followed him a piece from the road and he drew a pistol on the man and told him to give up his money and lie down and let him tie him, or he would kill him; said he intended to tie the man and take his cotton on to Round Rock and sell it, but saw a man passing along the road and was afraid the wagoner would see him, too, and give the alarm, so he told the wagoner he would let him off if he would say nothing about it, which he agreed to do; he said the man was working a paint horse in his team; I know defendant is the man who came to my window and told me of trying to rob a man near Round Rock; the Belton fair began that year on Tuesday, October 2.

On cross-examination Bonner stated: I am not friendly with defendant; I have, or rather my father has employed counsel to prosecute

this case: I am indicted in Bell County for robbery of Toblin's jewelry store; defendant is also charged with the same robbery; I was arrested in the fall of 1877 and taken to Bell County; defendant told me he went to Waco after the robbery and got a barber to remove the dye from his hair, and said the damned barber never did get it all off his eyebrows; the defendant told me this on Friday, October 5, 1877, it was 12 o'clock at night.

The witness, Kay, after testifying that he knew the reputation of John Bonner in the neighborhood where he lived, for truth and veracity, and that it is good, says: On the night of the 4th of September, 1878, I went, at the request of John Bonner, and concealed myself in a tree near Belton, and Bonner went off and returned with defendant, F. W. Robertson, and they were talking when they came up under the tree, and I heard the defendant say, "Shamblin could not swear to me and if the negro barber swears to blacking my hair I will kill him;" I know it was defendant with Bonner, for I know him well and know his voice; was very near him. On cross-examination he said, "I thought it was about 9 o'clock when defendant and Bonner came under the tree; it might have been later, I had no watch; it was a bright, moon-light night; I was in an elm tree.

There was other testimony tending to show that the defendant was at and about Round Rock at a time not generally stated with distinctness, but evidently introduced in order to show the proximity of the defendant to the scene of the offense at the time of its commission, as circumstances tending to connect the defendant with its perpetration. These witnesses, without exception, when the color of the defendant's hair or beard is mentioned, say it is red. The assaulted party having testified that the man had *black hair and no mustache*, and that the defendant has red hair and red mustache, it became necessary that the State should make further proof of the identity of the defendant with the crime charged against him.

It was evidently intended to supply this missing link in the testimony by showing that the defendant had disguised himself for the purpose of preventing his identification, and in addition to his employing goggles, as the assaulted party had testified he had, but that he had gone to a barber and procured his naturally red hair and beard to be dyed black, and this proof is attempted to be supplied by the evidence of Bonner and Ray, and in the manner above set out.

In this connection, before proceeding further, we desire to express our admiration at the usefulness and the necessity of right of cross-examination of a witness.

In the present case, by this means, it was developed, not only that the party upon whom the assault was alleged to have been committed, was unable to identify the defendant as the guilty party, but also that the witness, Bonner, was not only at enmity with the defendant, but that in

all probability had a deep interest in securing a conviction of the defendant.

The witness, Ray, if left alone, proves but little except that he, from some cause unexplained, he was a willing instrument in the hands of the witness, Bonner, in placing himself, at Bonner's instance, in a position where he could play the eaves-dropper on the defendant and overhear a part of a conversation between him and Bonner, in which it is contended that the defendant made an admission tending to support the idea that the defendant had disguised himself in order that he might perpetrate this particular crime without becoming recognized.

It is not shown that the defendant had disguised himself, either by dying his hair or otherwise, except by the reproduction of his midnight admission to Bonner supported, as it is, by the statement of Ray, as heard by him, from his position up a tree.

It is not to be overlooked that the witness, Shamblin, testified that the man who made the attempt to rob him had no mustache, whilst it is not shown that he had a black mustache, even in the interview with Bonner, or in the conversation overheard by the witness, Ray. The testimony by which it was attempted to identify the defendant with the attempt at the robbery, and to avoid detection and being identified, by having dyed his hair, coming, as it does, is, to say the least, very meagre and unsatisfactory as a foundation upon which to base a conviction for felony.

We would not feel warranted, however, in setting aside the verdict on this ground alone, except that to permit the judgment to stand, would be to sanction a precedent dangerous to the citizen, when the demands of the law had been fully complied with in other respects. In this case we are unable to say that all the rights of the defendant were properly guarded in the instruction given to the jury on the trial below.

In our opinion the following paragraph of the charge is not entirely free from objection: "If you can reasonably account for or explain the facts and circumstances in evidence before you, in this case, in any way consistently with the defendant's innocence, without resorting to unreasonable doubts and theories, then you should do so and acquit him. But if you can not account for nor explain the facts and circumstances detailed before you, in this case, upon any reasonable ground consistently with defendant's innocence, then, if you can not do this, you should convict."

A charge quite similar to the one here under consideration, and given under like circumstances, though not absolutely condemned in terms, was criticised unfavorably by this court, in *Estep v. The State*, 9 Ct. App. 369. A defendant in a criminal prosecution enters upon a trial shielded by the presumption of law, that he is innocent of the crime of which he is accused, which presumption abides with and protects him from punishment, until his guilt is es-

established by the proofs adduced against him. The language of the law is this:

The defendant, in a criminal case, is presumed to be innocent until his guilt is established by legal evidence, and in case of reasonable doubt as to his guilt, he is entitled to be acquitted. C. C. P. Art. 727. Every person accused of an offense shall be presumed to be innocent until his guilt is established to the satisfaction of those whose province it is to try him. P. C. Art. 11.

We are constrained to say that with the plain principles of the statute law staring us in the face, it is erroneous, and especially so, in a case of doubtful evidence as to guilt, for the court, by its charge, to direct, or even permit, the jury to go in search of evidence by which they can find a reasonable explanation of the facts and circumstances consistent with the defendant's innocence, before they would be warranted in acquitting when the law presumes that he is innocent independent of all those facts and circumstances, until his guilt is established by legal evidence. If the evidence leaves the case involved in reasonable doubt as to his guilt, that doubt inures to the benefit of the defendant, and the law says he is entitled to be acquitted.

An instruction on the presumption of innocence and reasonable doubt is a proper and necessary charge, in all criminal trials, but as a general rule, experience has demonstrated that a charge embracing language of the Code, C. C. P. Art. 727, without elaboration or attempt at explanation, is amply sufficient. *Massey v. The State*, 1 Ct. App. 563, and see other cases cited in note 215, p. 538, *Clark's Crim. Law*. The charge of the court, whilst in other respects, so far as observed, was an admirable as well as correct enunciation of the law of the case, was, in our opinion, marred, and the jury liable to be led to an erroneous conclusion to the injury of the defendant. Except in cases where the inculpatory facts depend upon circumstantial testimony, a charge on the presumption of innocence and reasonable doubt, considered in the language of the statute, was uniformly held sufficient, but when a conviction depends alone upon circumstantial evidence, a proper charge on that character of evidence is required by the rulings of this court. *Burr v. The State*, decided at the present term of this court, and authorities there cited. It seems, from the supplemental motion of the defendant for a new trial, and from affidavits appended, that it was a matter of considerable moment, as bearing upon the main defence of the accused, that of *alibi*, to determine when a certain Methodist quarterly conference or camp meeting came on, and that this was an incidental question which was not developed until after the trial had begun.

It is not seen that the testimony bearing upon the subject was of a nature which the defendant or his counsel could reasonably anticipate in preparing for trial, still we feel assured that, in strictness of law, the testimony said to be newly discovered, was of sufficient materiality and im-

portance to require a reversal of the judgment. We have not deemed it important to discuss, in this opinion, any of the other questions presented by the record and discussed in argument.

In view of the peculiar features of this case, and considering the meager and unsatisfactory character of the testimony, together with the liability of the charge to mislead the jury, and the probability that the defendant will be able, on another trial, to settle, definitely, the time when the Methodist meeting was held, as that fact bears upon the defence of *alibi*. Taken altogether we are of opinion the ends of justice and a clear administration of the law, required of the court below that he should have granted the defendant a new trial, which was, in our opinion, an erroneous ruling of the court for which the judgment will be reversed and the cause remanded.

COURT OF APPEALS OF TEXAS.

CONTINUANCE—EVIDENCE—NEGLIGENT HOMICIDE—INTENT—CHARGE OF COURT.

JOHN AKEN

v.
THE STATE OF TEXAS.

Even a first application for continuance, though in conformity with the requirements of the statute, is now no longer a matter of right, but its truth and merit is addressed to the sound discretion of the trial court, and if there overruled will be considered by that court again on motion for new trial in connection with the other evidence in the case.

Appeal from Milam county.

WHITE, P. J.

On the 10th day of January, 1876, the indictments in this case was returned into court charging appellant with the murder of one J. B. Scobee in Milam county, on the 7th day of May, 1874. He was brought to trial on the 17th day of May, 1881, and on the 21st a verdict was rendered against him for murder in the second degree, affixing his punishment at fifteen years in the penitentiary.

An application for continuance was made by defendant which was controverted, as to diligence, by the district attorney supported by affidavits as provided by statute. C. C. P. Art. 564. This application was overruled by the court, this ruling having been duly reserved by bill of exceptions is the final error complained of. Even a first application, though in conformity with the requirements of the statute, is now no longer a matter of right, but its truth and merit is addressed to the sound discretion of the trial court and if there overruled will be considered by that court again on motion for new trial in connection with the other evidence in the case. C. C. P. Art. 560. subdivision 6. In passing upon the refusal of a continuance asked on account of the absence of a witness the evidence adduced

on the trial is likewise considered by this court, for the purpose of determining whether the desired testimony was probably true, as well as whether it was material if true. *Dowdy v. The State*, Ct. App. 292; *Sheckles v. The State*, 9 Ct. App. 326; *Lyons v. The State*, 9 Ct. App. 636.

It is hardly probable, if the absent witnesses, Hurt and Joe Aken, had testified to the proposed facts stated in the application, that such testimony would have been true when so much other testimony is exhibited directly contradicting it, not the least important of which testimony was more than one voluntary statement made by defendant himself, that he was the party that did the shooting.

If the other witness, Davidson, had been present his testimony, that Black Crunk, who had since died, had admitted to witness that he, Crunk, had fired the fatal shot, would not only have been wanting in probability of truth, but would have been hearsay and inadmissible as evidence. "On an indictment for murder, the admission of other persons that they killed the deceased or committed the crime in controversy is not evidence." *Whar. Crim. Ev. sec. 225*; *Sharp v. The State*, 6 Ct. App. 250; *Boothe v. The State*, 4 Ct. App. 202; *Krebs v. The State*, 8 Ct. App. 1; *Means v. The State*, 4 Tex. Law Jour. p. 344.

There is no testimony going to show that Crunk was at or near the scene of the shooting at the time it occurred. Nor did the court err in refusing to allow the witness, Smith, to testify to these same facts on the trial. It is no longer a question in this State, that flight and the attendant circumstances are legitimate matters for the consideration of the jury in connection with the other inculpatory evidence. *Gose v. The State*, 6 Ct. App. 121; *Blake v. The State*, 3 Ct. App. 581; 58 Ala. 335.

The fact that the defendant was arrested in Arkansas and brought back for trial brings the point within *Blake's case*, *supra*. There was error in permitting the introduction of the testimony.

Quite a number of objections are urged to the charge of the court, but upon a careful consideration we fail to see that they are tenable. Only one is deemed necessary of notice. It is said that the charge is insufficient in that it did not submit the plea of negligent homicide, as shown by the evidence, the case was and could not be one of negligent homicide which can only be predicated upon facts showing "no apparent intention to kill." *P. C. Art. 584*; *Bobbins v. The State*, 9 Ct. App. 666.

It is true that malice is the essential ingredient of murder, but the principle is elementary, that this specific malevolence towards the person killed may be embraced in such utter and reckless disregard of life as shows a man to be an enemy to all mankind, as when a man resolves to kill the next man he meets and does kill him, or shoots into a crowd wantonly, not knowing whom he may kill, (4 Black. Com. 200). In such a case it may well be said that he has ma-

levolence towards the particular person killed because he was one within the general scope of his malignity. *McCoy v. The State*, 25 Tex. 33; *Lopez v. The State*, 2 Ct. App. 204.

Mr. Wharton says: "Where an action, unlawful in itself, is done with deliberation and intention of mischief or great bodily harm to particular persons, or mischief indiscriminately fall where it may and death ensue, against or besides the original intention of the party, it will be murder." 2 *Whar. Crim. Law*, (6th Ed.) sec. 967.

It is expressly provided by our statute that the intention to commit an offense is presumed whenever the means used is such as would ordinarily be used in the commission of the forbidden act. *P. C. Art. 50*. And as was said by Ch. J. Roberts in *McCoy's case*, "a man is always presumed to intend that which is the necessary or over probable consequence of his acts, unless the contrary appears." 25 Tex. 42. Appellant, according to the evidence, fired his pistol into the window of a passenger car of a railroad train in which it is also shown that he must have known, and did know, there were passengers. Deceased was struck in the neck by the ball and died in a day or two thereafter from the effects. A more reckless disregard of human life was never shown and can scarcely be imagined, and the dastardly act, under the circumstances developed is, and could be, in law nothing short of murder.

We have found no error in the proceeding which resulted in his conviction of murder in the second degree, the judgment assessing his punishment at fifteen years imprisonment in the State penitentiary is, in all things, affirmed.

COURT OF APPEALS OF MARYLAND.

CHERBONNIER v. EVITTS.

APRIL TERM, 1881.

Deeds—Undue Influence—Knowledge of Grantor. It is not inconsistent with the exercise of undue influence or artifice that the deed assailed was executed by the grantor voluntarily, and with a knowledge of its contents.

Appeal from Caroline Circuit Court.

The appeal is from a decree refusing to set aside a deed of gift. The bill was filed after the death of the grantor by his executor, the residuary devisee in his will. The evidence tended to show that the grantor was of feeble mind and advanced age, and that the execution of the deed was procured by false and fraudulent suggestions made to him.

RITCHIE, J.,

In delivering the opinion of the court said: The law is jealous to defeat a fraudulent use of the means afforded by intimacy of association. And it is not inconsistent with the exercise of undue influence or artifice that the instrument assailed was executed voluntarily and with a knowledge of its contents. The following cases are illustrative in this connection: In the case

of *Huguenin v. Boseley*, 14 Ves. Jr. 275, before Lord Chancellor Eldon, in which the deed was impeached on the ground of undue influence and the confidential relation existing between the grantor and grantee, Sir Samuel Romilly argued that "the rule is not confined to attorneys or persons entitled to reward." *Roof v. Hines*, was the case of a tradesman who officially interfered; the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another. He cited *Hatch v. Hatch*, 9 Ves. Jr. 292, and *Bridgman v. Greene*, 2 Ib. 627, in which there was much evidence that the person was perfectly aware of what he was doing, and repeatedly confirmed it. Upon that Lord Chief Justice Wilmot's observation is "that it only tends to show more clearly the deep-rooted influence obtained over him." Lord Eldon after referring to those cases with approbation, applying the principle to the case before him, in which the grantor was a widow in the prime of life, said: "The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and prudence was placed around her as against those who advised her, which from their situation and relation with respect to her they were bound to exert in her behalf." In the case of *Dent v. Bennett*, Lord Cottenham quoted Sir Samuel Romilly's language, uttered thirty years before, and incorporated it in his opinion as an established principle of equity. 4 My. & Cr. 277. The same doctrine has been frequently announced in American courts. *Taylor v. Taylor*, 8 How. 183. In *Sears v. Shafer*, 2 Seld. 268, it is said: "In some cases undue influence will be inferred from the nature of the transaction alone; and in all cases a court of equity interposes its benign jurisdiction to set aside instruments executed between parties, in which one party is so situated as to exercise a controlling influence over the will, conduct, and interests of another." *Harvey v. Sullens*, 46 Mo. 147, is the case of a will. There the court say: "Where a person is so sick, worn out, and enfeebled that he is a mere passive instrument in the hands of those who produce the will, it is evident such will ought not to be permitted to stand." We have a number of Maryland decisions of the same general tenor, viz: *Brogden v. Walker*, 2, H. & J. 285; *Carbury v. Tarmhill*, 6 Ib. 224; *Highberger v. Stiffler*, 21 Md. 352; *Todd v. Grove*, 33 Ib. 194; and *Eagle v. Reynolds*, decided April Term, 1880; as also *Stumpf v. Stumpf* of October Term, 1879, unreported. We are convinced from the proof that the mind of the grantor was greatly impaired, and that its perverted action was fraudulently taken advantage of by means of the deed in question.

Decree reversed.

An Eastern man will no doubt be selected by President Arthur, to fill the vacancy on the Supreme bench occasioned by the death of Justice Clifford.

SUPREME COURT OF MICHIGAN.

MUTUAL BENEFIT ASSOCIATION v. HOYT.

JULY 1, 1881.

A contract by a benefit society to pay upon the death of one of its members to one who it is clearly apparent has no interest in the life insured, is contrary to public policy, and will not be enforced.

MARTSON, J.

The plaintiff in error is organized under chapter 94 of the Compiled Laws. The act authorizes any number of persons not less than five to organize as a corporation, for the purpose of securing "to the family or heirs of any member upon his death" a certain sum of money, to be paid out of the corporate funds or by an assessment upon the members in the class to which the deceased belonged. The principle facts in this case, are that Isaiah Phair, on the twenty-second day of November, 1879, made a written application, upon one of the blank forms of the association, for a \$5,000 certificate, to be made payable to Enos Hoyt. In this application Phair was asked to state "relation of the beneficiary (Hoyt) to the applicant" and the answer given thereto was "no relation." The proper medical report was made, money premium paid, and a certificate issued on the twenty-fifth day of November. Phair died March 4, 1880, and at the time of his death there were but 1,135 members of the association in the class in which he was insured. The association declined to pay upon several grounds, the most important and the only one we shall consider, being that Hoyt was not a member of Phair's family or one of the heirs.

This case seems to be peculiar, and if not one of fraud, then from the very inception, it would appear at least to be delusive and deceptive. While the insurance, if such it may be called, was for \$5,000, and the premium paid was for this sum, yet the actual amount was fixed by the number of members in the class to which the assured belonged, which turned out to be a little over 1,100, so that the amount to be recovered was thus cut down.

Again, the application, signed by Phair, and delivered to the company, and upon which the certificate was issued, showed clearly, and without any ambiguity or uncertainty, that the certificate to be issued was to be made payable to Hoyt who was no relation to the applicant. The certificate issued three days after the date of the application, referred to the application and made it and each of the statements therein a part of the contract and the statement made in the certificate was to "pay to Enos Hoyt, friend of Isaiah Phair, of Jackson. * * the sum of \$5,000."

It is thus clearly apparent that the association in accepting the application, receiving the premium, and issuing the certificate, well knew that Hoyt was not a relative, and was not claimed to be a member of Phair's family or an heir, within even the most liberal construction. So that the association issued the certificate under circumstances which most strongly call upon the courts to enforce performance of their agreement, if certain imperative rules of public policy do not forbid. The defense set up in this case must be considered as that of the public and not that of the defendant, as it stands in no position to interpose such a defense. *Lyon v. Waldo*, 36 Mich., 333.

We need not discuss the other facts at length. The testimony of Hoyt shows that this contract was in the nature of a mere wager policy, and that his interest could not be promoted by prolonging the life of Phair. Such contracts are so clearly contrary to public policy that they

cannot be upheld, and must be declared absolutely void. The judgment in this case must be reversed with cost of both courts.

(The other justices concurred.)

Negligence; Evidence.—In an action against the defendant company for negligently killing a traveller by running over him at a railroad crossing, it was claimed that at the time the train was being driven at an unlawful speed, and on the question as to what rate of speed the engineer drove the train at that time and place, *Held*, That evidence of the speed at which he drove the same train at the same place on other days must be admitted. Whether such evidence should be excluded for remoteness of time or place is a question of fact. See *State v. M. & L. R. R. Co.*, 52 N. H., 526; *State v. Colston*, 53 N. H., 483; *Hall v. Brown*, 58 N. H., 93; *Shailer v. Bumstead*, 99 Mass., 112; *State v. Hoyt*, 46 Conn., 330. [*State of New Hampshire v. Boston & Maine Railroad Company*. Supreme Court, New Hampshire, 1881.]

Insurance; Accident.—The insured, while at a railway station, was seized with a fit and fell off the platform across the track and was run over and killed by a passing train. The policy provided that there was no insurance in case of death arising from fits or any disease, "arising before or at the time or following such accidental injury (whether consequent upon such accidental injury or not, and whether causing such death or disability directly or jointly with such accidental injury.)" *Held*, a death by accident and not from fits or disease. See also *Winston v. Accident Insurance Company*, 6 C. B. Div., 42. [*Lawrence v. Accident Insurance Company*, 7 Q. B. Div., 216.]

An outspoken judge had to sentence a prisoner in Danville, Va., to prison for eighteen years, for murder, the jury making a "compromise verdict." The judge informed the defendant that the sentence was due to the "moral cowardice of twelve men." Telling him, that he considered him guilty, as charged, and added: "You should rejoice and praise God that you fell into the hands of, and were tried by, a jury of your peers."

MALICIOUS PROSECUTION.

Justification under Civil Process—Want of Jurisdiction in Officer issuing Process.—In an action for false imprisonment the defendants justified by filing an answer, stating that the imprisonment for which the plaintiff brought his action was had under and by virtue of an order of arrest issued in a civil action by a justice of the peace. The defendants set forth in their answer a copy of the affidavit upon which the order of arrest was issued, and from this copy it appears that the affidavit did not state any one of the grounds required by the statute to be stated in an affidavit for an order of arrest; *held*, that the justification was not sufficient; that an affidavit for an order of arrest is jurisdictional in its character, and where it does not state any one of the grounds required by the statute to be stated in an affidavit for an order of arrest, all proceedings afterward had under it, or by virtue thereof, or which are founded thereon, are void: *Haus v. Kohlar*, 26 Kans.

CONTRACT—PHYSICIANS FEES—SERVICE TO VISITOR—PROMISE TO PAY.

Where the testimony shows that A., a physician, is called by B. to render professional service, without any specification to whom or on whose account such services are to be rendered, and in response thereto goes to B's house and renders such services in medical attention to one who is the father of B. and a member of his family, all the while looking to B. alone for compensation, and after the services are rendered presents his bill therefor to B., who makes no objection, but promises to pay it, it was *held*, that the testimony makes out a *prima facie* case against B. for the amount of the bill. *Hentig v. Keruke*, Kansas, July Term, 1881.

CONTRACT—CONSTRUCTION—AUTHORITY AND LIABILITY OF MANAGER OF BUSINESS.

Under an agreement between the patrons and manager of a cheese factory, providing that the latter shall make all the sales of the cheese manufactured, the manager, in the absence of an express provision to the contrary, is to be allowed the necessary expenses incurred by him for broker's commission on cheese sold at places other than that in which the factory is situated.

Under a provision in the agreement that the manager shall have charge of the whole business of manufacturing the cheese, and shall make a number one article, he is not liable for an inferior or unmarketable article if produced without fault on his part. *Bilborrow v. James*. N. Y. Supreme Court. June, 1881.

ASSIGNMENT OF CLAIM TO ATTORNEY.

An attorney has a right to take an assignment of an interest in a claim to secure payment for services rendered in reference to it.

Where a plaintiff's title to the claim in suit is established by a transfer legal in itself, his recovery is an absolute bar against all persons claiming through him and the assignors upon whose acts his title is based, and it is incompetent for the defendant to inquire into the purpose for which the plaintiff obtained his title to the claim, or into any supposed relation of trust between him and any of his assignors or others. *Wetmore v. Hegeman*. N. Y. Supreme Court. March 11, 1881.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Oct. 12, 1881.]

1189. *Samuel B. Clark et al. v. Truman Osborn*. Error to the District Court of Coshocton County. Nicholas & James and J. T. Simmons for plaintiffs; Spangler & Pomerine for defendant.

1190. *Onto ex rel. W. M. Shimmick, Jr. v. John Green*. Quo Warranto—Reserved in the District Court of Muskingum County. M. M. Granger and J. R. Stonesipher for plaintiff; A. W. Train and G. L. Phillips for defendant.

1191. *Cincinnati House of Refuge v. Patrick H. Ryan*. Error to the Superior Court of Cincinnati. D. Thew Wright for plaintiff; Goss & Peck for defendant.

1192. *President and Trustees of Montgomery County Children's Home v. Superintendent and Trustees of Ohio Soldiers' and Sailors' Orphans Home*. Mandamus. M. P. Nolan for plaintiff.

1193. *Samuel A. Van Fossen v. The State of Ohio*. Error to the Court of Common Pleas of Muskingum County. Evans & Evans and Beard for plaintiff; Geo. K. Nash for defendant.

1194. *A. B. Coffin v. James Secor et al.* Error to the District Court of Lucas County. Ritchie, Howe & Ritchie for plaintiffs; Lee, Brown & Kinkade for defendants.

Ohio Law Journal.

COLUMBUS, OHIO, : : : OCT. 20, 1881.

CHIEF JUSTICE BOYNTON returned from Europe last week, arriving at his home on election day, just in time to cast his vote. Being present on Tuesday morning at the open session of the Supreme Court, the bench was full, with Judges Okey, Johnson, White and McIlvaine, in their chairs. Tuesday afternoon the Court heard oral argument in the case of *Samuel Billingsley v. The State*—Appeal from the Court of Common Pleas of Franklin County.

OLD TIME INSURANCE.

Though the Emperor Claudius, according to Pliny, was an insurer of corn imported into Rome, and though Cicero speaks distinctly of a remittance of money from Laodicea, though the old Saxon guilds were of the nature of mutual insurance societies, though marine insurance was already common in Europe in the fourteenth century, and the trade in annuities—the exact converse of life insurance—was well known and largely extended even so early as the sixteenth century; yet the earliest life insurance company in England was the Mercers', established in 1698, and this shortly failed. Before this, however, individuals of wealth had been in the habit of making contracts in the nature of life insurances. The earliest instances of these occur among the Crusaders of the Middle Ages. To the Knight of the Cross, the danger most feared was captivity; and though the romantic ballads of those days make frequent mention of gallant soldiers released by fair Saracens, like Lord Bateman by the Sultan's daughter, it was sufficiently plain that such good luck could scarce be counted on, with any satisfactory degree of certainty. A personal insurance was therefore not unfrequently entered on, by which, in consideration of a certain payment, the insurer, generally a Jew, agreed to ransom his client, who thus went on his way with a lighter heart. Another method was often practiced by ship-masters and others departing on a long and dangerous voyage, by which a specific amount was deposited with a money-broker, on condition that if the insured returned he should receive double or treble the

amount, while in the event of his non-return the Jew kept the deposit.

NEW BOOKS.

AMERICAN DECISIONS, VOL. XXVII.

This Volume Contains the important cases decided in 1834 and 1835 in N. Y., N. J., N. C., S. C., Penna., Ohio., Tenn., Vermont, Virginia, Ala., Conn., Delaware and Illinois. Among the leading subjects of these decisions, and those of sufficient importance to justify a digest of authorities are:

Voting by Proxy, 33 to 63.

Payment by bills of Insolvent Bank, 177-193.

Competency of Husband and Wife as witnesses where the other is charged with crime, 376-382.

Whether a Verdict of Acquittal can be set aside, 469-481.

Dedication of Land to Public use, 554-571.

Stare Decisis, 628-635.

AMERICAN DECISIONS, VOL. XXVIII.

Selections from the reports of the same States during the same years make up this volume. The authorities generally are collected upon the following topics:

Liabilities of Successive Insurers, 118-126.

Alienation Defeating claim for Insurance.

What will extinguish a Vendor's Lien, 196-203.

Whether assignment for benefit of Creditors precludes discharge under insolvent laws, 207-220.

Restitution of Property upon Reversal of Judgment, 363-373.

Members of Trades Unions may be indicted and Convicted for conspiracy, 501-513.

The Celebrated *Austin Case*, 5 Rawle. (Pa.) 191, so often cited in proceedings for Contempt and where the power of the court over an Attorney at Law is in question, is reported in full with notes, 657-668.

Nothing is more entertaining to the student or more satisfactory to the practitioner than a perusal of the volumes of this valuable series. Every case is important, and, either from its novelty or the fact that it relates strange cases and complications, and gives sound arguments upon living principles of law, the reader when he once opens the book finds it difficult to put it aside until all the cases and notes are carefully read.

We need not mention Messrs. A. L. Bancroft & Co., San Francisco, as the publishers.

CRIMINAL LAW AND PRACTICE OF CALIFORNIA.

A treatise upon the Practice and Pleading under the

Criminal Law of The State of California, containing *The Penal Code of California* and all amendments thereto up to March, 1881. Compiled and annotated by Clinton L. White and Wilbur F. George, of the Sacramento Bar. Law Sheep, pp. LXVI; 723. San Francisco, Cal., A. L. Bancroft & Co., 1881, \$7.50, net.

While this work is essentially an absolute necessity to the practitioner in California it is also valuable to any one whose practice is in criminal courts, and particularly valuable in all states where the penal code is similar to that of California.

This is true of New York, Iowa, Kansas, Texas, and a few others..

We would be glad to see the Penal Code of California adopted in Ohio, as it has been in New York. There are very many offences possible without punishment under our laws, which, in California or New York, would result in serious discomfort to somebody. Although we ought, in justice to our law-makers, to add that very many good and salutary laws are dead letters practically, by reason of the slovenliness, and incompetency of some of our prosecuting attorneys.

The arrangement of the text of the Code and the decisions bearing upon the various parts—the definition of offences, sufficiency of indictments and proof, is most admirable. Taken altogether it is a very valuable work.

[Correspondence.]

SEPARATE PROPERTY OF MARRIED WOMEN—AN AMENDMENT WANTED.

Section 3108 of the Revised Statutes in regard to the separate real property of the wife reads as follows: "An estate or interest, legal or equitable, in real property belonging to a woman at her marriage, or which may have come to her during coverture, by conveyance, gift, devise, or inheritance, or by purchase with her separate means or money, shall, together with all rents and issues thereof, be and remain her separate property, and under her control; and she may, in her own name, during coverture, make contracts for labor and materials for improving, repairing and cultivating the same, and also lease the same for any period not exceeding three years. This section shall not affect the estate by the courtesy of the husband in the real property of his wife after her decease, but during the life of such wife, or any heir of her body, *such estate* shall not be taken by any process of law for the payment of his debts, or be conveyed or encumbered by him, unless she join therein with him in the manner prescribed by law, in regard to her own estate."

What does "such estate" refer to? Does it refer to the separate estate of the wife, or to the courtesy of the husband? If it refers to the

courtesy of the husband, how can the wife join with him in conveying or encumbering it after she is dead? If her joining is necessary, then his courtesy after her decease not only cannot be sold on execution, but it cannot be conveyed or encumbered by the husband himself.

If it cannot be taken by any process of law, then this consequence follows: That he is in much better position than a widow. The dower of a widow which is only one-third of her husband's land for life, may be sold by process of law immediately on the death of her husband; but the courtesy of the husband, which is a life estate in the whole of the wife's land, cannot be touched during the life of any heir of her body. What is the reason for this distinction? Why protect the husband against the payment of his honest debts and not the widow?

If the words "such estate," refer to the separate estate of the married woman, then the sentence is very awkwardly constructed and requires amendment.

The last estate mentioned preceding the words "such estate" is the estate by the courtesy of the husband, and if the Legislature did not refer to that, they ought to have said, "such separate estate of the wife," or used some similar expression.

What is the effect or meaning in this connection of the words, "or any heir of her body?"

Circleville, Ohio.

SUBSCRIBER.

SOLICITORS CHARGING LIEN ON MONEYS OF CLIENT.

As we have not infrequently noted with respect to various subjects selected for discussion in these columns, that to which we devote the present paper has recently formed the matter of contemporaneous treatment both in England and the United States; and the cases of *Emden v. Carte* (44 L. T. N. S. 840) and *In re Knapp* (24 Albany L. J. 106), in which the nature and effect of the solicitor's right to a lien on moneys recovered or preserved for a client were well considered, while the doctrine on which that right depends was further developed, or of more than sufficient practical importance to render any apology for collating them unnecessary. The English case, in particular, is deserving of remark, as the point involved does not appear to have been altogether covered by any previous authority; and, on the other hand, the American decision presents an instructive examination of the general principles fundamentally governing the law upon this subject, and accordingly we shall, in the first instance, quote some obser-

vations made in the latter case by the New York Court of Apper¹—

It was there contended said Danforth, J., that the order in question "unduly protects the attorney and invests his office 'with an extraordinary prerogative, at which the alarm of suitors may well be awakened,' and her learned counsel pointed out the injurious effect upon the profession, and the injustice to the client of an adjudication which upholds the attorney's right to retain his compensation from moneys collected by him. The doctrine was criticised as if it was new and depended for its support upon recent decisions. On the contrary, the general proposition that an attorney has a lien for his costs and charges upon deeds or papers, or upon moneys received by him on his client's behalf in the course of his employment is not doubted; nor does it stand upon any questionable foundations. It comes to us *super antiquas vias*. As early as the year 1734 it was held by Lord Chancellor Talbot to arise upon a contract implied by law, and as effectual as if it resulted from an express agreement: *Ex parte Bush*, 7 Viner's Ab. 74. And in 1779, in *Wilkins v. Carmichael*, 1 Doug. 101, Lord Mansfield declared that the practice which protected it 'was established on general principles of justice, and that Courts of both law and equity had carried it so far that an attorney or solicitor may obtain an order to stop his client from receiving money in a suit in which he has been employed for him till his bill is paid;' and in *Welsh v. Hale*, 1 Doug. 238, the same judge held that an attorney has a lien on the money received by his client for his bill of costs. If the money come to his hands he may retain the amount of his bill. He may stop it *in transitu* if he can lay hold of it. If he applies to the Court they will prevent its being paid over till his demand is satisfied.' Indeed, he has inclined to go still further, and to hold that if the attorney gave notice to the defendant not to pay till his bill should be discharged, a payment by defendant, after such notice, would be in his own wrong, and like paying a debt which had been assigned after notice. And Parke, B., in *Baker v. St. Quentin*, 12 M. & W. 451, refers to this decision as establishing an attorney's claim to the equitable interference of the Court to have the judgment held as security for the debt due to the attorney, or after notice to compel the defendant to pay its proceeds over again. In our own State this was so well settled that Kent, in his commentaries, Vol. 2, p. 641, puts it down as an established principle that the attorney has two liens for his costs—one on the papers in his hand, and the other on the funds recovered. No new rule, therefore, was enacted in *Bowling Green Savings Bank v. Todd*, 52 N. Y. 489, where it was said that the lien of the attorney * * * attaches to the money recovered or collected upon the judgment. It is plain, then, that the right of lien exists. Its origin should not be lost sight of. The declaration in *Ex parte Bush* was re-stated by Chancellor Eldon in *Corvell v. Simpson*, 1 Ves. 279, where he describes it as *prima facie* 'a

right accruing through an implied contract,' and as it exists in favor of those who have bestowed labor and service upon property in its repair, improvement or preservation, the agreement implied must be that the person rendering it shall retain the property until compensation is made. The lien of an attorney stands on no higher ground. In *Ex parte Yaldon*, 4 Ch. Div. L. R. 129, James, L. J., says, 'The things upon which they claim a lien are things upon which they have expended their own labor or their own money;' and asks, 'Why are they not to have that lien in the same way as any other workman, who is entitled to retain the things upon which he has worked until he is paid for it?' And in like manner in a recent case of *Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 443, the lien of the attorney upon a judgment recovered by him is upheld upon the theory that his services and skill procured it. Wherever it exists it is supported by the Courts. In the case of a horse-trainer, *Best, C. J.*, says: 'As between debtor and creditor the doctrine of lien is so equitable it cannot be favored too much. *Jacobs v. Latour*, 5 Bing. 180. And this remark is quoted by Sugden, Ld. Ch., and applied to the case of a solicitor claiming a lien in *Plunden v. Desart*, 2 Dr. & W. 427.'

It will be observed that in the reference above made to *Baker v. Quentin*, Parke B., is mentioned as affirming that the solicitor has a claim to the equitable interference of the Court in his behalf; "the lien," he said, "which an attorney is said to have on a judgment (which is perhaps an incorrect expression) is merely a claim to the equitable interference of the Court to have that judgment held as a security for his debt." Now in a later case (1 H. & N. 173), Martin, B., said: "The right of the attorney is simply this—that if he gets the fruits of the judgment into his hands the Court will not deprive him of them until his costs are paid." But, this observation certainly seems to narrow overmuch the right of the solicitor to the active intervention of the Court; and indeed the context shows that the learned judge speaking of the solicitor's "general" lien, which is, of course, quite different from his lien for the costs of particular suit: see *Stokes on Lien of Attorneys*, 139, n. He added: "What possession has the attorney of a judgment? If the client employed another attorney to issue execution would the first attorney have a lien on the proceeds?" (as to which see 5 Ir. Eq. 34; 4 Sc. N. R. 769; *Stokes on Lien*, 174). And in *Lloyd v. Maunsell*, 22 L. J. Q. B. 111 (at 10 C. B. 428-9), Erle, J., says, as regards a rule obtained by plaintiff's attorney for the defendant to pay him the amount awarded to be paid by the defendant to the plaintiff: "This rule must be refused. An attorney for a plaintiff is only entitled to receive the amount recovered in the action as agent of, and representing the plaintiff. To grant this application would be like allowing an attorney to bring an action in his own name where the client was the contracting party." And in 1 Lush Pr. 3d ed., 339, it is laid down

that, "The attorney can not at law actively enforce the lien, his rights being only to retain the fruits of the judgment if they come to his hands; hence he cannot in his own name obtain a rule against the opposite party for payment to him of the amount awarded to his client on a reference. It would seem, however, that the attorney may by a suit in equity enforce this lien for his costs at law, as a solicitor may certainly enforce his lien upon the fruits of a suit in equity for his costs of that suit. And a Court of law will on an application in the name of the client order payment to him or his attorney of a sum awarded without regard to a judgment obtained by the opposite party against the client in another action." But, we are unable to reconcile this statement of the passiveness of the lien at law with other passages in Lush at pp. 334, 323, 326. In equity certainly one of the leading distinctions between a solicitor's retaining lien and his charging lien has been affirmed as that, while the former is passive, the latter "is a lien which the solicitor is entitled actively to enforce" (*per* Ld. Cottenham, 4 My. & Cr. 357). And we apprehend that it is properly stated in Marshall on Costs (1860) p. 457: "Both Courts of law and equity have concurred in recognizing the lien so far that an attorney or solicitor may obtain an order to stop his client from receiving money recovered in a suit in which he has been employed for him till his bill is paid. But the attorney is not the *dominus litis* so as to marshall the proceedings on the judgment or the execution as he may think fit. He can not, therefore, carry a writ of execution into effect against the instructions of his client with a view to obtain his costs, even though the parties should collude to deprive him of his lien (12 N. & W. 451; 1 Marsh R. 114). And his lien on the proceeds when recovered does not enable him to require the defendant to pay the money to him and not to his client" (citing Lloyd v. Maunsell, *supra*. p. 2). That he may obtain such an order as above see *per* Ld. Mansfield (Doug. 104-238). But recent cases appear to go beyond the last passage cited from Marshall. In *Ex parte Morrison* (L. R. 4. Q. B. 156, 19 L. T. N. S. 430) Blackburn J., observes: "There is no doubt at all that where an attorney has by his labor or his money obtained a judgment for his client he has a lien upon the proceeds of such judgment, and is entitled to have its proceeds pass through his hands. The lien does not amount to an equitable assignment of the proceeds of the judgment, but it is yet protected by the Court." So in Pulling on Attorneys, 3d p. 382, it is said that most of the decisions respecting this lien treat "it as a right founded on the equitable claim of the attorney to prevent the client running away with the fruits of the cause without satisfying his legal demands for the industry and expense by which these fruits were obtained; or, as it is expressed by an eminent Scotch lawyer (1 Bell, Com. Law Scot. 572), 'It seems to proceed on the idea or principle of a tacit agreement or understanding between the agent and his client, founded on equity, that the

client should not receive payment of the expenses awarded against the opposite party without paying his agent; that the client is bound to assign the claim to his agent, and that which he could not refuse the Court is entitled even without his consent to grant by decree.' " Certainly, the Courts have frequently gone so far as to order payment to the attorney: see 2 C. B. 823 and n., at end, 28 L. J. Ex. 213—in equity see 5 Ir. Eq. 38; and see Slater v. Mayor of Sunderland, 33 L. J. Q. B. 37, 9 L. T. N. L. 422, "where the defendant was ordered to pay money over to the plaintiff's attorney" (*sic*, 1 Arch. Pr., 12th ed., 139, n.). In 3 C. B. 823 & n., where it is said: "The proper form of application to the Court would seem to be for a rule restraining the opposite party from paying the money to the client until the attorney's lien is satisfied." In 1 Arch. Pr., 12th ed., 139 (and so, see 1 Lush Pr., 3d ed., 323, 326, and 5 Ir. Eq. 37) it is added that in clear cases of collusion the Court might allow the attorney to proceed in an action for the recovery of the costs. But, collusion or fraud is not necessary except where a compromise is sought to be set aside: see Slater v. Mayor of Sunderland, *ubi supra*.—*The Irish Law Times*.

GAMBLING CONTRACTS.

The following is the recent charge of Judge Jameson, of Chicago, to the grand jury in the Criminal Court of Cook County, Illinois.

GENTLEMEN OF THE GRAND JURY: Besides the statutes against gambling, selling liquor to minors, and acts of violence to person or property, which form the subject of your ordinary deliberations, I wish to call your attention to one which I will now read:

"Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so, in relation to any of such commodities, shall be fined not less than \$10 or more than \$1,000, or confined in the county jail not exceeding one year, or both." Revised Statutes Illinois, Chap. 38, Sec. 180.

By this section are denounced three separate misdemeanors—the sale of "options," "forestalling the market," and "cornering the market." All these have either in name or in spirit, been always interdicted by the common law, and that of "forestalling" was, at a very early day, made punishable in England by statutes. Over a century ago a movement arose in England for abolishing the restrictions upon the freedom of trade, and these statutes were, as a part of them, repealed; but the common law has remained, both there and in this country, unchanged, though fallen into disuse. The exigencies of the times induced our Legislature a few years since to re-enact the statute against "forestalling," and to add to it those touching

"options" and "corners" which I have read—offenses in which the criminal ingenuity of our ancestors seems not to have been equal.

The first offense is the illegal sale of options for future delivery of grain and other commodities. The fact that property is sold to be delivered at a future day does not make the contract illegal; or that it is not at the time possessed or owned by the seller; or that the time of its delivery is left within fixed limits, optional with the buyer or seller, though in one sense any such sale is a sale of an option apparently within the statute. What makes it a gambling contract is the intent of the parties that there shall not be a delivery of the commodity sold, but a payment of differences by the party losing upon the rise or fall of the market. Of this intent the jury are to be the judges, and it may be inferred directly from the terms of the contract, or indirectly from the course of dealing of the parties: *Pickering v. Cease*, 79 Ill., 328; *Walcott v. Heath*, 78 Ill., 433; *Pixley v. Boynton*, 79 Ill., 351.

By this legislation the General Assembly had no purpose to interdict *bona fide* sales of commodities, but only such as are colorable or fraudulent, contrived by both parties as a cover merely for gambling transactions.

The offense of forestalling originally consisted in the buying or contracting for merchandise or victuals coming to market, or dissuading persons from bringing their goods or provisions there, or inducing them to raise their prices. 2 Wharton Criminal Law, § 1849.

Our statute has narrowed the offense so that it covers only forestalling the market by "spreading false rumors to influence the prices of commodities therein." The obvious purpose of the Legislature in making this provision was to protect the people, the consumers as well as innocent traders, from the damage resulting from unnatural and fictitious fluctuations of prices brought about by the false suggestions of interested persons.

The offense of cornering the market is not, so far as I am aware, mentioned in the books, but it is one of the numerous family of frauds of which the various members in their fight with society assume an infinitude of shapes and colors. To detect and punish these, notwithstanding the novelty and apparent innocence of their disguises, is the first business of courts and justices. The thing which we know as a "corner" in the market might be briefly described as a process of driving unsuspecting dealers in grains, stock, and the like, into a "corral" and relieving them of their purses. The essence of the offense consists in the party securing a contract for the future delivery of some commodity at his option, and then, by engrossing the stock of such commodity in the market, making it impossible for the other party to complete his contract, but by purchasing of his adversary at his own price, or paying in cash the difference fixed by such adversary. As was said of another great wrong, if this is not wrong then nothing is wrong.

Public rumor on the street and in the press justifies me in saying that these offenses are rife amongst us, and in asking you, if evidence to that effect should reach you, to make them the subject of inquiry. Your duty and mine is plain. However powerful the combination to defy the laws, and however difficult to detect and punish the crime, we rank ourselves with the criminal if we fail to bring the terrors of the law to bear upon him. For one, I refuse not to hear what fills the ears of all to the discredit of the business men and methods of this city. If the crimes indicated are being committed, it imports much that the validity of our statute and its sufficiency to reach the guilty parties should be early tested. If the spread of gambling has infected our business men, the consequences cannot but be disastrous; the course of business, instead of proceeding quietly and healthily, will become broken by fits of fever and panic; unlawful gains will be preferred to the slow profits of legitimate trade; our farmers, partaking of the prevalent spirit, will hold back their crops in expectation of corner prices, borrowing money upon mortgage to carry on their operations, instead of realizing by the sales of farm products. It is said that these phenomena are already apparent, and they are charged to be the effects of violations of the law. I will only add that, it is not your duty to seek inquisitorially for evidence that crimes have been committed. Should evidence come to you through the regular channels, your duty will be to consider it and act fearlessly and promptly to vindicate the laws. I think I may promise on the part of the judiciary of the county that if you present men for crime it will not go unpunished, so far as the enforcement of the laws depends upon them."

TRIAL BY JURY.

Trial by jury proves the existence of a free government; it is the exercise by the people of one branch of supreme power. When we say it founds or upholds it, we put the effect for the cause. But suppose its value for the conservation of liberty in the past were admitted it does not follow that it is needed now for a like purpose. Officials are powerless beyond the constitutional limits. Judges by the tenure of office are beyond the influence of executive power, and generally of the ballot-box. The end now to be sought is that the law, as the expressed will of the people, should be everywhere and always supreme and uniform in its administration.

And so we come to this vital question: Is justice according to fixed rates of law more likely to be attended by our present system, or by one in which both fact and law are settled by the court without the intervention of a jury?

In cases in which we may assume that jurors would have no bias, it is obvious that they are greatly liable to error from the want of proper qualifications for the work they are to do. It

was found in the beginning that the world's work could not be done without special preparation for special duties. Our neighbor may be a great man, but we do not call upon him to set a broken limb unless he has had the training of a surgeon. Much as we may esteem our physician, we do not ask his advice when a claim is set up to the estate we inherited and supposed our own. We never go to our shoemaker for a coat, nor to our tailor for boots. In our late war, we sometimes, when smarting under defeat, talked wildly about military genius and West Point machines; but in the end the value of military education was splendidly vindicated, while the civilians, who early in the war, by political influence or otherwise, obtained independent commands in the army, for the most part failed miserably, involving the country in vast loss and suffering. The average jurymen is unaccustomed to continuous thought. He has never learned by practice to weigh and compare evidence, nor to judge of the truthfulness of witnesses. In protracted trials it is impossible for him to carry the testimony in his memory, or to aid his memory affectively by notes. At the close of the testimony the court instructs him in the law applicable to the case, and then it becomes his duty to make up his verdict by applying as best he may legal principles often imperfectly understood to testimony imperfectly remembered. We should not set a man to cultivate a farm or make a shoe without practical acquaintance with his work. We should expect nothing from him but failure, if his preparation had been only a lecture or a course of lectures. And yet we set jurors to the performance of the most responsible and difficult of all duties, with such preparation and aid only as they can receive from the arguments of the lawyers and the charge of the court.

Again, the jurymen is impressed into the service. Often he brings with him the cares of the business from which he was taken; and if anxiety about the harvesting, the notes that must be paid before the banks close, or the conduct of the boy who thinks "epsom salts means oxalic acid" distracts his attention, he will console himself by the reflection that his responsibility is shared by eleven others.

On the other hand, the judge brings to the work a mind disciplined by years of study, followed by years of practice. His knowledge of law enables him to see what facts are to be proved, and on which of the parties rests the burden of proving them, and so, as each witness delivers his testimony, to appreciate its probative value. Practice has taught him to read witnesses. For him not words only, but the manner, the tone, the gesture, the countenance, have force and meaning. He is not likely to be misled. He has opportunity to take full notes, if need be, and afterwards to revise and compare the statements of witnesses. The duties of his office are his work. His attention is not distracted by outside cares.

So much for the relative capacity of judge and

jury to administer justice.—*John C. Dodge, in Atlantic.*

LAW OF FRAUDULENT CONVEYANCES.

No branch of municipal law is of greater importance, or of more frequent application, than that named in the title, and none has been more thoroughly confused by the decisions of English and American courts. The old struggle between debtor and creditor, since not only servitude, but also imprisonment for debt, have been abolished, is in our days carried on mainly in suits at law, in equity, or in bankruptcy, for setting aside conveyances or arrangements as fraudulent against creditors.

The simplest case is where the conveyance is in the words of the old statutes, "feigned;" in common language, "sham." A, the debtor, assigns his property, real or personal, to B, in name and form only, but with the understanding that he may enjoy and control it, exactly as before. Such an arrangement is void by common reason, and, as it has been declared, also by the common law, without the aid of the Statute of 13th Elizabeth, which declares all such conveyances "made by fraud, collusion, covin or guile," void against the persons thereby to be defrauded.

It would seem that where a conveyance is not only fraudulent but feigned, the only question should be one of fact, not of law; yet the line is hard to draw. A man, for instance, settles his personalty for the separate use of his wife; the enjoyment remains practically the same, and, if he and his wife have children, the property will go pretty much, or altogether, in the same direction after his death in which it would have gone without the settlement; yet the settlement will, though not based upon any consideration, be good against subsequent debts, and, if based upon a valuable consideration, even against antecedent debts. This may be justified upon the ground that, though the enjoyment of the property remains as before, yet the control and disposition stand differently, for the wife may have a different will from her husband's. But let us go a step further: A man settles his property, real or personal, upon a wife or infant child, and reserves a power of revocation in the deed. Such a deed is, for all practical purposes, a nullity; yet a highly respectable court decided lately, upon the best English and some American authorities, that the settlement is good, and that the property can not be reached by the husband's creditors, nor assignee in bankruptcy; and it is quite doubtful whether the Supreme Court of the United States will not affirm the decision. In fact, the English Judges made the very Statute of 27th Elizabeth which is directed against conveyances designed to defraud purchasers, the surest shield against the grantor's creditors. They decided that every voluntary conveyance is, as of course, void against subsequent purchasers, even such as have notice; but, if made by a man out of debt at the time, it is held good against his subsequent creditors. So, if a man wants to hold his property under his own control, but secure against the demands of the law, he has nothing to do but to settle it upon an infant child. It can not be reached by the sheriff with an execution; the child can not sell nor encumber it, being an infant; but the father, if he wishes to do so, can sell it, for the purchaser's title, though he knew of the previous gift, will prevail over that of the donee. Lord Mansfield, in *Doe v. Routledge*, though avoiding this doctrine, alluded to it as sustained by two cases in Coke's reports, and in another case declared it to be too firmly established to

be shaken. Nay, it was carried so far that the father could buy the property again from the purchaser for value, and thus get the title as well as the enjoyment of the thing itself from his child or other donee back into his own hands. Thus, in fact, every voluntary settlement contained in itself, tacitly, a clause of revocation for every settlement was, in fact, a sham, and remained, such until the settler's death put a sale of the settled property out of his power. Yet were these sham settlements always held valid against subsequent creditors, if the grantor was out of debt at the time when he made the voluntary conveyance.

American cases do not go as far in favor of sustaining such arrangements as the precedents of the mother country. This may seem strange to some of your professional readers. The general impression prevails that England is severe, but that America is lenient, in its treatment of unfortunate debtors; and this impression is quite true in general; but England has been rather lenient to its *fortunate* debtors, and the cases decided in her courts of law and equity, as to the validity of family settlements, have generally arisen among the privileged classes. Traders fell under the provisions of the bankrupt laws, which until lately were severe enough; all others, except persons enjoying privileges of parliament, or similar exemptions, were held in awe by imprisonment for debt. The leading cases of contest between creditors and donees, like *Cardogan v. Kennett*, decided by Lord Mansfield, and reported in Cowper's Report, page 434, arose over the estates of highborn and courtly spendthrifts, who could not be made to give up their goods by the simple process of sending them to jail. The same policy of the law, which forbade the incarceration of a jolly lord at the instance of his lowborn creditors, money-lenders, or tradesmen, forbade, also, the forced sale of his wines, his plate, his linen, his manor-house, and his park.

Upon the whole, the American courts have not been as favorable as those of England to voluntary settlements, but American legislation has introduced a new mischief. Under the guise of protection to married women, most of our States have given to every married man the broadest facilities for running up two sets of debts—one in his own name, the next in that of his wife. The personality of the wife has been guarded against the control and debts of the husband; she may make contracts like an unmarried woman, and may, if she choose, employ him as her agent. In the immense majority of cases, the wife is, notwithstanding such laws, under her husband's control as much as before, and, instead of guarding her against her husband, these laws simply aid the latter in defeating the just claims of his creditors.

There is another class of cases in which the question arises, can a man have all the enjoyment of property, and yet exclude his creditors from reaching it? Rich fathers, whose sons have been brought up in idleness, try to bequeath to them their inheritance tied up in such a way as to prevent any interest therein from being attached for debt. For this purpose, the estate is vested in trustees, who are to pay to the beneficiary only the profits, without power of anticipation, or who are to support the beneficiary out of the profits. Now, there is a simple rule which in common reason ought to be applied to such cases. Any mere cause against alienation being incompatible with the right of property in a male adult must be left out of view, and the question then remains: Could the beneficiary have used the property or its income voluntarily toward the payment of his debts? If he

could so use it voluntarily, he should be compelled to do so, if too dishonest to do so without compulsion. It is the same rule which, as indicated above, should be applied to property which the debtor has disposed of by deed or gift or settlement. If he can resume the property, if he can by his mere will make it subject to the demands of his creditors, he should be compelled to do so. I do not maintain that such is now the common law of the United States, but such I maintain it ought to be in order to be just and consistent. The intent of the debtor, in making a conveyance, should hardly ever be the standard by which to judge of the fairness or validity of a conveyance. The old English statutes are full of this intent, and so are many of their American copies, but the grantor's intent is not only hard to find, but immaterial when found. What difference can it make to the creditor, whether the debtor has thrown away his property from the worst or from the purest of motives, if the result in each case alike is the defeat of the creditors in the collection of his debt?

I write now of conveyances that are not feigned, but real, but which have been made without valuable consideration. I approve highly of the rule laid down by the Kentucky statute, which declares a voluntary conveyance void as against antecedent debts, without using the word "fraud" or "fraudulent," or any of its equivalents; and I look upon the New York statute, which was made to upset the just decision of Chancellor Kent in *Reade v. Livingston*, and which left it to the jury, in each case, to judge of the grantor's intent, as highly absurd, for, aside from the bad policy of leaving important rights to depend upon the proof of processes going on inside of a man's brain, the grantor's intent is of no intrinsic importance. It may often be a hardship upon the receiver of a gift that he should, after the lapse of years, have to give it up to the grantor's creditors—a great hardship, if, upon the strength of that gift, he has been led into more expensive habits, or into risky business enterprises, and thus been induced to spend or lose the whole value of the gift—but that hardship is no less, when the grantor intended to cheat his creditors by making the gift, nor is it any greater when the grantor acted in the best of faith, believing most sincerely that he had enough other property to meet all his liabilities. The good faith of the donee would be a much better criterion than that of the donor. I think the Court of Appeals of Kentucky started from the right principle, when it held that a son-in-law's removal from a distant country, upon a farm given to him by his father-in-law, was a valuable consideration, sufficient to protect the farm from the creditors of the latter. This visible act is a safer and juster ground on which to rest the ownership of the farm, than the purity of the father-in-law's motives in making the gift.

The law of fraudulent and voluntary conveyances can be brought down upon a firm and rational basis only by eliminating from it, as much as possible, the question of intent. Let us replace that word by the word "effect;" and above all, we should condemn every "feigned" conveyance or disposition. The recent decision of the Supreme Court of the United States, that a mortgage of a stock of merchandise, which the mortgagor retains in his possession with the implied permission to sell it at retail, is fraudulent and void, was a step in the right direction. The court did not indulge in any psychologic research into the mortgagor's mind, but it held the mortgage to be void, because it is upon its face untrue—because it is a contradiction in terms. The courts

should never forget that the statutes which denounce fraudulent conveyances as void are civil, not criminal; that their object is not the punishment of a guilty mind, but simply the ascertainment of a question of property. If the conveyance was unreal, the property is still in the former owner; if it was voluntary—made upon any valuable consideration—the law simply steps in and says to the debtor, "you must be just before you are generous; you can not give your property away; you hold it, or its representative price, in trust for your creditors."

Some absurd conclusions in detail have followed from not keeping this fundamental principal in view. Where a firm—say A & B—are insolvent, neither of them have a beneficial interest in the firm assets, it follows that the creditors of either A or B, individually, can not reach any part of these assets by any process at law, in equity nor in bankruptcy, yet both English and American courts have held, that an appropriation of such assets to the payment of an individual creditor can not be set aside as fraudulent by the creditors of the firm, upon the alleged ground that the partnership creditors have no lien upon the first assets, but can claim only through the partners, whose consent binds them—a course of reasoning which overlooks entirely the controlling point, that, if the partners consent to part with their property without a consideration to themselves, without receiving anything to take the place of the property disposed of, their consent is voluntary, and therefore void as against those creditors who, but for their consent, could have reached the property thus given away.

In many cases, the true rule has been recognized by statute. Thus, it is a part of the English Bankrupt Law, and has been such for nearly two centuries, through all its changes, that personal chattels within the possession and visible control of the bankrupt, shall pass to the assignee. The meaning of the law-giver was this: What a man has in his possession, and what he controls, is his; he may owe duties concerning the thing to third persons, but practically it is his, and so when he fails to meet his debts, it should be a fund for his creditors. In some American States, for instance in Missouri, the doctrine of *Twyne's case* has been carried to the fullest length, both by legislative enactment and judicial decision. Yet, several years ago, in a Kentucky case (*Short v. Tinsley, 1 Metcalf, 497*)—a case by-the-by, in which the facts hardly called for the mischievous distinction—the Appellate Court declared, that a sale of chattels without delivery but otherwise honest, was void only in a Pickwickian sense, namely, at law; but in equity, it would be treated as a security for the amount actually paid; in short, it would be treated as a mortgage, which parties, who perhaps were not honest, can at pleasure make large enough to cover the whole value of the chattel, and which mortgage, contrary to the known policy of the law, is not only unrecorded, but even unwritten. In like manner, the old doctrine of *Twyne's case*, according to which the continued possession of personal chattels, after an absolute sale, has been held for ages to be fraudulent and void as to creditors, has been much misunderstood, and hence much broken in upon. The true reason for the rule is this: If a man really buys a chattel he wants the possession of it, and his not taking possession is almost conclusive proof that he has not bought it. The seller still has the enjoyment of the chattel; why should it not be subject to his debts? The court trying the right of property will rather believe their senses than human testimony, as to conversations that

may never have taken place, and as to intentions hid away in men's hearts. It therefore shuts its ears to the latter, and judges only by the facts open to the eye.

It seems to us that in every new revision or codification, pains should be taken to eliminate from the law of Fraudulent Conveyances, as far as possible, all reference to the grantor's intention, and to rest the rights of grantees on the one hand, and of creditors on the other, upon outward visible facts—such as a valuable consideration of the grant, its irrevocable character and actual charge of possession—and wherever the frame of the local statute does not prevent it, I hope the courts may return to the views held by Chancellor Kent in *Read v. Livingston*, according to which men's actions are a safer guide to a right decision than thoughts and motives.

Kentucky Law Journal.

L. N. DEMBITZ.

SUPREME COURT OF PENNSYLVANIA.

ANDREW HUNTER,

v.

CONRAD MOUL.

OCTOBER 3, 1881.

The mere acceptance from a debtor of his own note, or the note of a third person, in case of an antecedent indebtedness, is not a payment of the indebtedness. In the absence of a special agreement, it must be considered as a conditional payment or as collateral security.

One not a party to a note, but who has caused it to be drawn or indorsed or delivered over to a third person as a security, or has guaranteed the payment, is not entitled to notice of dishonor of it, but in an action on the original liability he may show in defense any injury he has actually sustained by the laches of the transferee. The fact that the collaterals were changed for other securities which were ultimately found worthless, changes the liability unless it is further shown that a loss resulted to the owner of the collaterals by reason of such exchange.

A creditor has a right to retain all unpaid securities until he obtains satisfaction of the debt due him.

Error to the Court of Common Pleas of York County.

MERCUR, J.

This judgment was entered on the report of a referee. The important facts found by him are substantially these: Hunter was indebted on book account to Moul in the sum of some eleven or twelve hundred dollars. On being asked for payment, he replied he had no money, but had the promise of a note of \$900 from Camp & Randall, payable in four months, and that he would give that to Moul to get discounted and use the money. The latter answered that he did not want the note, but that Hunter should take the note and get it discounted and give him the money. To this Hunter replied he was a stranger, and could not get it discounted, but that Moul should take the note and get it discounted, and he, Hunter, would stand for it and see it was paid. Moul assented to this. The note was made payable to him and sent to him. It was not indorsed by Hunter. Moul had it discounted at bank and received the proceeds. When it matured it was protested for non-payment and taken up by the defendant in error. In lieu thereof, and soon thereafter, he took from Camp & Randall their two drafts of \$450 each, payable at twenty and thirty days respectively,

and wrote Hunter informing him of the fact but received no answer. The draft first falling due was paid at maturity, the other was protested for non-payment, and Moul wrote Hunter informing him thereof. This draft remained in the hands of the defendant in error. Treating it as no payment, he seeks to recover of the plaintiff in error on the original account, a sum equal to the amount of the draft.

The contention is whether the circumstances under which the defendant in error took the note, or his subsequent action in relation thereto compelled him to apply it as a payment on the account against the plaintiff in error. There was no express agreement to accept the note as payment, nor to give time for the payment of the account. The referee found the note was not taken by the defendant in error, as absolute payment of so much of the indebtedness of the plaintiff in error, and technically not as collateral security therefor, but inasmuch as paper so held has been called collateral by the courts, he treats it as such. He further found the defendant was guilty of no negligence in failing to collect the note, and that he did not so convert it to his own use as to bar his right to recover of the plaintiff in error.

The mere acceptance from a debtor of his own note or the note of a third person, in case of an antecedent indebtedness, is not a payment of the indebtedness. In the absence of a special agreement, it must be considered as a conditional payment or as collateral security. The debtor continues liable for his own debt in the event of a failure of payment of the note thus given or transferred: *Leas et al. v. James*, 10 S. & R., 307; *Maginn v. Holmes*, 2 Watts, 121; *Weakly v. Bell et al.*, 9 Id., 273; *M'Intyre v. Kennedy et al.*, 5 Casey, 448; *Brown et al. v. Scott*, 1 P. F. S., 357; *Logue v. Waring & Company*, 4 Norris, 244.

When the transfer of a note is a conditional payment, it is necessary to inquire what the true condition was and if not fulfilled by the person accepting it, what injury if any has resulted from the breach. The cases are not in harmony, as to the effect of a failure to present the note of a third person and give notice of its dishonor when no injury therefrom has resulted to the debtor. We shall not attempt to review them, but refer to some which we think correctly rule this case. Great regard must be had to the character of the transaction. If the debtor indorse the note, a more stringent rule prevails as to notice than if he transferred it by delivery only. When the guarantee is absolute, that a specific act shall be done by another, it was said in *Vinal v. Richardson*, 13 Allen, 521, demand and notice need not be averred, although the want of them may be a defense on the ground of negligence to the extent of the resulting injury. One who has merely guaranteed it, but whose name is not on the bill or note, is not in general entitled to notice of non-payment. *Chitty on Bills*, 498. So on page 441, it is further said in general if the bill or note be given as collateral security and the party delivering it were no party to it, either by

indorsing or transferring it by delivery when payable to bearer, but merely caused it to be drawn or indorsed or delivered over by a third person as a security, or has merely guaranteed the payment, it has been considered that he is not within the custom of merchants an indorser or party to it so as not to be absolutely entitled to strict regular notice, nor discharged from his liabilities by the neglect of the holder to give him such notice unless he can show by express evidence, or by inference, that he has actually sustained loss or damage by the omission. The reason is, when a person delivers over a bill to another without indorsing it, he does not subject himself to the obligations of the law merchant, and cannot be sued on the bill. As he does not subject himself to the obligation he is not entitled to the advantages. If he can prove he has sustained damages, then he is discharged only to the extent of such actual damages. *Id.* The guarantor of a note does not stand in the same situation as parties to it. His obligation is in the nature of an insurance of the debt, and there is no need of the same proof to charge him as if he was an indorser. The necessity of demand in order to charge the indorser of a bill is solely grounded on the custom of merchants, and applies only to actions against the indorser on the bill itself. It does not apply when the guarantor is not an indorser: *Gibbs v. Cannon*, 9 S. & R., 201; *Overton v. Treacy*, 14 S. & R., 311; *McLughan v. Bovard*, 4 Watts, 308. The law is clearly stated in 2d Parsons on Bills, 184, where it is said if paper be transferred by delivery only as security for a pre-existing debt, and it is dishonored while in the hands of the transferee, it affects in no way the debt it was intended to secure. The original liability remains what it was, and upon dishonor of the paper it is not even necessary to give him notice thereof as an indorser, but the debtor may show in defense any injury he has sustained by the actual laches of the creditor. Nor does the fact that the collaterals were exchanged for other securities which were ultimately found worthless, change the liability unless it is further shown that a loss resulted to the owner of the collaterals by reason of such exchange: *Girard Fire and Marine Insurance Co. v. Marr* 10 Wright 504.

The name of the plaintiff in error was neither in or on the note. It was not payable to bearer. He was in no sense a party to it. With a view that the proceeds when paid should discharge an amount of his indebtedness equal thereto, he caused it to be made payable to his creditor and put it into his hands. Through no fault of that creditor it was not paid. It is not shown that it could, at any time, have been collected of the makers. The acceptance from the makers of their two drafts was no payment, but did result in the payment of one-half the amount. Having sustained no loss of damage by any act of his creditors the plaintiff in error has no just cause of complaint at being still held liable for his indebtedness. The creditor was not obliged to give up the unpaid draft be-

fore bringing this suit. It is not shown to be of any value, but if valuable he has a right to retain all the securities in his hands until he obtains satisfaction of the debt due him.

Judgment affirmed.

SUPREME COURT OF MISSOURI.

GILL v. BALIS.

Section 32 of the insurance law (Wag. Stat., p. 774,) confers upon the courts, in proceedings instituted against an insurance company under that law by the Superintendent of the Insurance Department, power to appoint agents or receivers to take possession of the property of the company and to make such orders and decrees as may be needful to suspend, restrain or prohibit the further continuance of the business of the company, or for the dissolution of the company and the winding up of its affairs.

Held, That the general power of making all needful orders for winding up the affairs of the company thus conferred included the power to make an order authorizing and directing a receiver appointed in such a proceeding to bring suit in his own name for the assets of the company; and that a suit so brought under such an order could be maintained.

The board of directors of an insurance company knowing that their company had just been reported by an official examiner to the Superintendent of the Insurance Department as being in an unsound condition, and that that officer would probably institute legal proceedings to have the company wound up, passed a resolution to the effect that all stockholders who would pay five per cent. on their stock (on which ninety per cent. was unpaid) and would surrender their stock certificates to the company, should have the privilege of retiring from the company; and withdrawing their stock notes. If all the stockholders had acted on this resolution, the company would have had the means of paying about one-half of its ascertained liabilities, and no more, with no provision for its outstanding policies.

Held, That the resolution was a fraud in law, if not in fact, upon the creditors of the company, and was no protection as against them, to those stockholders who had availed themselves of its provisions.

The board of directors of a corporation have no power to diminish the capital stock of the corporation unless authorized by a vote of the stockholders.

An attempt on the part of a portion of the stockholders of a corporation to withdraw from the corporation before all its debts are paid, by cancelling their stock, will be none the less void because enough remain to meet the claims of creditors.

Appeal from Jackson Circuit Court.

NORTON, J.

The Superintendent of the Insurance Department, on the 24th day of March, 1871, instituted a suit in the Circuit Court of Jackson County against the Kansas City Fire and Marine Insurance Company, the purpose of which was, among other things, to enjoin it from carrying on its business as an insurance company, and to wind up its affairs. On the 9th day of August, 1871, a decree was rendered in said cause enjoining and restraining said company from conducting business, and with a view to winding up its affairs. L. C. Slavens was appointed receiver, and was directed to take possession of all the assets and property of every nature and description, including moneys and all books, records and papers belonging to said company. On the 10th day of May, 1872, said Slavens tendered his resignation as receiver to said court, which was accepted, and on said day said court, by its order and decree, and

in furtherance of its purpose of winding up the affairs of said company, appointed Turner A. Gill, the plaintiff in the present suit, receiver, and devolved upon him the performance of all duties required of the former receiver, Slavens.

By the further order of said court made in June, 1873, the said receiver, Gill, was required and directed to join in an action prosecuted in his own name, all parties liable in any way for and on account of subscriptions to the capital stock of said insurance company, now unpaid and for balances unpaid on stock or subscriptions therefor. In obedience to the order, plaintiff Gill, as such receiver, instituted the same suit in his own name against all the defendants as stockholders of said company for the purpose of recovering forty per cent. of the par value of each share of the capital stock of said company. The trial of the cause resulted in a judgment for the plaintiff, from which the defendants prosecute their appeal to this court. The principal grounds of error relied upon by defendants as touching the merits of the case are, first, that the plaintiff, as receiver, could not institute or maintain a suit in his own name, and second, that if he could do so, they were in no way liable as stockholders, each of the defendants claiming exemption from liability as such by reason of their having surrendered their stock to said company, whereby they insist they ceased to become stockholders thereof.

It will be observed that the receiver in this case derives his power and right to sue from an order of the Jackson County Circuit Court; and the question presented, whether or not he can maintain this suit in his own name, is dependent upon a construction of section 32, page 772, Wagner's Statutes. The above section is found in a law entitled "Insurance," which, among other things, provides for the creation of an insurance department, which shall be charged with the execution of all laws in relation to insurance and insurance companies in this State, and also provides for the appointment of a Supt. of the Insurance Department as the chief officer thereof. Section 32 of this law makes it the duty of the Superintendent, when, upon an examination of the affairs of any insurance company, it shall appear that such company is insolvent, or that its condition is such as to render its further proceedings hazardous to the public, to file, in the office of the Circuit Court of the County, in which it has its principal office or place of business, a petition setting forth the condition of the company, and praying for a writ of injunction to restrain said company in whole or in part, from further proceedings in its business. At any time after such a petition is filed, the court in which it is pending is charged with the duty of appointing agents or receivers to take possession of the property of said company, and upon final hearing, with the further duty of making such orders and decrees as may be needful to suspend, restrain and prohibit the further continuance of the business of said company, or

any part thereof, or for the dissolution of the company and the winding up of its affairs.

By virtue of this section, when the Superintendent of the Insurance Department files his petition, the court or judge may, upon inspection of the petition, before answer filed or any hearing had upon the merits, appoint a receiver to take charge of the property of the delinquent company; and if no other power than this had been conferred upon the court, the position taken by appellants that the receiver could not prosecute a suit in his own name, for the recovery of a debt due the company, would be maintainable. But the section goes further and authorizes the court on a final hearing to make such orders and decrees as may be needful "in winding up the affairs of such company." It is difficult to perceive how the court could perform the duty enjoined upon it of winding up the affairs of the company, if it could not employ agencies to enforce the collection of the debts owing to said company. The settlement or winding up the affairs of a delinquent corporation can only be accomplished by the application of its assets to the payment of its debts, and the distribution to the stockholders of what may remain after the debts are paid. Ordinarily, before the assets, when they consist in property and debts due the company, can be thus applied, it is necessary to convert the property into cash and to collect the debts, and the duty enjoined upon the court of winding up its affairs would remain unperformed.

The duty of settling up the affairs of the company, being thus devolved upon the court, no reason is perceived why it might not (without any statutory provision) resort to such methods as would enable it to perform the duty. But we think that section 32, *supra*, sets this question at rest by expressly authorizing the court to make all orders and decrees needful for winding up its affairs. The statute invests the court in which the proceeding is pending, with the power to determine the necessity of the orders and decrees it may make in respect to the end to be attained; and if, in order to the attainment of the end, it appears to the court that a necessity exists for the collection of the debts due the company, and if, acting upon the necessity, it does order and direct a receiver, its own officer, to institute suits in his own name for that purpose, we would not be authorized to review his action in that respect, unless the power thus exercised was a gross and palpable abuse of it and in no aspect of the case calculated to accomplish the winding up of the affairs of the company. The question is not as to the power of the receiver to sue in his own name, but as to the power of the court charged with the duty of winding up the affairs of the corporation to make such orders as in its judgments are necessary to enable it to perform the duty enjoined. This question the statute settles by expressly giving such power to the court, and to deny that it possessed it would be to nullify the statute. The making of an order

in terms dissolving the corporation is not a condition precedent to the exercise of the power given to wind up its affairs, since the defendant corporation in this suit instituted by the Superintendent of the Insurance Department for the purpose of dissolving it and winding up its affairs, withdrew its answer to the petition and suffered judgment to go by default.

Defendants base their claim of exemption from liabilities as stockholders on a certain resolution passed by the board of directors on the 17th day of February, 1871, to the effect that all stockholders who would pay five per cent. on their respective shares of stock and surrender their stock certificates to the company, should have the privilege of retiring from the company and withdrawing their stock notes. Defendants claim that they complied strictly with the above resolution, and by reason of such compliance they are released from liability as stockholders. It is, on the other hand, insisted that the passage of said resolution by the directors was *ultra vires*, and for that reason void, and that it was also fraudulent as to creditors and stockholders.

A solution of this question can only be reached by reference to the facts found by the referee to whom the case was referred. It appears from his report that the capital stock of the company was \$400,000, of which \$255,250 had been subscribed, and on which only ten per cent. had been paid, and the remainder secured by the stock notes of the respective stockholders; that after the resolution of February 17, 1871, the stockholders, among whom the defendants are embraced, surrendered to the company certificates of stock amounting to \$167,200, after paying five per cent. thereon, and received therefor from the company their stock notes, given to secure the payment of stock respectively subscribed for by them to the amount of \$150,400. The only stock remaining after this surrender, amounted to \$88,000, on which there was owing not to exceed \$81,000, only \$47,760 of which the receiver finds was collectable. At the time the resolution was adopted, according to the report of the finance committee of said company, the company had lost \$48,250, and the liabilities of the company other than the capital stock amounted to \$32,121.27, including a re-insurance fund estimated at \$10,000, which estimate the referee finds to be \$5,621.37 less than it ought to have been. In the report of this committee no account was taken of \$350,000 of outstanding policies and liabilities. The referee further finds that on the 17th day of February, 1871, the Superintendent of the Insurance Department entered, through an expert, upon an examination of the condition of said company, who, on the 14th day of February, three days before the passage of the resolution under which defendant claims exemption, reported to the Superintendent that the condition of the company was such as to render its further proceedings in business hazardous to the public and those holding policies. The referee finds further, that at the time of the passage and adoption of said resolu-

tions the affairs of said company were in a bad, unsafe, unsound condition, and in such a state that said stockholders of said company were liable to lose heavily; and said directors also, then, each and all, well knew of the before mentioned examination of the affairs of the company, caused to be made by the Superintendent of the Insurance Department, and that said Superintendent would probably file a petition praying for an injunction to restrain said company in whole from further proceeding with its business, to wind up its affairs; and they also knew that said company had failed to make the reports to the Insurance Department required by law, and to comply with the law governing it and its business in many respects; that said resolutions were never ratified or adopted by the stockholders of said company. The referee further finds that at the time of the passage of the resolution, excluding the stock notes held by the company, the remaining assets amounted only to \$2,000.

In the light of the above facts we cannot see how the action of the board of directors in the passage of the resolution of February, 1871, can be upheld. Casting out of view liabilities which might come against the company in consequence of the \$350,000 of outstanding policies, and taking the estimate of its liabilities to be \$32,121.27, as reported by finance committee, if all the stockholders had complied with the terms of the resolution by paying five per cent of their stock notes and surrendering their stock, and receiving in return therefor their stock notes, constituting all the assets of the company except \$2,000 and the five per cent thus paid in on \$255,250, amounting to \$12,762.50, the spectacle would be presented of a company with liabilities amounting to \$32,121.27, with no one responsible for the payment of the balance of \$17,358.77, which would be remaining after the application of the \$12,762.50 and \$2,000 of the assets to the payment of such liabilities. A resolution which embraces within its scope such a result can neither be maintained on principle nor authority. It is no answer to this to say that but two thirds of the stockholders availed themselves of the avenue of escape from liability provided in the resolution. Its validity is to be tested by the fact that under its terms all the stockholders might have escaped liability, taking with them all the assets of the company, amounting to \$230,780, except \$2,000, and putting in the treasury in lieu thereof \$12,760.50 in money, with which to pay liabilities amounting to \$32,121, for the payment of which all the stockholders would have been ratably bound previous to such withdrawal. If such withdrawal of all would have operated as fraud in law, if not in fact, on the creditors, so the withdrawal of a part would likewise *pro tanto* have the same effect.

The resolution in question never having been ratified or sanctioned by the stockholders, is also assailable on the ground that the directors had no power to pass it, inasmuch as by its operation the capital stock was diminished from \$255,250 to \$88,000. The directors had only the general

powers of managing the affairs of the company in the prosecution of its business, and its business was to make contracts of "insurance against loss or damage by fire, on land and water, on any description of property or merchandise." Such powers do not authorize the directors either to increase or diminish the capital stock, or to change the fundamental organization of the company. The case of *Railway Co. v. Allerton*, 18 Wall, 233, fully sustains the above proposition, where it is held that changes in the extent of constituency or membership of a corporation involving the amount of its capital stock, are necessarily fundamental in their character, and cannot on general principles be made without the express or implied consent of the members. A change as respects the constituency or capital and membership of a body corporate, being fundamental and next in importance to the purposes and objects of the corporation, without the consent of the stockholders, "would be to make them members of an association in which they never consented to become such. It would change the relative influence, control and profit of each member. If the directors alone could do it, they could always perpetuate their power. Their agency does not extend to such an act unless so expressed in the charter."

The case of *Upton v. Tribilcock*, 91 U. S., 45, is equally emphatic in condemnation of the right of directors to limit the liability of stockholders as to unpaid stock, and pronounces such a transaction void. Justice Hunt, speaking for the court, uses the following language: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund of which the directors are trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a football to be thrown in the market for purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has often been attempted but never successfully. The capital paid in and promised to be paid in is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid and carefully husband it when received." Section 201, Thompson on Stockholders, is an authority to the effect that the American courts have steadily annulled all arrangements between corporations and their stockholders whereby the latter sought to be released from their liability to creditors. The same author, in the following section, refers to the case of *Dorr v. Stockdale*, 19 Iowa, 269, to which counsel of defendants have cited us as sustaining the resolution of the 17th

of February, 1871, as the only American case showing a departure from the rule laid down by him.

It is, however, urged by counsel that notwithstanding the retirement from the company under the resolution of the directors, with \$150,000 of its assets, that the unpaid stock notes of other stockholders who did not retire, were sufficient to pay all creditors, and that no wrong was done by virtue thereof to creditors, and that they could not, therefore, complain. In the case of Bedford R. R. Co. v. Bowser, 48 P. St., 29, a similar question to the one here, was considered. In that case 266 subscribers to the stock of a railroad company claimed to be released by virtue of an order of the board of directors authorizing the cancellation of their stock, and the court instructed the jury that if the company had sufficient assets to pay its debts, such order was valid, and the cancellation of the stock under it released the defendants. The court held that this instruction was erroneous, and marked, in passing upon it, that the directors of the company then in office were its agents, with limited power, the extent of which the defendant was bound to know. Their duties were to conduct the affairs to the furtherance of the ends for which the company was created. They had no right to give any of its funds or to deprive it of any of its means, to accomplish the full purpose for which it was chartered. The creditors were not the only persons who had interest at stake. The stockholders who had paid their subscription or bought their stock * * were at least equally interested. So in the case of Spackman v. Evans, L. R., 3 H. L. Cas. 186, where a kindred question came before the court, Lord Cranworth remarked that a stockholder might well object to relieving other stockholders and say "I became a stockholder, relying on the names of those who were engaged with me in the partnership. I delegated the management to certain directors, with defined powers and duties. It was part of the stipulation of the deed of partnership that none of my fellow shareholders should quit the partnership except by substituting in his place some other person approved by the directors. This was, I thought, sufficient security for me; that in the event of my being called on by a creditor, who, having recovered judgment against the company, should proceed to enforce payment against me; I had solvent partners, from whom I might obtain contribution, and now I find that, without authority, you, the directors, have taken on yourselves to enable several of my partners to withdraw from the partnership, a proceeding which I never authorized." It follows, we think, from the above authority, that the resolution of the board of directors of February 17, 1871, whether it be considered with reference to its bearing on the creditors of the company or its stockholders, or on both, cannot afford the protection which the defendants claim under it.

The other questions presented by the counsel we have not considered, not deeming them ma-

terial to a proper disposition of the case. Judgment affirmed, in which all concur.—*Insurance Law Journal.*

SUPREME COURT OF CALIFORNIA.

THE PEOPLE v. WREDEN.

SEPTEMBER 10, 1881.

Insanity Witness Not an Expert May State Opinion from Conversation Had. Upon the question of insanity a witness though not an expert, who details a conversation between himself and defendant, may also, in connection therewith, state his opinion, belief, or impression as to the state of the mind of defendant as it seemed or appeared to him at the time of the conversation. But a witness is not permitted to testify to an impression which might have been produced by what he had heard a person other than defendant say.

Proof of Insanity by Preponderating Testimony is Sufficient. Insanity, in order to constitute a defense in a criminal action, need not be proved beyond a reasonable doubt; it may be established by mere preponderating evidence.

Reasonable Doubt Clearly Established. The words "clearly established by satisfactory proof" are equivalent to the expression "established by satisfactory proof beyond a reasonable doubt."

Statement of Insane Person. It is error to refuse an instruction: "If at the time of the making of the alleged statements the jury were satisfied that the defendant was insane, they should disregard them entirely, no matter what caused the insanity."

Appeal from Superior Court, Stanislaus Co.

SHARPSTEIN, J.,

The appellant was tried on a charge of murder and convicted of manslaughter. The transcript is quite voluminous, and the number of exceptions unusually large. We shall confine our attention to the exceptions which we think were well taken.

Insanity was very much relied upon as a defense, and the court seems to have labored under the impression that a witness who was not an expert should not be permitted to state his opinion upon the question of the sanity of the accused. One Williams, a witness for the defense, testified that he had known the accused intimately for the period of twelve years, and that he saw him in the forenoon of the day on which it is alleged that the homicide was committed. He described quite fully the appearance of the accused, and detailed a conversation which he had with him at that time. The witness was then asked this question: "From his appearance, his actions, his condition, and conversation, what was the state of his mind?" The Court sustained an objection to this question on the ground that the witness was not competent to answer it, no foundation having been laid. We think that the exception to this ruling must be sustained. As was said by this Court in *People v. Sandford*, 43 Cal. 29: "We understand the rule on this point to be that a witness, even though not an expert, who details a conversation between himself and another may also, in connection therewith, state his opinion, belief, or impression as to the state of the mind of such person as it seemed or appeared to the witness at the time of the conversation." And that accords with our construction of subdivision 10 of Section

1870 of the Code of Civil Procedure.

The following question was put by the District Attorney to a witness for the prosecution: "Then taking your knowledge of his having been drinking, *and what you had heard*, and his appearance and conduct at the time, the impression made on your mind was simply that he was a drunken man." The counsel for the accused objected to the question on the grounds that it was hypothetical and improper. The objection was overruled, and the witness answered: "I concluded that he was very drunk—crazy drunk." The objection should have been sustained. The witness should not have been permitted to testify to an impression which might have been produced by what he had heard any other person than the accused say.

Some of the instructions of the Court to the jury are clearly contradictory. In one they were told that if they entertained "a reasonable doubt of the sanity of the person he must be acquitted," and in another that it was not sufficient that they "should merely entertain a reasonable doubt as to his sanity," and in a third that insanity "is not proved by raising a doubt whether it exists or not." It is quite clear that some or all of these instructions must be erroneous. One of these instructions reads as follows: "I charge you that where insanity is relied upon as a defense, the burden of proof is on the defendant, and the proof must be such in amount that if the single issue of sanity or insanity of the defendant should be submitted to the jury in a civil case, they would find that he was insane; or in other words that insanity must be clearly established by satisfactory proof; it is not sufficient that you should entertain a reasonable doubt as to his sanity, but the proof must be satisfactory and the fact of insanity clearly established." In a late case (*People v. Wilson*, 49 Cal. 13) it was held to be well settled, in this State, that insanity, in order to constitute a defense in a criminal action, need not be proved beyond a reasonable doubt, but that it might be established "by mere preponderating evidence." Is not the expression "*clearly established by satisfactory proof*" the full equivalent of "established by satisfactory proof beyond a reasonable doubt?" How can a fact be said to be clearly established so long as there is a reasonable doubt whether it has been established at all?

There can be no "reasonable doubt" of a fact after it has been clearly established by satisfactory proof. "Clearly" according to Webster's definition of it, means "in a clear manner; without obscurity; without obstruction; without entanglement or confusion; without uncertainty," etc. And that is doubtless the sense in which it is popularly understood. The definition of "a reasonable doubt" given by Mr. C. J. Shaw, which has been generally approved by the Courts, is as follows: "It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the

truth of the charge; * * * a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it." (*Com. v. Webster*, 5 Cush. 320.) A juror would have no excuse for saying that he did not "feel an abiding conviction to a moral certainty" of the truth of a fact which had been "*clearly established by satisfactory proof*." Such proof, if any could, would convince and direct the understanding, and satisfy the reason and judgment of a conscientious juror.

Under the instruction given, it was the duty of the jury to require that the defense of insanity should at least be proved beyond a reasonable doubt. This was error.

Some of the witnesses for the prosecution were permitted, against the objection of the appellant to testify to what he said at or about the time of his arrest. His counsel seems to think that what the witnesses testified to his then having said, amounted to an admission or confession which should have been excluded on the ground that it was made under inducements. We have examined the testimony upon this point with some care, and are unable to find that there is any evidence of his having said anything which can be construed to be an admission or confession, as those words are defined in *People v. Parton*, 49 Cal. 632. But we think that the Court erred in refusing to give an instruction requested by the accused, that "if, at the time of the alleged statements," the jury were "satisfied that the defendant was insane," they "should disregard them entirely, no matter what caused the insanity."

It is quite obvious that the utterances of an insane man ought not to be treated as evidence against himself even. And while the witnesses did not testify to his having said anything that would amount to an admission of guilt, it might in connection with other evidence, have a tendency to prove him guilty.

Judgment and order reversed, and cause remanded for a new trial.

KENTUCKY.

(*Court of Appeals.*)

SIMRALL V. GRANT, &C.

1.—A sale of personal property levied on to satisfy an ordinary execution cannot be suspended by a court of equity until the remedy at law has proved inadequate.

2.—But in a controversy between a trustee and a *cetui que trust* a court of equity will entertain jurisdiction on the complaint of either, when made in reference to the trust estate.

Where an execution is levied on trust estate by a creditor of the trustee the interest of the trustee is in direct conflict with the interest of the *cetui que trust*, and a court of equity will entertain jurisdiction.

3.—On a motion upon the whole case to dis-

solve an injunction, although the entire controversy is involved, the decision of the court is not final and does not dispose of the case on its merits.

In this case the *cestui que trust* enjoined the levying of an execution against the trustee individually upon the trust estate. The motion of the execution plaintiff to dissolve the injunction was overruled and thereupon the court rendered a final judgment perpetuating the injunction. That judgment is reversed.

Application for Continuance Because of Absence of Material Witness.

SALISBURY V. COMMONWEALTH.

1. Section 189 of the Criminal Code which provides that "when the ground of application for a continuance is the absence of a material witness, and the defendant makes affidavit as to the facts which such witness would prove, the continuance *shall* be granted, unless the attorney for the Commonwealth admit upon the trial that the facts are true," does not destroy the power of the court to postpone the trial to any time in the same term, if the party applying is given a reasonable opportunity to procure the presence of his absent witnesses and prepare for trial.

The party applying must show, first, that the witnesses are material, and second, that he has used due diligence to have them present.

2. The introduction of counter affidavits contradictory of the statements made in the party's affidavit of what his absent witnesses would prove is contrary to law and deprives accused persons of the right to have the witnesses of the facts brought face to face.

3. "A private person may make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony." Criminal Code, section 37.

A private person illegally deputized to execute a warrant of arrest, is not deprived thereby of his right to make an arrest, where he has reasonable grounds for believing the person arrested has committed a felony.

TEXAS.

(Commissioners of Appeals.)

Suit for Subscription Demurrer—Disqualification of Judge—Mutilated Contract.

R. P. DICKS V. AUSTIN COLLEGE.

1.—See demurrer to petition properly overruled.

2.—In a suit against a party for subscription to a college, a judge, who also subscribed to the same college and who still owes part of his own subscription, but who is not otherwise interested in the amount subscribed by the defendant, is not thereby disqualified.

3.—Where proof, other than that of the par-

ty himself, is offered to establish the fact, with regard to the mutilation of a contract and the explanation of the same, it is not necessary that an affidavit of the mutilation should have been filed to render such evidence admissible.

Suit on Account—Agency—Statement of Facts—Practice.

J. T. LITTON V. JENNIE THOMPSON.

As a general rule a statement of facts is necessary to show error in the admission or rejection of evidence and in giving and refusing charges, and when the absence of the statement of facts is attempted to be supplied by bills of exception, the bill or bills of exception must disclose enough facts to show that the supposed error is not merely abstract, but one which may have operated to the injury of the complaining party.

Murder in the second degree—Manslaughter as a defense—Charge of Court—Evidence of malice—Conspiracy—Self-defense.

JOHN W. McLAUGHLIN V. THE STATE OF TEXAS.

1.—Manslaughter is a defense to murder as well as self-defense, the former partial while the latter is complete. The rule applicable to all defenses, whether complete or otherwise, is that the court below must apply the law clearly, pertinently and affirmatively to the facts tending to support the defense.

2.—Every theory presented by evidence in the case demands of the court a charge thereon, whether strongly or weakly supported by the testimony.

3.—Where a conspiracy against the defendant is set up as a defense the charge of the court should not limit the right of self-defense as against the acts of any particular one of the conspirators, nor should it charge that the defendant must have known of the conspiracy.

4.—Where the defendant, having been acquitted of murder in the first degree, is being tried for murder in the second degree, it is not error to admit evidence tending to show express malice.

SUPREME COURT OF OHIO.

JANUARY TERM, 1881.

Hon. W. W. BOYNTON, Chief Justice; Hon. JOHN W. OKEY, Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Judges.

TUESDAY, October 18, 1881.

GENERAL DOCKET.

No. 131. Ohio Coal Company v. George Davenport. Error to the District Court of Washington County.

McILVAINE, J. *Held*:

1. A creditor of an alleged fraudulent vendor cannot prove the acts or declarations of such vendor made after the sale and delivery of the property against the purchaser for the purpose of impeaching his title.

2. It is incompetent for a witness to state his opinion

upon a question of law; but, where the intent with which an act done by him is drawn in question, he may testify as to such intent.

Judgment reversed and cause remanded for new trial.

1191. *The Cincinnati House of Refuge v. Patrick H. Ryan*. Error to the Superior Court of Cincinnati.

JOHNSON, J. Held:

1. That the proceedings and commitment of a minor, whose father is living, to the house of refuge, under the third clause of Sec. 2087 of the Revised Statutes, as amended (77 O. L. 217), are not void for want of notice to the father.

2. The statute under which such proceedings and commitment of homeless children are authorized, is not repugnant to section 14 or section 16, of Art. 1, of the State Constitution, as the law provides a full and complete remedy by habeas corpus for any infringement of parental rights.

3. On a hearing of *habeas corpus*, the father, if an unsuitable person, is not entitled to the custody of such child, on the ground that he had no notice of the proceedings under which the child was committed to the house of refuge.

Judgment reversed and cause remanded.

129. *Board of Commissioners of Athens County v. Baltimore Short Line Railroad Company*. Error to the District Court of Athens County.

WHITE, J. Held:

The provision in section 4 of the act further to prescribe the duties of county commissioners (S. & C. 250), declaring it to be essential to the validity of a contract entered into by the commissioners, that it shall be entered in the minutes of their proceedings by the auditor, is intended for the protection of the county from liability on such contract, unless evidenced or authenticated in the mode prescribed; but, where such contract has been fully performed on the part of the county, the other party to the contract cannot resist performance on his part, on the ground that it was not so entered. By accepting performance by the commissioners the defendant is estopped from raising the question.

Judgment reversed, demurrer sustained to the second defense and cause remanded to the common pleas for further proceeding.

132. *Dayton National Bank, and Alfred Pruden, assignee in bankruptcy of Andrew Gump, v. Merchants' National Bank*. Error to the Superior Court of Montgomery County.

OKKY, J.

1. A pledgee of shares of the capital stock of a national bank, having an irrevocable power of attorney for the transfer of such shares to him on the books of the bank, brought suit for the value of such stock against the bank, which, after notice that the pledgor had been adjudicated a bankrupt, had refused to permit such transfer to be made. The assignee in bankruptcy of the pledgor having been made a party by consent, filed an answer and cross-petition praying for an account of the amount due the pledgee and a sale of the stock, which prayer was granted: **Held**, that it is error for the court to render a further judgment that, in the event the proceeds of the sale are insufficient to satisfy the pledgee's claim, the bank shall pay the deficiency, not exceeding the difference between the proceeds of the sale and the value of the stock at the time of such refusal.

2. Where part of a promissory note is paid, and a note in renewal is executed for the balance, a pledge given as collateral security when the first note was executed, will stand as collateral security for the balance of the debt embraced in the new note, in the absence of any agreement to the contrary.

Judgment reversed as to liability of the Dayton National Bank, except with respect to the dividends after deducting taxes; and judgment in all other respects affirmed at costs of defendant in error.

128. *Hiram W. Lewis v. Spencer Lewis*. Error to the District Court of Seneca County. Judgment reversed for error in refusing to charge the jury as requested, and the misleading character of the charge given. There will be no further report.

130. *Zelotes G. Murray, administrator, &c., v. Hugh D. Michaels et al.* Error to the District Court of Wyandot County. Dismissed for want of preparation under the rule.

135. *George A. Baker et al., executors, &c., v. Elizabeth Stults*. Error to the District Court of Cuyahoga

county. Judgment affirmed. There will be no further report.

102. *Albert H. Spencer et al., administrators, &c., v. Lucy M. Baer et al.* Error to the District Court of Cuyahoga County. Dismissed by plaintiffs in error.

1018. *A. B. Voorhees et al. v. Charles B. Hubbell et al.* Error to the District Court of Hamilton County. Dismissed by plaintiffs in error.

1071. *Charles Schneider v. The State of Ohio*. Error to the Court of Common Pleas of Hamilton County. Judgment affirmed. There will be no further report.

1190. *Ohio ex rel. W. M. Shimmick, Jr., v. John A. Green. Quo Warranto*. Reserved in the District Court of Muskingum County. Judgment ousting the defendant and inducing the relator. To be reported hereafter.

MOTION DOCKET.

No. 163. *James Raymer et al. v. James L. Chase*. Motion to dismiss cause No. 350 on the General Docket. Motion overruled.

170. *Matilda P. Hart, administratrix, v. J. H. Devereaux, receiver, &c.* Motion to dispense with printing in cause No. 1184 on the General Docket. Motion granted, except as to pleadings, judgment of district court, charge of the court of common pleas, and requests to charge. Time to print extended for 60 days.

173. *Union Central Life Insurance Co. v. Emma A. Cheever*. Motion to take cause No. 1106 on the General Docket out of its order for hearing. Motion granted and cause restored to its original place on the Docket.

175. *The State of Ohio ex rel. W. M. Shimmick v. John A. Green*. Motion to take cause No. 1190 on the General Docket out of its order for hearing. Motion granted.

176. *Alexander Starbuck et al. v. Leo A. Brigel*. Motion to extend the time for printing the record in cause No. 1144 on the General Docket. Motion granted and time for printing extended for 90 days.

177. *Mary C. Bieroe et al. v. Elizabeth A. Bieroe et al.* Motion to extend the time for printing the record in cause No. 1143 on the General Docket. Motion granted and time for printing extended for 90 days.

178. *Charles Ward v. The State of Ohio*. Motion for leave to file a petition in error to the Court of Common Pleas of Greene County. Motion overruled.

179. *Charles Ward v. The State of Ohio*. Motion for leave to file a petition in error to the Court of Common Pleas of Greene County. Motion overruled.

180. *Eunice Hulburt v. John M. Graham et al.* Motion for stay of execution in cause No. 1066 on the General Docket. Motion granted. Bond fixed at \$200.

181. *Eunice Hulburt v. Regina Reinthal et al.* Motion for stay of execution in cause No. 1070 on the General Docket. Motion granted and bond fixed at \$200.

182. *Samuel Hoffmire v. A. H. Cunard*. Motion to extend the time for printing the record in cause No. 1135 on the General Docket. Motion granted and time for filing printed record extended to November 9, 1881.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Oct. 19, 1881.]

1195. *Ensley D. G. Campbell v. William Campbell, et al.* Error to the District Court of Licking County. *Charles Follett & Son* for plaintiff; *C. H. Kibler* for defendants.

1106. *Kendall Brown v. Samuel J. Rice*. Error to the District Court of Brown County. *White & White* for plaintiff; *W. W. McKnight* for defendant.

1197. *W. W. Gilliland, et al. v. H. P. Reynolds, et al.* Error to the District Court of Brown County. *White, McKnight & White* for plaintiffs.

1198. *W. W. Gilliland, et al. v. Eva Reynolds, et al.* Error to the District Court of Brown County. *White, McKnight & White* for plaintiffs.

1199. *James Clark v. Margaret Bruce*. Error to the District Court of Highland County. *C. H. Collins* for plaintiff.

1200. *Pennsylvania Company v. Charles Gallagher*. Error to the District Court of Richland County. *Rush Taggart* for plaintiff; *Jeanner & Tracy* for defendant.

Ohio Law Journal.

COLUMBUS, OHIO, : : : OCT. 27, 1881.

CHIEF JUSTICE BOYNTON has tendered his resignation as a member of the Supreme Court to Governor Foster, to take effect, November 9th, next.

NEW BOOKS.

A Digest of the Revised Statutes of Ohio, relating to Railroad and Telegraph Companies, including all Railroad and Telegraph Statute Law in force in Ohio January 1st, 1882. By James A. Wilcox, Esq., author and publisher, pp. 208. Price \$3.00. For sale by A. H. Smythe, Columbus, Ohio.

At no time since the enactment and publication of the Revised Statutes has there been so determined and persistent searchings after the true inwardness of Railroad and Telegraph law as within the past week. The war between the various factions of the Ohio Railway Companies has aroused great curiosity concerning the rights and wrongs of the different parties, both among the attorneys of the factions and outsiders who have sympathies, although no fees in the case.

This work of General Wilcox, who is solicitor for the C. & H. V. and C. & T. Railroads, is most opportune in view of these investigations. It was prepared for his own private convenience by the General, and but a very small edition was published. All the heretofore great labor required to find what is desired in the Statutes is entirely obviated by this digest, and every man connected with railroads, or who has anything to do with railroad law should secure a copy. Orders must be sent early to secure the book, as but few are in print or on the market. (Advertisement elsewhere.)

SUPREME COURT OF OHIO.

DAYTON NATIONAL BANK,
v.
MERCHANTS' NATIONAL BANK.

OCTOBER 18, 1881.

1. A pledgee of shares of the capital stock of a national bank, having an irrevocable power of attorney for the transfer of such shares to him on the books of the bank, brought suit for the value of such stock against the bank, which, after notice that the pledgor had been adjudicated a bankrupt, had refused to permit such transfer to be made. The assignee in bankruptcy of the pledgor, having been made a party by consent, filed an answer and cross-petition praying for an account of the amount due the pledgee and a sale of the stock, which prayer was granted: *Held*, that it is error for the court to render a further judgment that, in the event the proceeds of the sale are insufficient to satisfy the pledgee's claim, the bank shall pay the deficiency, not exceeding the difference between the proceeds of the sale and the value of the stock at the time of such refusal.

2. Where part of a promissory note is paid, and a note in renewal is executed for the balance, a pledge given as collateral security when the first note was executed, will stand as collateral security for the balance of the debt embraced in the new note, in the absence of any agreement to the contrary.

Error to the Superior Court of Montgomery County.

The parties above named are corporations organized under the national banking acts, and engaged in the business of banking at the city of Dayton. On November 8, 1873, Andrew Gump, being the owner of thirty shares, each for one hundred dollars, of the capital stock of the Dayton National Bank, assigned the same to the Merchants' National Bank, and executed to it an irrevocable power of attorney authorizing its president to transfer such shares on the books of the Dayton National Bank, and receive a new certificate. This transfer of stock was made as collateral security, to secure to the Merchants' National Bank the payment of a loan of money made November 19, 1873, evidenced by a promissory note for the amount, fifteen hundred dollars, upon which note Gump was liable. On February 9, 1874, the sum of three hundred dollars was paid on the note, and a new note for the balance, twelve hundred dollars, was executed, payable in ninety days, and the collateral security was retained. It is further claimed by the Merchants' National Bank, that the stock was pledged by Gump and held by it as collateral security for the payment of four other promissory notes upon which he was liable, three of them executed in December, 1873, and the other in January, 1874, the four notes amounting to two thousand five hundred and fifty dollars and being given in renewal of notes outstanding when the stock was pledged; but this claim is denied by the Dayton National Bank in its answer in the suit hereinafter mentioned.

The Merchants' National Bank presented the certificate for the shares and the power of attorney to the Dayton National Bank, and demanded a transfer of the shares on the books of the bank and the issue of a new certificate for such shares; but the Dayton National Bank refused to permit such transfer to be made, or to issue such certificate; and afterward, on June 13, 1874, the Merchants' National Bank brought suit against the Dayton National Bank seeking to recover damages in the sum of four thousand five hundred dollars, "and other relief," by reason of the matters above stated.

During the pendency of the action, Alfred Pruden was made a defendant, who filed an answer and cross-petition, in which he avers that said note for fifteen hundred dollars was delivered up to the makers and cancelled, and that the stock was never pledged as collateral for the note for twelve hundred dollars, nor for the payment of any of the above mentioned notes; that he, Pruden, is the assignee in bankruptcy of said Gump, and has received a deed of assignment under the bankrupt act, conveying to him the property of every sort owned by said Gump, or to which he was entitled, or in which he was interested, on March 26, 1874; and that, as such assignee, he demanded the stock of the Merchants' National Bank, but the bank refused to deliver the same to him. He asked that the court should decree a cancellation of the certificate of stock in the hands of the Merchants'

National Bank, and award judgment against the Dayton National Bank for the value of the stock, and prayed for such other and further judgment as might be warranted.

All the persons liable upon the promissory notes hereinbefore referred to are insolvent.

The case was submitted to the court on the pleadings and testimony, and the court found that at the time the creditors of Gump filed their petition in bankruptcy, that is, on March 26, 1874, the Merchants' National Bank held the shares of stock as collateral security for the payment of all the above mentioned notes, amounting in principal to three thousand seven hundred and fifty dollars; that the indebtedness, when the stock was received from Gump, as collateral security, on November 8, 1873, was evidenced by other notes, those above mentioned being given in renewal thereof; that after the appointment of Pruden as such assignee, he gave notice to the Dayton National Bank to not permit any transfer of the stock on its books to the Merchants' National Bank, and not to issue to it any certificate for such stock; that this was before the Merchants' National Bank had requested that such transfer be made or such certificate issued; and that subsequently to such notice by the assignee, and before bringing suit, the Merchants' National Bank requested the Dayton National Bank to make such transfer, or permit it to be made, and issue such certificate, which request was refused. The court decreed that the Dayton National Bank should pay the Merchants' National Bank the amount of four dividends on the stock, after deducting taxes paid on the stock, and that such balance of the dividends should be applied on the indebtedness to the Merchants' National Bank, amounting to four thousand one hundred and ninety-one dollars and eighty-two cents. The decree then proceeds as follows: "And it is further ordered, adjudged and decreed that, for the purpose of paying the balance remaining unpaid of such indebtedness, the Merchants' National Bank shall, after giving notice by publication in some newspaper of general circulation in Montgomery County, of the time and place of such sale, proceed to sell said thirty shares of capital stock to the highest and best bidder, and shall by its president, duly transfer and assign to such purchaser the stock upon the books of the Dayton National Bank; whereupon the Dayton National Bank shall, by its proper officers, issue to such purchaser a new certificate for said thirty shares, and after paying the costs and expenses strictly incident to such sale, out of the proceeds of the same, the balance shall be applied to the payment of the amount remaining unpaid of such indebtedness, with interest. And in case there shall be any surplus remaining of such proceeds of the sale, after the indebtedness and such costs and expenses shall be fully paid, the same shall be paid over to Alfred Pruden, assignee as aforesaid. And in the event that upon such sale the stock should be sold for less than one hundred and twenty-five dollars

per share, its value at the date of such refusal, and by reason of its sale for such lesser amount, the proceeds shall be insufficient to fully pay the amount then remaining unpaid, with interest, then and in that case the Dayton National Bank shall pay to the Merchants' National Bank any such deficiency balance, provided the same shall not exceed the difference between the amount such stock shall actually have brought, and said sum of one hundred and twenty-five dollars per share; and it is further ordered that the Dayton National Bank pay the costs of this suit, taxed at \$—."

On application of the Dayton National Bank and Alfred Pruden, assignee, this petition in error was, on leave, filed in this court.

OKEY, J.

Nothing is better settled than that shares in the capital stock of a corporation are the subject of pledge. A national bank may hold such shares in the capital stock of another national bank, as collateral security for a loan or loans made or to be made. *National Bank v. Case*, 99 U. S. 628. This is not inconsistent with *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350. Where, as in this case, the pledgor executes an irrevocable power of attorney authorizing a transfer of such shares on the books of the bank issuing the same, the pledgee has the right to demand that such transfer be made. Here, immediately after the note of February 9, 1874, became due, the pledgee applied to the Dayton National Bank to permit such transfer. On refusal of the request, the right to prosecute this action for the value of the stock accrued to the pledgee. *Case v. Bank*, 100 U. S. 446; *Johnston v. Laffin*, 103 U. S. 800; and see *McAllister v. Kuhn*, 96 U. S. 87. True, at the time of such refusal, an assignee in bankruptcy had been appointed for Gump; but this did not affect the interest of the pledgee in the shares of stock. *Jerome v. McCarter*, 94 U. S. 784, 789; *Yeatman v. Savings Institution*, 95 U. S. 764. If, however, as said in the latter case, the assignee "desire a sale of them, and a distribution of the proceeds, or if he doubted the validity of the pledge, he could have instituted an action against the corporation, in some court of competent jurisdiction, * * * and thereby obtained a judicial determination of the rights of the parties."

We find in the answer of the Dayton National Bank a request that Pruden, assignee of Gump, be made a party to the action; but the record does not show that he was made a party on motion of that bank, and, what is of more importance, it does not disclose any objection on the part of the pledgee to such new party. We think the answer and cross-petition is, in effect, an equitable action to obtain an account and a sale of the stock, and, under the circumstances stated, we must regard such answer and cross-petition as having been filed by consent of the parties.

In such posture of the case, the decrees should direct, as this does, that the amount for which

the stock is held as collateral security should be ascertained; that the Dayton National Bank should pay upon such indebtedness the amount of dividends received by it on the stock, with interest, less the amount of taxes it has paid on such shares; that the stock should be sold at a public sale; and that the proceeds of the sale should be applied in satisfaction of the balance due the pledgee, and costs and expenses, and if a surplus remained that it should be paid to the assignee. But the decree should not direct, as this does, that if the stock sells for less than its value at the time the request for transfer was refused, and the proceeds of the sale are insufficient to satisfy the sum due the pledgee and costs and expenses, then the Dayton National Bank shall pay the pledgee the deficiency, not exceeding the difference between the amount realized from such sale and the sum the stock was worth at the time of such refusal. In such equitable action, the pledgee can only look to the stock and dividends for the satisfaction of its claims. The proposition that it may go further and recover damages, in any amount, as for a conversion, is supported by no just principle.

We are not prepared to say the finding that the stock was deposited by Gump with the Merchants' National Bank to secure the payment of all sums for which he was then or might become liable to that bank, is clearly against the weight of evidence—certainly we cannot say such finding is so against the evidence as to call for reversal of the judgment in that respect. Clearly the pledge was to secure the fifteen hundred dollars. Perhaps there is sufficient support in the evidence for the finding that the stock was not only pledged to secure the payment of fifteen hundred dollars to be thereafter advanced, but also as collateral security for the other sums for which Gump was liable, and then due to the bank, notwithstanding any change that might thereafter be made in the form of the indebtedness; but, however that may be, property may be pledged for future advances, as well as for an existing indebtedness; and where it is taken in pledge for an existing indebtedness, the renewal of a promissory note given as evidence of such indebtedness, will not affect the creditor's interest in the pledge, in the absence of an agreement to the contrary, but the pledge will stand as security for such balance of indebtedness in its new form.

Nor can we say there was any error with respect to the question made in argument concerning usury in the pledgee's claims. The matter is not so presented in the record as to call for any interference with the judgment on that ground. Whether, therefore, if the record disclosed the facts concerning usury to be as claimed in argument, any ground of complaint against the judgment in that respect would be available to the plaintiffs in error, we need not determine. See *National Bank v. Matthews*, 98 U. S. 621; *Pullman v. Upton*, 96 U. S. 328.

Judgment modified as above.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

THE CINCINNATI HOUSE OF REFUGE

v.

PATRICK H. RYAN.

OCTOBER 18, 1881.

1. That the proceedings and commitment of a minor, whose father is living, to the house of refuge, under the third clause of Sec. 2067 of the Revised Statutes, as amended (77 O. L. 217), are not void for want of notice to the father.

2. The statute under which such proceedings and commitment of homeless children are authorized, is not repugnant to section 14 or section 16, of Art. 1, of the State Constitution, as the law provides a full and complete remedy by habeas corpus for any infringement of parental rights.

3. On a hearing of *habeas corpus*, the father, if an unsuitable person, is not entitled to the custody of such child, on the ground that he had no notice of the proceedings under which the child was committed to the house of refuge.

Error to the Superior Court of Cincinnati.

This was a proceeding in the court below, by defendant in error, to obtain the custody of his three minor children. In his petition for a writ of habeas corpus, he avers that he is the father of these children, all of whom are under the age of six years, that their mother is dead, and that he has always provided for them in a suitable manner, and is still willing to do so; that they were forcibly taken from his home, on the 16th of November, 1880, and carried to the Children's Home, and from thence, upon the commitment of Henry Harmyer, a Justice of the Peace of Hamilton county, committed to the House of Refuge; that he had no notice of the taking of these children, or of these proceedings. He therefore claims, that the custody of said children, by plaintiff in error, is without legal authority. The answer of the Directors of the House of Refuge justifies the custody and detention under the warrant of commitment of said Justice of the Peace.

It appears that these children were found by one Joseph L. Smith, an officer of the society for the Prevention of Cruelty to Children, and brought before the justice for hearing upon his affidavit that they were without a home and homeless.

On the hearing, which took place the same day, and without notice to the father, the justice found, from the testimony of said officer, that they were infants under the age of sixteen, without a home and homeless, and were suitable persons to be committed to the discipline and instruction of the Cincinnati House of Refuge. He thereupon committed them to said House of Refuge, until discharged by due course of law, or until they attain their respective majorities.

On the hearing upon habeas corpus, evidence was adduced pro and con, touching the fitness of the father to have the custody of these children, and as to the truth of the warrant of commitment.

In rendering its decision the court held, that the proceedings before the justice, being without notice to the father, were void and for that

reason alone, the children were discharged from the House of Refuge, and restored to the father. It is conceded by the court, and by counsel for defendant in error, that it did not appear that the father was a proper person to have the guardianship and control of these children. It is further conceded that the proceedings and commitment by the justice, were, in all respects, regular and valid, unless want of the notice to the father invalidates them. It is for want of such notice alone, that the children were discharged.

JOHNSON, J.

Section 2087 of the Revised Statutes, as amended, 77 O. L. 217, paragraph 3, is the law under which these children were committed to the House of Refuge. That paragraph authorizes a mayor, police judge or justice, to commit minors under sixteen years of age, upon complaint and due proof that they are homeless, or are without proper and suitable homes.

Section 2061 provides that:

"No commitment of an infant to a house of refuge and correction shall be for a shorter period than till such infant shall be reformed, or attain the age of majority, except in case of infants committed to await their trial, or as witnesses, and except in such cases as the board may, by its general rule provide; but any infant, by whomsoever or for whatever cause committed, may at any time be discharged upon the order of the board duly entered upon its minutes, or upon habeas corpus, if the court or judge, upon hearing, decide that neither the interest of the minor nor of the public will be endangered by such discharge."

This section was amended, 78 O. L. 253, but since final judgment was rendered in this case, hence the amendment need not be considered, as it does not affect the question at bar.

Houses of Refuge and Correction established since May 7, 1869, are governed by sections 2081 to 2082 of the Revised Statutes, while those established prior to May 7, 1869, are governed by sections 2083 to 2090, as amended. Section 2050, which is applicable to both classes of Houses of Refuge provides that the board may, *in its discretion*, receive into such institution infants under sixteen years of age, committed to their custody by the mayor, judge, or justice of the peace, on complaint and due proof in the following cases:

1st. By parent, guardian, or next friend of such infant, when it appears that by reason of incorrigible conduct such infant is beyond control, and that from regard to the welfare of such infant and the protection of society, he should be placed under the guardianship of the board of directors of such house of refuge.

2d. When, upon complaint by any one, and due proof that such infant is a proper subject for such guardianship, in consequence of vagrancy or of incorrigible or vicious conduct, and from the moral depravity of the parent, guardian or next friend, they are incapable or unwilling to exercise proper care and discipline over such infant.

3d. When such infant is without a suitable home, and means of obtaining an honest living, or is in danger of growing up to an idle, vicious life.

Sections 2051, 2052 and 2053 provide for commitment of such infants, convicted of crimes and offenses.

Section 2054 authorizes grand juries in their discretion, where the evidence against an infant under sixteen years of age, would warrant an indictment, to return to the court that the accused is a suitable person to be committed to the guardianship and correction of the directors of the house of refuge. Thereupon *on notice to the minor*, and giving him an opportunity to be heard, the court shall, without a jury, dispose of the case, and if satisfied of the truth of the return, commit the accused.

No provision is made in the statute for notice to the parent, guardian or next friend.

It was not the intention to confer upon mayors and like officers, judicial powers over the legal rights of parents, to the custody of their children. The paramount object is the good of such infants as are destitute of parental care. It is the exercise of that parental guardianship which the State has assumed. The proceeding is in its nature special. While notice to parents or others standing in that relation to infants, should be given where practicable, it is not essential to the jurisdiction of the examining officer. These officers are not invested with power to finally adjudicate the legal rights of parties. The scope and purpose of this statute is to provide in a summary manner for the destitute and homeless, as well as the vicious, and to provide for the maintenance and discipline of those who might otherwise grow up in habits of idleness and crime.

It is conceded that such a notice is not required when the infant is accused or convicted of crime, or is held as a witness. This is so, not because the parent has forfeited any of his legal rights, but because in such cases the police power of the State is paramount. So where the grand jury, in place of an indictment for crime, makes a return that the infant should be committed to the house of refuge or the Reform Farm, the court, after notice to the infant alone, and without a jury, determines the case, and commits the accused.

If this is a correct exposition of the statute, the next inquiry is whether an act which does not require notice, is not against public policy, and in violation of the fundamental law of the land?

The error of the court below, consisted in assuming that the judgment of the committing officer divested the parent of his legal right without an opportunity of being heard.

It is obvious that this is a misconception. The proceeding is purely statutory. It is intended to provide a summary method for caring for destitute children.

The commitment is not assigned as a punishment of crime, but to place destitute, neglected

and homeless children, and those who are in danger of growing up as idle and vicious members of society, under the guardianship of the public authorities for their proper care, and to prevent crime and pauperism.

As to such infants, it is a home and a school, not a prison. While no provision is made for a notice to those interested, if such there be, of the pendency of the proceeding, yet it would doubtless be proper for the examining officer, where it is practicable, before making the order to require such notice, but the statute does not seem to require it as essential to the exercise of this power.

As was said in *Prescott vs. The State*, 19 O. St. 188, where a similar question arose, "neither the infant, nor any person who would in the absence of such commitment be entitled to his custody and services, will be without a remedy." The statute itself, as well as the provisions relating to *habeas corpus*, provide an adequate and complete remedy. In such a direct proceeding, on *habeas corpus*, the commitment, does not operate to restrict the power of the court to enquire fully into the cause of the detention, and to determine upon the whole case, whether the parent is entitled to the custody of his child.

The court below should have fully heard this case upon its merits, the commitment being in due form, and if the father was not a suitable person to have the care of these children, should have remanded them to the custody of defendants until legally discharged.

The authority of the State as *parens patriae*, to assume the guardianship and education of neglected, homeless children, as well as neglected orphans, is unquestioned. The institutions of public charity, for this purpose in this State, are a subject of just pride to every citizen. The provisions of law under which these institutions are maintained should receive such a construction as will not defeat their humane intention. So long as the management of these institutions is held to public account and is amenable to the courts, there need be no apprehension, that personal rights will be infringed, especially where, as in this case, direct and ample remedies by *habeas corpus* are provided for the protection of the legal rights of parents and others.

Judgment reversed and cause remanded.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

COMMISSIONERS OF ATHENS COUNTY

v.

BALTIMORE SHORT LINE RAILROAD COMPANY.

OCTOBER 18, 1881.

The provision in section 4 of the act further to prescribe the duties of county commissioners (S. & C. 250), declaring it to be essential to the validity of a contract entered into by the commissioners, that it shall be entered in the minutes of their proceedings by the auditor, is intended for the protection of the county from liability on such contract, unless evidenced or authenticated in the mode prescribed; but, where such contract has been fully performed on the part of the county, the other party to the

contract cannot resist performance on his part, on the ground that it was not so entered. By accepting performance by the commissioners the defendant is precluded from raising the question.

Error to the District Court of Athens County.

The original action was brought by the Board of Commissioners of Athens County against the Baltimore Short Line Railroad Company upon an agreement entered into between the parties. The agreement was, in substance, that in consideration of the grant by the commissioners of the right to the company to use and occupy portions of a certain county road permanently and other portions temporarily, in the location, construction, and operation of its railroad, the company agreed to restore such portion of said road as should be temporarily occupied, to its former condition; and for such portions as should be permanently occupied by the railroad, the company would provide new portions of said road, so that the said county road should be as good and safe for the public as it was before it was taken possession of by the company.

The petition avers that the company took possession of the county road under the agreement, appropriating portions thereof to the use of its railroad permanently, and occupying other portions temporarily in the construction of its railroad; but that the company had failed and refused to comply with said agreement on its part.

Among other defenses the defendant pleaded the following:

"II. And, as a defense to the said petition so finally amended, the defendant says, that the engagement and contract in said amended petition set forth, was not entered in the minutes of the proceedings of said board by the auditor of said county."

On demurrer this defense was adjudged a bar to the action, and judgment was rendered dismissing the petition. The judgment was affirmed by the district court; and the present petition in error is prosecuted to reverse both judgments.

WHITE, J.

Had the railroad company obstructed the highway without authority, section 17 of the act establishing boards of county commissioners, as amended March 7, 1873 (70 O. L. 53), would have afforded an adequate remedy. *Little Miami Railroad Company v. Commissioners of Greene County*, 81 O. L. 338.

But the amended petition, on which the case was adjudicated, is founded on an agreement entered into between the commissioners and the railroad company, under section 12 of the act providing for the creation and regulation of incorporated companies, as amended April 15, 1857. S. & C. Stats. 278. The agreement prescribes the terms and conditions upon which the railroad company was to occupy and use the highway; and the company having taken possession of the highway and appropriated it to the uses of the railroad, under the agreement, the

question is whether the company is bound to perform the agreement on its part.

The company rests its defense on section 4 of the act of April 8, 1856, further to prescribe the duties of county commissioners. S. & C. Stats. 249. The section is as follows: "It shall be essential to the validity of every contract entered into by the county commissioners, or order made by them, that the same shall have been assented to at a regular or special session thereof, and entered in the minutes of their proceedings by the auditor."

The ground on which the company claims to be relieved from the performance of the agreement, is that it was not entered in the minutes of the proceedings of the commissioners as required by this section.

The object of the section is to protect the county from liabilities of the character named in the section, unless they are evidenced or authenticated in the mode prescribed. But where the agreement has been fully executed by the commissioners, on the part of the county, and the defendant is in the full enjoyment of the rights and benefits intended to be conferred by the agreement, the failure to record cannot avail as a defense. The defendant is, in such case, upon the plainest principles of justice, precluded from raising the question.

Judgment reversed, demurrer sustained to the second defense, and the cause remanded to the court of common pleas for further proceedings.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

SETH F. ELDRIDGE

v.

THE STATE OF OHIO.

A general verdict that the defendant "is guilty in manner and form as he stands charged in the indictment," where the indictment contains two counts charging distinct misdemeanors, will authorize a sentence upon each count.

Motion for leave to file a petition in error to reverse the judgment of the District Court of Geauga County.

At the October term, 1878, of the Court of Common Pleas of Geauga County, an indictment was found against Seth F. Eldredge, containing two counts precisely alike, charging the said Eldredge, in proper form, with unlawfully selling intoxicating liquors to Jesse Curtis, a minor, on September 7, 1878.

The accused pleaded not guilty.

On the trial, evidence was offered showing that at the place and on the day stated in the indictment, Eldredge sold intoxicating liquors to said Curtis, and that on the same day, at the same place, about two hours after the first sale, he again sold intoxicating liquors to Curtis; that at the time the sales were made, Curtis was a minor, as Eldredge well knew; and that there was no written order of either the parents, guardian or family physician of the minor authorizing such sale to be made.

The jury returned a verdict that the accused "is guilty in manner and form as he stands charged in the indictment." No request was made for a finding by the jury as to each count. The sentence was, that upon the first count the defendant should be imprisoned in the county jail for the period of ten days, and that upon the second count he should pay into the county treasury a fine of fifty dollars, and costs, and that he should stand committed until the fine and costs were paid.

The statute provides as follows: "Whoever * * * sells intoxicating liquors to a minor, except upon the written order of his parent, guardian, or family physician, * * * shall be fined not more than fifty nor less than five dollars, or imprisoned not more than thirty nor less than ten days."

The district court affirmed the judgment.

OKEY, J.

The defendant relies, for a reversal of judgment, upon the fact that he was sentenced to greater punishment than could have been lawfully imposed upon conviction under one count of the indictment only. The only authority relied on to show the illegality of such sentence is Tweed's case (*The People ex rel. v. Liscomb*, 60 N. Y. 559.) There it appeared that Tweed was tried upon an indictment, charging, in separate counts, two hundred and twenty distinct misdemeanors, and that he was found guilty upon two hundred and four of the counts. The statute upon which he was indicted provided that, "where any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every wilful neglect to perform such duty" should be a misdemeanor, punishable by imprisonment not more than a year, and a fine not exceeding two hundred and fifty dollars. Upon twelve of the counts the court sentenced him to twelve consecutive terms of imprisonment of one year each, together with fines of two hundred and fifty dollars each, and on other counts to additional fines, the fines amounting in the aggregate to twelve thousand five hundred dollars. Tweed having served a term of one year in prison, and paid a fine of two hundred and fifty dollars, the court held that the fine and imprisonment ordered upon the first count exhausted the power of the court, and that he was entitled to a discharge upon habeas corpus. The court say that in such case the punishment may be awarded on one count or several counts, but that the whole punishment cannot exceed that which might be inflicted under one count.

It has been thought the mode of trial adopted in that case was prejudicial to the rights of the accused; while others are of opinion that separate prosecutions would have been far more oppressive. Here, however, the inquiry is, not whether one mode of prosecution is less objectionable than another, but whether the law will sanction the punishment inflicted.

That Tweed's case is in conflict with the rule of the common law, as administered in England

and this country, seems to be clear. *R. v. Robinson*, 1 Moody, 413; *Douglass v. R.*, 13 Q. B. 74; *Barnes v. The State*, 19 Conn. 398; *The State v. Amba*, 20 Miss. 214; 1 Bishop's Cr. Pro. (3d ed.) §§ 455, 1005 a; *Wharton's Cr. Pl. & Pr.* § 910. Indeed, in this State, the common law rule as to misdemeanors may, in the discretion of the court, be extended to felonies. *Bailey v. The State*, 4 Ohio St. 440; *Boose v. The State*, 10 Ohio St. 575. And in Massachusetts there may be a lumping sentence embracing all the punishment that might be inflicted by separate sentences.

Regularly, where the indictment contains more than one count, the verdict should respond specifically to each count, and not generally to all; and where the verdict is guilty as to more than one count, there should be judgment as to each, the sentences to operate consecutively. To refuse a request that the court direct the jury to make such separate finding, would no doubt be error. *Commonwealth v. Carey*, 103 Mass. 214. Indeed, doubt has been expressed "whether, in any case, a general verdict of guilty will authorize separate penalties to be inflicted upon separate counts of the indictment." *Buck v. The State*, 1 Ohio St. 61, 62. But we are of opinion that where, on such general verdict, the court has sentenced as to each count, it will be presumed, in the absence of any showing to the contrary, that several offenses were proved. 1 Bishop's Cr. Pro. (3d ed.), §§ 1015, 1325—1327; *Wharton's Cr. Pl. & Pr.*, § 907.

Motion overruled.

[This case will appear in 37 O. S.]

CIRCUIT COURT, UNITED STATES.

W. D. of Pennsylvania.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO.,

v.

THE NEW YORK, CHICAGO & ST. LOUIS RAILWAY CO.

SEPTEMBER 5, 1881.

1. Real estate acquired by a railroad corporation by purchase or condemnation and held for the necessary enjoyment of its essential franchises, cannot be taken from it by another railroad corporation by the usual method of appropriation.

2. But the extent of such acquisition is not conclusively determinable by the directors of the first corporation; and where another corporation seeks to make such appropriation, it is a proper subject of judicial inquiry whether the real estate proposed to be taken is reasonably necessary to the first corporation.

3. In determining this question every reasonable inducement will be made in favor of the primary rights of the first corporation, and in measuring their extent, there must be a liberal consideration of the future as well as the present necessities of the corporation.

4. But where at a preliminary hearing the affidavits do not fully disclose the necessities present and prospective of the first corporation, and the case is not free from doubt, a preliminary injunction will not be granted to restrain the second corporation from constructing its road over land of the first corporation, where the acts complained of will not immediately interfere with the business or operations of the first corporation. In such case the court will not undertake to determine the rights of the parties until final hearing.

Sua motion for a preliminary injunction.

[The railroad in course of construction by the respondent company, The New York, Chicago & St. Louis Railway Company, runs side by side with the road of the plaintiff company from Buffalo, N. Y., to Cleveland, Ohio, passing through the part of Pennsylvania wherein lies the land in dispute.

The plaintiff had built several spur tracks reaching out on the south side of the main line to gravel pits at some distance therefrom. The respondent company proceeded to construct their main line across these spur tracks, upon which the plaintiff made application for a preliminary injunction, claiming the exclusive right to use and control the ground occupied by their spur tracks by virtue of the verdict and order of condemnation giving them title and possession thereof.

The opinion of the court denying the motion for a preliminary injunction, fails to show anything more than an evasion of the question involved. The high reputation of Mr. Acheson as a lawyer, before his appointment to the bench, gives certain regret that the question of the right to condemn and appropriate previously condemned and appropriated property, was not met in a more manly way. If the plaintiff has any rights the respondent is bound in law to respect, why not so award? And if not so, why request or suggest to the defendant that he shift his line and not interfere with the plaintiff's tracks?

The opinions we credit to the *Pittsburgh Legal Journal*.—EDS. OHIO LAW JOURNAL.]

ACHESON, D. J.

At the late sitting of the Circuit Court at Erie, I heard and refused a motion for a preliminary injunction in this case. The importance of the controversy is such, however, that a re-argument was allowed, and the case has been heard by the Circuit Judge and myself upon fuller proofs. Of these proofs, however, I may say, that they consist in the main of *ex parte* affidavits, and in some particulars are less full than is desirable. For example, they afford little information as to the extent of the business done at Harbor Creek Station. It is true, we have the opinions of respectable and intelligent witnesses as to the requirements of the plaintiff company at that point; but in matters of fact the affidavits are deficient.

In respect to the plaintiff's properties occupied, or proposed to be occupied, by the defendant at Twenty-Mile Creek, Sixteen-Mile Creek, the Brawley piece and the gravel pit, we have had no difficulty in reaching a conclusion adverse to the plaintiff's application.

As to the wood-yard at Moorhead's the case is not entirely clear. But as the answer and the affidavit of Mr. McGrath, the defendant's superintendent of construction, (as we understand them), declare that the defendant does not intend to take up or remove either of the plaintiff's spur tracks at this place, or in any wise interfere with the plaintiff's use thereof, we think that the present proofs do not make out such case as calls for a preliminary injunction. At the final hearing,

with all the evidence regularly taken before us, we can more intelligently and safely determine the rights of the parties.

With some hesitation we announce a similar conclusion in respect to the land at Harbor Creek Station. I myself entertain serious doubt whether any portion of the plaintiff's land at this point is open to appropriation by the defendant; but for lack of complete information my mind has not reached a settled conviction. If the right of appropriation exists, it certainly ought to be exercised so as to avoid all unnecessary injury to the plaintiff. The defendant's line as located divides the plaintiff's property, cutting off a strip of forty-one feet in width along Boynton's line. If there is no engineering difficulty or other obstacle in the way the defendant had better consider whether it ought not to shift its location down to Boynton's line and thus leave the plaintiff additional available space south of its southerly track.

Upon the whole case as now presented, and after a careful consideration thereof, the court is of opinion that the motion for a preliminary injunction should be denied. And it is so ordered.

McKENNAN, Cir. J., concurring.

The opinion of Judge Acheson announces the decision of the court on the motion for a preliminary injunction in this case. The motion was argued before him alone at Erie, and was then denied, but as he assented to the request of counsel for a re-argument, and desired me to be present at it, I consented to sit with him merely that I might render him, by conference and suggestion, such assistance as I could, leaving still with him the ultimate burden of responsible decision.

I concur with him in the denial of the motion, and in the reasons given for it.

It is undoubtedly true that real estate acquired by a railroad corporation, by purchase or condemnation, and held for the necessary enjoyment of its franchises cannot be taken from it by another corporation, by the usual method of appropriation. But I do not agree with the argument that the extent of such acquisition is conclusively determinable by the directors of the corporation, and that the exercise of their power in this connection is questionable only on the ground of bad faith, as the equivalent of fraud. The power of acquisition is limited by the necessary wants of the corporation, and an exercise of it beyond this limit is not within its protection. I see no reason then why this limitation of the power of a corporation to acquire and hold real estate is not as proper a subject of judicial inquiry, where alleged encroachments by another corporation is to be determined, as the existence of the power itself.

Upon the result of such an inquiry the decision of this case depends. In finally disposing of it, every reasonable intendment must be made in favor of the primary rights of the complainant. At the points of the alleged conflict, no actual encroachment upon these rights can be sanc-

tioned or allowed; and in measuring their extent, there must be a liberal consideration of the future as well as the present necessities of the complainant, touching the use of existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of freight business.

In view of these considerations, the suggestion of Judge Acheson has great force, that it might be most prudent on the part of the respondent to modify its location at Moorheads and Harbor Creek.

UNITED STATES CIRCUIT COURT, W. D. TENNESSEE.

PENDLETON v. KNICKERBOCKER LIFE INS. CO.

Life Insurance—Draft taken in Payment of Premium—Commercial Law. Where an insurance company takes a draft in payment of a premium, the company is bound to comply with the rules of the commercial law as to negotiable paper, as to presentation for acceptance and payment.

Action on a life policy. The company took from the policy holder, on account of the premium, a draft dated July 14, 1871, reading: "Three months after date, without grace, pay to the order of the Knickerbocker Life Insurance Co. three hundred and twenty-five dollars, value received, for premium on policy No. 2346, which policy shall become void if this draft is not paid at maturity. (Signed.) S. H. Pendleton," and directed to a firm in New Orleans. The policy contained a condition that it should be void if the draft was not paid when due "without notice to any party or parties interested therein." The defendant claimed that the draft was presented before due and acceptance was refused. No notice of presentment, etc., was given the insured. On motion of defendant for a new trial.

HAMMOND, J.

The defendant corporation, in order to avoid liability upon the policy, is compelled to assume that it had absolutely no duty whatever to perform in relation to the draft, and that what it did do toward presenting it was merely *ex gratia*. It was conceded at the hearing that if the money had been in the hands of Greenwood and Co. to pay the draft on the 14th day of October, 1871, when it was due, the company would have been liable if it had failed to present it on that day, and the only question of fact which the company desired to try was whether or not Dr. Pendleton had thus placed funds in the hands of his merchants to pay the draft. This concession seems to have been receded from in the printed brief submitted on this motion for a new trial, and it is now said: "That the receipt of the draft imposed no obligation upon the company to do anything beyond presenting it for payment, at or after maturity, at the place designated therein, and we very much doubt whether we were bound to go as far as we did on the trial, and show a presentation in fact, for the production of the draft on the trial *prima facie* established its non-payment, and the burden of proof to show that it

would have been paid on presentation rested on the plaintiff." This seems to still concede a necessity for presentation at some time, and in order to meet the exigencies of the proof, the occasion of presentation for acceptance is taken as a compliance with that duty; and inasmuch as acceptance was refused, it is said that "on principle, as well as authority, this refusal rendered a demand for payment on the day of maturity unnecessary;" for which *Plato v. Reynolds*, 27 N. Y. 586, is cited. This statement of the law ignores entirely an essential factor in the rule invoked, and that is due notice of non-acceptance, which was given in the case cited, and must be always, to excuse non-presentation for payment, as the jury were told in this case. 1 *Daniel on Neg. Inst.* (2d ed.) §§ 449, 598. But the notice not having been given in this case, the jury were properly told that a failure to give it rendered presentation for payment as necessary on the day when the draft fell due as if no presentation for acceptance had been made. *Ib.* §§ 449, 454. Indeed, it is possible, although the holders of this draft, payable, as it was three months after date, on a day certain, were not bound to present it for acceptance; that having undertaken to do so, the failure to protest for non-acceptance itself discharged the drawer, and operated to make the payment of the premium complete by making the paper their own absolutely. *Ib.* § 452; *Gracie v. Sanford*, 9 Ark. 233. There was scarcely any proof before the jury to justify them in saying that the relations between the drawer and drawee were such as to make the drawing of this bill a fraud that would excuse the laches which seems under modern decisions, to be the only excuse. 1 *Daniel on Neg. Inst.* (2d ed.) § 450; 2 *Ib.* §§ 1075-1079.

It was repeatedly said in the argument, that no injury could result to the plaintiffs by want of presentation and notice. I do not understand, from the foregoing authorities, that this is now the test by which we determine whether the failure to present and give notice has been excused; but if it be so, this case manifestly falls within the cases of injury, as pointed out by the adjudications cited by this learned author on the commercial law of negotiable instruments. Moreover, there were special circumstances in this case which made the probability of injury much greater, and the laches more inexcusable. In the first place, we all know that where relations like those between Dr. Pendleton and Greenwood and Co. exist, there would be much more prospect of acceptance where protest would result from refusal than where it is waived, as the agents of the company here assumed to do without Dr. Pendleton's authority. He had not waived protest, and they had no right to do it for him without discharging him from all liability to pay the draft, and thereby releasing the condition for a forfeiture which depended on that liability. Again on the facts of this case, there is good ground to say that there was that obligation on the part of Greenwood and Co. to accept and pay, that a failure to do so

would render them liable for consequential damages and require them to indemnify these plaintiffs against the forfeiture claimed in this case, if it should result from their refusal to accept or pay. *Sedgwick on Dam.* (6th ed.) 84, in notes; *Daniel on Neg. Inst.* (2d ed.) § 564; *Story on Bills*, § 398; *Hadley v. Baxendale*, 9 Exch. 341; *S. C.* 26 Eng. Law and Eq. 398; *Prehn v. Bank*, 5 Exch. 92; *Riggs v. Lindsay*, 7 Cranch, 500; *Russell v. Wiggins*, 2 Story, 214, 242. And whether they would be so liable where by the laches of the holder, the drawer had been discharged, or where they could say in their own defence, if this draft had been presented on the day when due, we could and would have paid it, but not being so presented we are now unable, or having parted with the drawer's funds, should not be required now to pay, may be doubtful. Why the holder of a bill of exchange, who has by his negligence released the obligation to pay it, should be allowed to claim a forfeiture for non-payment, is not clear to me; but certainly, if the drawer has by that negligence lost his remedy for damages against the drawee, he should not be permitted to enforce the forfeiture. Hence, there was a greater reason for acting promptly, under the law merchant, with this draft.

The burden of proving the presentment was on the plaintiff, and that there was no such proof as the law requires is plain. 1 *Daniel on Neg. Inst.*, § 598. There is no little doubt that if the presentment for payment had been made the draft would have been paid. The draft for the cash portion which by calculation appears to have been just enough to cover the interest and agent's commissions was paid; and as precisely the same course had been pursued in reference to the first premium, it appears by the account of Greenwood that that draft was not presented promptly, nor for some days after it was due. This, taken with the proof here as to the mode of business adopted in reference to this draft, shows that the agents of the company were not so diligent or prompt in their dealings with this policy to justify them in requiring strict and prompt action on his part. Here was a man in the wilds of Arkansas, where communication was difficult at all times some hundreds of miles away from this city, where the insurance agency was located, and many hundreds more away from the city where he did all his financial business and got all the money to pay his debts. His insurance was solicited at his house by a travelling agent, who recognizing from the nature of his business as a planter that he would not be in funds till his crop matured, took a long time draft on this commercial house for the premium, which was paid. Then, when the second premium was about to fall due, the process is repeated. Now, while it must be admitted that the commercial law did not require it, acting in a spirit of liberality and fairness, it does seem to me that looking at all the facts, if the company intended to rely upon the forfeiture with that strictness it now does, these agents should have forwarded the draft promptly—far

more promptly than they did—for acceptance, with instructions to protest and give notice if not accepted, so that Pendleton would have timely warning to prepare for payment and save the immense forfeiture that impended over him. Failing in this, the least they could do was to forward it promptly for payment, which they did; but by the neglect of the New Orleans agent it was not presented,—certainly not at maturity, and, as I believe from the circumstances, never at all. This is not a case, as Mr. Justice Woods said in *Thompson v. Ins. Co. 2 Woods, 547*, where there is an attempt to collect the policy without paying the premium, but where there is an attempt to avoid payment of the policy by taking advantage of the literalism of the contract to defeat the ordinary effect of that negligence on the part of the company which would prevent it from recovering on this draft as if this were an ordinary transaction. Why there should be any different result of this negligence when the consideration of the draft is a premium of life insurance is beyond my comprehension. It is true there was a further security for payment in the condition for a forfeiture, but that security was described by, and depended upon the terms of the contract; not only those contained in the language of the draft and the policy, if you please, but likewise those imported into the contract by the law merchant when this negotiable instrument was taken in payment of the premium. The cases of *Pitt v. Berkshire Ins. Co. 100 Mass. 500*; *Roehner v. Ins. Co. 63 N. Y. 160*; *Thompson v. Ins. Co. supra*; *Baker v. Ins. Co. 43 N. Y. 286*; *Roberts v. Ins. Co. Disney, 106*; and *Howell v. Ins. Co. 44 N. Y. 276, 2* with others that might be cited to same effect, have no application to a case like this, and for the plain reason that there is a very essential distinction between the undertaking of the maker of a negotiable promissory note with a condition like that found in this case, and that of a drawer of a bill of exchange. The one is an absolute and unconditional promise to pay, and if not otherwise expressed, as these cases properly hold, the duty of the maker is to hunt up the creditor and pay him wherever found, and no demand is necessary to complete the forfeiture. The other is only a conditional promise to pay, and is itself defeasible if the condition is not complied with by the holder of the paper.

Motion overruled.

SUPREME COURT OF PENNSYLVANIA.

EDMUND DALE, TRUSTEE, v. BENJAMIN KNAPP.

OCTOBER 2, 1881.

The support of religious societies is a charity in a broad Catholic sense, and whatever is morally fit and proper to be done on Sunday in furtherance of the great object is likewise a charity.

A subscription made on Sunday towards the erection of a church is a well recognized charitable work of active goodness. It is not prohibited by the Act of 22d April, 1794, and an action will lie to enforce payment of such subscription.

Error to the Court of Common Pleas of Clearfield County.

MERCUR, J.

This contention is whether a subscription made on Sunday toward the erection of a church edifice is void.

A contract made on Sunday is not void at common law: *Kepner v. Keefer, 6 Watts, 231*; *Fox v. Mensch, 3 W. & S., 446*, *Shuman v. Shuman, 3 Casey 90*. If then this contract is void it is by reason of the Act of 22d of April, 1794. That act declares: "If any person shall do or perform any worldly employment or business whatsoever on the Lord's day, commonly called Sunday, works of necessity and charity only excepted," and such other exceptions as are mentioned in the proviso, every person so offending shall be subject to a penalty as in the act prescribed.

It may be conceded that the making of this subscription is not a work necessarily done on Sunday. The question then is whether the raising of money to build a house of worship is a work within the meaning of the act, or is the solicitation of contributions for that purpose from a congregation assembled on Sunday for religious worship a work of charity?

No man can legally be compelled to contribute towards the erection of a house for public worship, nor to attend or support religious services therein. The statute imposes no such obligation. It, however recognizes Sunday as the proper day for public worship. It leaves every one free to use the day for that purpose or refrain from such use. It is designed to compel cessation of all those employments which will interfere with or interrupt the exercise of religious services, either public or private, on that day. The right to so worship is protected by its penal enactments. Each person has an indefeasible right to worship Almighty God according to the dictates of his own conscience. Each is at liberty to use Sunday for the purpose contemplated by the statute. If he refrains therefrom, he shall not so use the day as to annoy others who may be engaged in religious worship: *Johnson v. Commonwealth, 10 Harris, 102*. The purpose of the law is to protect the day for the comfort of those conducting or attending religious worship. Charity is active goodness. The means which long established and common usage of religious congregations show to be reasonably necessary to advance the cause of religion are not forbidden, and may be deemed works of charity within the meaning of the statute. It is not essential that they be purely charitable. It is sufficient if they so far partake of that character as to be recognized by the congregation as a part of its active goodness, and are not expressly forbidden by the statute: *Commonwealth v. Nesbit, 10 Casey: 398*.

The inclination of this court has long been not to permit a person to set up this law against another person from whom he has received a meritorious consideration or on whom he has inflicted an injury. It was therefore said in *Mohney v. Cook, 2 Casey, 342*, that the law relating to the observance of the Sabbath defines a duty

of the citizen to the State and to the State only. It was there held, that one who had erected an obstruction in a navigable stream whereby the boat and cargo of another were wrecked on Sunday, could not, in an action for such injury, set up as a defense that the plaintiff was unlawfully engaged in navigating his boat on that day. So it was held the hiring of a carriage on Sunday by a son to visit his father created a legal contract although no reason was shown for visiting him on that day, other than flows from a general filial duty and affection: *Long v. Mathews*, 6 Barr, 417. It is not a violation of the act for a hired domestic servant to drive his employer's family to church on Sunday in the employer's private carriage: *Commonwealth v. Nesbit*, *supra*. A will executed on Sunday is not void, although at the time the testator be in his usual state of good health and live five or six months thereafter: *Beitman's Appeal*. 5 P. F. Smith, 183.

Contracts for services on Sunday of the preacher, the sexton, the organist and the singers are not illegal, although these persons may engage in such employment as a means of livelihood. Their services are in furtherance of the same great charity.

The custom of soliciting contributions on Sunday from congregations assembled for religious worship, is very general, and has existed from an early period of time. With some denominations it may be for a greater variety of objects than with others. Sabbath offerings may be for the incidental expenses of the church; to light and warm the house, to pay the organist and sexton; to assist the poor; to repair, enlarge and rebuild the church edifice; to support foreign and domestic missions. The latter often extends to furnishing aid to poorer congregations towards erecting houses of worship. If it be illegal to give or agree to give for such objects on Sunday it must be illegal to solicit the giving. We are not aware it has ever been held that the preacher became liable to the penal provisions of the statute by soliciting from the pulpit such contributions, nor any of the officers of the church for taking up the collection. Whether the sum be large or small does not change the principle applicable to the transaction. It is true there is a legal distinction between having given and agreeing to give, yet inasmuch as we think a subscription towards the erection of a house of public worship is a work of charity, such agreement is not prohibited by the Act of 22d of April, 1794. The conclusion at which we have arrived is not in accord with the doctrine assumed in *Catlett v. The Trustees*, etc., 62 Indiana, 365, but in principle it is in harmony with the rule declared in *Flagg v. Millburg*, 4 Cushing, 243; *Bennett v. Brooks*, 9 Allen, 118; *Doyle v. Lynn et al.*, 118 Mass., 195, and directly sustained in *Allen v. Duffy*, decided last year by the Supreme Court of Michigan, and reported in 9th volume of the Reports, 646.

The support of religious societies is a charity. It is giving for the love of God, or the love of a

neighbor in a broad Catholic sense. Whatever is morally fit and proper to be done on Sunday in furtherance of the great object is likewise a charity. The learned judge therefore erred in ordering a non-suit and in refusing to take it off.

Judgment reversed and procedendo awarded.

Digest of Decisions.

PENNSYLVANIA.

(Supreme Court.)

SUSQUEHANNA MUTUAL INS. CO. v. TUNKHANNOCK TOY CO.

It is *prima facie* sufficient, for an assured to mail notice and proofs of loss, properly directed, to the home office of the insurance company. It is not in contemplation of the parties that such notice should be served upon the company by special messenger.

The certificate of any mutual fire insurance company, duly assigned and attested, setting forth that an assessment has been made upon the premium note or notes of any member is *prima facie* evidence, and it is error to reject such certificate.

An assured, in a mutual insurance company, is bound by a by-law enacted before his connection with the company, which enacts that five directors shall constitute a quorum, and an assessment made by a meeting composed of five directors is *prima facie* valid and binding upon the assessed.

THE CITY OF PHILADELPHIA v. LINNARD.

When land is taken by a city for opening or widening a street, the true and well settled measure of damages is, the difference between the market value of the land as affected by the taking of part for the street, and such value is unaffected; that is, what would the land have sold for at and immediately before the street was widened at its front?

What would it have sold for as affected by widening? In applying the above rule, it was error for a referee to refuse to regard the conjectural appreciation in value by reason of a possible recession of either or both of the adjoining buildings at some indefinite time in the future.

When parties by written agreement submit a civil case to the decision of a referee, under Act of April 22d, 1874, and no provision is made for hearing exceptions or otherwise receiving or controlling the decision of the referee by the Common Pleas, the power of control and review is expressed to be in the Supreme Court. This is constitutional.

COHEN'S APPEAL.

Two judgments were entered on the same day. One only stated on its face that it was to secure

the purchase money of the property transferred. *Held*, That the holder of the other judgment could also come in equally with the purchase money judgment, if it could be shown that the records gave notice to the assignee of the purchase money judgment; that the other judgment was also for purchase money.

Whatever puts a party on inquiry amounts to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, when the inquiry if pursued, would lead to knowledge of the requisite facts.

FINLEY v. STEUBING.

Where A. was the owner of two contiguous lots of ground on one of which he erected a brick messuage, the wall of which was built on the line of the lots, half thereof on each lot, and afterward conveyed the lot with the building on it to A., and then conveyed the other lot to B., *held*, that A. could not recover from B. for the use of the wall. It was not a party wall under the Acts of Assembly.

Oat v. Middleton, 2 Miles 247; *Doyle v. Ritter*, 6 Philadelphia, 577; *Beaver v. Nutter*, 10 id. 345, followed. *McGittigan v. Evans*, 8 Philadelphia, 264, overruled.

WISCONSIN.

(*Supreme Court.*)

DAVIS v. TOWN OF FULTON. Filed September 27, 1881.

1. The fact that in the record of a village plat the owner's certificate, required by the statute, is not upon the back of the plat, but upon a paper annexed thereto, is not sufficient proof that the original was so made.

[2. Even under the the Revisions of 1849 and 1858, which required such a certificate to be indorsed upon the plat, *quære* whether the word "indorse" should be strictly construed, as requiring the certificate to be written upon the back of the plat. But it was not necessary to determine that question in this case.]

3. The improper rejection of evidence *held* not sufficient ground for reversal where similar evidence was in fact given by several witnesses for the appellant and there was no contradictory evidence and no reason to think that the verdict could have been affected by the error.

WILCOX v. MATTESON. Filed September 27, 1881.

1. To transfer title to personalty by gift, possession of the property must pass from the donor, during his life, to the donee.

2. Several hours before the death of W. he stated to the nurse in attendance upon him that his pocket-book was "under the bed, just under his shoulders," and requested her to "take it and give it (with its contents) to his wife when she came." Nothing was done towards comply-

ing with the request until some hours after W.'s death, when his body was moved and the nurse took the pocket-book from the place described and handed it to another person, to be given to the widow of the deceased if she should come, otherwise to be sent to her. *Held*, that the possession did not pass from W. during his life.

3. The widow of W. cannot recover upon a promissory note found by her in such pocket-book upon the ground that it belongs to her as a part of the \$200 which she is entitled to select from her husband's estate, (section 3935, Rev. St.) without proof that she had made such selection and included the note therein.

KELLY, ADM'R, ETC., v. CHICAGO, M. & ST. P. R. Co. Filed September 27, 1881.

1. The mere fact that in a railroad company's private yard, where cars are loaded and unloaded and trains made up, such cars are permitted to move along the tracks unattended by a brakeman cannot be held negligence as matter of law as against the company's servants employed in such yard.

2. One who undertakes an employment with full knowledge of the rules and methods pursued by the employer in the business, cannot recover from the employer for an injury happening in consequence of such methods.

3. In an action for injuries from negligence, where the specific acts constituting such negligence are averred in the complaint, it must be presumed here, in the absence of anything in the record to the contrary that the evidence of negligence was confined to those acts; even where there is a general verdict for the plaintiff.

4. *Quære* whether, when a special verdict is demanded by either party, it is proper, under our statute, to take also a general verdict.

5. Where a special verdict was demanded and ordered, it will not be presumed here that the jury were also directed to find a general verdict.

6. After answering all the questions propounded for a special verdict, the jury added that they found "for the plaintiff to the amount of \$2,000." In the absence of any proof in the record that the court directed a general verdict, this is construed as simply a finding of plaintiff's damages in case he were entitled to recover upon the facts of the special verdict.

TEXAS.

(*Commissioners of Appeals.*)

Suit on Promissory Note—Failure of Consideration—Pre-emption right.

BLUFORD BYBEE v. E. WADLINGTON.

1.—An abandonment of a pre-emption right would be a sufficient consideration to support a promise to pay a note given to induce the abandonment by one who wishes to succeed to his rights.

2.—The production of a note and its acknowl-

edgment on its face that it was given for value received, establishes, *prima facie*, that it is founded on a sufficient consideration.

3.—See discussion and application of statutes relating to pre-emption rights.

ILLINOIS.

(Supreme Court.)

RAY & WHITNEY v. THOMAS MACKIN. Opinion by DICKEY, J., affirming. Filed Sept. 26, 1881.

Contract—Against public policy—fraud.—The property owners along a certain street in the city of Chicago having in contemplation the paving of the street, were negotiating with a paving contractor on that subject, and some of the owners had signed a contract with such contractor for the doing of the work. Pending these negotiations a second and rival paving contractor sought to obtain the contract for himself, soliciting the owners for that purpose. Finally, the rival contractors compromised their respective interests in the matter, by the withdrawal of the one first mentioned, and the agreement on his part to aid in securing the contract for his rival, the latter agreeing to pay to the former a certain sum out of the profits expected to be realized for the work. This arrangement was consummated to the extent that the one who was to have the contract under the arrangement between the two rival contractors, did secure it from the property owners. That was brought about in this way; the contractor who withdrew from the contest to obtain the contract for the doing of the work, urged those of the owners who had signed the agreement with him, to transfer their names to the other contract, and at a meeting of a committee of the property owners to consider and determine upon the matter, he wrote out a bid for the work for himself, and a lower bid for the other contractor, according to the arrangement beforehand. In an action to recover upon the agreement made by the contractor who secured the contract to do the work, to pay to the other a certain sum out of the profits of the job, it was held, that the agreement sued upon, taken in connection with its consideration, was against public policy, and a fraud upon the persons who were to pay for the improvement of the street, and therefore formed no valid foundation for the action.

JAMES B. HOES v. DANIEL FERGUSON'S ESTATE.—Opinion by DICKEY, J., affirming. Filed Sept. 26, 1881.

Practice—To show ruling of law in trial by court.—On a trial by the court without a jury, in order to present a question of law to this court as having been passed upon by the court below, the party should submit to the trial court written propositions of law to be "held" or "refused," or set out in the bill of exceptions the ultimate facts found by that court from the evidence.

CAROLINE A. JACKSON v. GEORGE A. MINOR ET AL.—Opinion by DICKEY, J., reversing and remanding. Filed Sept. 26, 1881.

1. **Fraudulent Conveyance—Gifts not valid as to existing creditors.**—The purchase by a man of property for a woman in his own name and its conveyance to her without any pecuniary consideration, and in view of illicit intercourse with her, past and expected, will not be sustained as against the claims of creditors for debts owing at the time of the grant, which he at that time was unable to pay.

2. When property was bought for another as a gift and such person put in possession of the same in 1870, and the conveyance made to her and recorded in December, 1871, at which time the party making the purchase and gift was solvent and in good credit, it was held, that the gift could not be set aside by creditors for debts accruing to them in 1873 and 1874.

3. **Compromise—Setting aside for fraud.**—A compromise by a debtor with his creditors, by which he paid fifty cents on the dollar of his indebtedness and procured releases, will not be set aside in the absence of proof of any false representations or fraud, except his

omission to inform his creditors that he had held the title to certain houses and lots, and had made a gift of it to another.

4. **Chancery—Relief must be based on case made by the bill.**—On a creditors' bill to set aside certain voluntary conveyances as having been made to hinder and defraud creditors, a fair compromise of the debtor with the creditor by which fifty per cent. of his indebtedness was taken in full discharge, cannot be set aside and the settlement opened for fraud when no such case is made in the pleadings as shown by the proof.

5. **Deed—Impeaching execution and acknowledgment by wife of grantor.**—The testimony of a widow that she never joined with her husband in the execution of a deed, or acknowledged the same, is not sufficient to overcome the certificate of the officer as to her acknowledgment, and his testimony in support thereof.

ELIJAH H. GAMMON v. JESSE HUSE.—Opinion by DICKEY, J., affirming. Filed Sept. 26, 1881.

1. **Practice—Finding of facts by Appellate Court.**—The statute does not authorize the Appellate Court to incorporate into the record any special finding of facts except in cases where the same is different in part at least from the finding in the Circuit Court.

2. **Same—When general finding must prevail.**—A general finding by the Appellate Court that "the evidence supports the verdict," must stand, unless there be some special finding inconsistent with it.

3. When a partner on a sale of his interest suffers his name to remain as a member of the firm, taking an agreement from the purchaser to pay all the indebtedness of the firm, whether contracted in the past or to be contracted in the future, he will be bound by a note given by a partner in the old firm name to one without notice of any actual change in the firm.

4. **Notice—Of partner's defect of power through agent.**—Where partnership articles provided that A should not give the firm note without the consent of B, another partner, which provision had been habitually disregarded without objection for about two years before the giving of a firm note by B for money loaned to the firm, the fact that C, another partner, acted as the agent of the lender, is not sufficient to charge the latter with notice of such provision, without any proof that it was present in the mind of C while acting as agent.

5. **Same—When notice to agent applies to principal.**—It seems doubtful whether notice to an agent of one loaning money and taking a firm note, who is also one of the borrowers and makers of the note, will be notice to the principal.

6. **Parol evidence.—Of agreement at the time of making written contract.**—Parol testimony that at the time of the execution of a written agreement for the sale of a partner's interest in a partnership, he agreed to let his name remain as a member of the firm, is admissible in a suit by a third person seeking to charge him as a partner, such evidence does not vary the terms or conditions of the written contract, and such agreement is not in any proper sense a part of it.

HENRY G. HARPER v. THE UNION MANUFACTURING COMPANY ET AL.—Opinion by DICKEY, J., affirming. Filed Sept. 26, 1881.

1. **Corporation—Liability of stockholders to creditors.**—Under section 9 of the act of 1857, relating to manufacturing corporations, the stockholders are made severally and individually liable to the creditors of the company to the amount of stock held by them, for all debts, etc., made by such company prior to the time when the whole capital stock shall have been paid in. This liability cannot be enforced by a single creditor suing in his own behalf alone. It can be enforced only upon a bill brought by, or at least in behalf of all the creditors of the corporation.

2. **Same—Stockholders' liability not enforceable until assets of the corporation are exhausted—Parties to bill.**—Stockholders in a corporation organized under a law making them liable individually for the debts of the corporation, will not be required to pay any portion of such debts until the assets of the corporation are first exhausted. If such assets are in the hands of an assignee for the benefit of creditors, he will be a necessary party to a bill in

chancery to enforce the stockholders' individual liability.

3. *Statute—Liability of stockholders superceded by act of 1872.*—The court are inclined to think that the provisions of the act of 1857 relating to corporations, and making stockholders individually liable for the debts of the corporation, were superceded and became inoperative by reason of the general law of 1872 upon the same subject, but find it unnecessary to adjudge that question.

SUPREME COURT OF OHIO.

JANUARY TERM, 1881.

Hon. W. W. BOYNTON, Chief Justice; Hon. JOHN W. OKEY, Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Judges.

TUESDAY, October 25, 1881.

GENERAL DOCKET.

No. 999. *Ingham & Bros. v. George Lindeman.* Error to the Probate Court of Hamilton County.

McILVAINE, J. *Held:*

1. Under the act of 1859 "regulating the mode of administering assignments in trust for the benefit of creditors," mortgaged chattels in possession of the assignor (mortgagor) pass to the assignee and become assets in his hands to be administered, notwithstanding the condition of the mortgage was broken before the assignment. *Lindeman v. Ingham Bros.*, 36 Ohio St. 1, approved.

2. After the sale of such property by the assignee under an order of the probate court, where an action is brought by the mortgagee against the assignee for the conversion of the property to his own use, reasonable attorney fees in defending the trust should be allowed to the assignee from the proceeds of the sale of such property.

3. In determining the amount of such allowance, the court is not concluded by the amount actually paid or by the opinion of witnesses as to the value of the services.

4. No allowance should be made to such assignee for the expense of employing an auctioneer, unless the court directing the sale, is of opinion, under the circumstances, that the services of an auctioneer were necessary.

Judgment affirmed.

White, J., dissented, adhering to his dissenting opinion in the case as reported in 36 Ohio St. 1.

1190. *Ohio ex rel. Wm. M. Shinnick Jr. v. John A. Green.* Quo warranto. Reserved in the District Court of Muskingum County.

JOHNSON, J.

The council of the city of Z., a city of the second class, consisted of eighteen members, duly qualified, who with the mayor were legally assembled to organize, as required by Sec. 1676, of the Revised Statutes. The mayor was acting as president and the election was proceeded with. A motion was made to elect S. clerk, objection was made to this mode of electing, which was overruled by the mayor, against which ruling nine members protested. On the adoption of the motion by a roll call, the nine protesting members refused to vote, so that the vote stood nine yeas and no nays. No other candidate was in nomination or voted for. One of the nine, not voting, objected, because no quorum voted, but the objection was overruled and S. was declared elected, to which the nine not voting protested. *Held:*

1. That it was competent to elect by a motion, there being no other person than the one named in the motion in nomination.

2. All the members being present and engaged in holding the election, members by refusing to vote when their names are called, cannot defeat the election, or divest the body of the power to elect.

3. In such case the legal effect of refusing to vote is an acquiescence in the choice of those who do vote, and this

is so, although those refusing to vote object to the mode of voting, and on the ground that no quorum voted.

Judgment for the relator.

86. *James Cullen and Charles B. Russell, partners as James Cullen & Co. v. Ezra Bimm and Christian Herchelrode.* Error to the Superior Court of Cincinnati.

OKEY, J.

1. If a vendee refuse to accept personal property tendered in accordance with the terms of the contract of sale, he is liable in damages for the difference between the contract price and its market value; and the fact that the vendor, against the objection of the vendee, made an invalid sale of the property to himself, and thereafter treated it as his own, does not change the rule, nor defeat the action, where the same is brought to recover damages for non acceptance of the property by the vendee.

2. In an action for refusing to accept a lot of ice containing several hundred thousand cubic feet, which by the terms of the contract of sale was to be merchantable, the court charged the jury that the plaintiff could not recover unless it appeared that the ice as a lot was of merchantable quality, "fit for the ordinary uses to which ice is put," and such as would "fairly pass in market;" *Held*, that in refusing to charge that *all*, that is, every part of the ice should be merchantable, the court did not err.

3. In such action, the defense being that the ice was not merchantable, a letter of the seller was offered in evidence to show a request to the purchaser to examine the ice. The letter contained a statement that the ice was not merchantable, which statement was corrected in a subsequent letter of the seller, also properly in evidence: *Held*, that the reception of evidence offered by the seller to show on what information the first letter was written, afforded no ground for a reversal of the judgment.

Judgment affirmed.

136. *The Pennsylvania Company v. Lorenzo Pitzer.* Error to the District Court of Mahoning County. Judgment affirmed on authority of *Merrick v. Bowry*, 4 Ohio St. 60; *Breece v. The State*, 12 Ohio St. 146. No further report.

995. *Michael G. O'Connor et al. v. Central Building Association, No. 2, of Cincinnati.* Error to the District Court of Hamilton County. Settled and dismissed.

1021. *Jarvis Postelwait et al. v. The Trustees of Pleasant Township &c.* Error to the Common Pleas Court of Putnam County. Reserved in the District Court. Judgment affirmed on authority of *Hibbs v. Franklin County*, 35 Ohio St. 458; *Bowles v. The State*, 37 Ohio St. 85. There will be no further report.

1168. *Thomas Billingsley v. The State of Ohio.* Error to the Court of Common Pleas of Franklin County. Judgment affirmed. There will be no further report.

MOTION DOCKET.

No. 185. *Merchants' National Bank v. Pomeroy Flour Company et al.* Motion to dismiss cause No 1130, on the General Docket, for want of printed record, and counter motion for leave to file printed record in same cause. Motion to dismiss overruled and leave to file printed record granted.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Oct. 26, 1881.]

1201. *Adam Spitsnagle v. Lucretia Spitsnagle, admrx.* Error to the District Court of Putnam County. T. E. Cunningham and D. Pugh & Son for Plaintiff; C. J. Swan for defendant.

1202. *Jeremiah W. Egbert v. Pleasant Ridge Cemetery Co.* Error to the District Court of Seneca County. George E. Seney and Noble & Adams for plaintiff; N. L. Brewer for defendant.

1208. *Jacob Robert v. David Sliffe, et al.* Error to the District Court of Tuscarawas County. Hance & O'Donnell for plaintiff; A. L. Neely for defendants.

Ohio Law Journal.

COLUMBUS, OHIO, : : : NOV. 3, 1881.

JUDGE LONGWORTH, of Cincinnati, recently elected Judge of the Supreme Court, has been appointed by the Governor to fill the vacancy occasioned by the resignation of Chief Justice Boynton. Judge Longworth having accepted the appointment, has resigned from the Common Pleas Bench, and will take his seat on the Supreme Bench November 9th.

36TH OHIO STATE.

Volume 36 of the Ohio State Reports has not yet been received from the State Printer in New York. We have assurances that a shipment of the reports will be made this week, in which case our many subscribers will have their orders filled before another issue of the LAW JOURNAL.

AN ORIGINAL LIBRARY.

The following list of books composed a complete law library in the time of Lord Coke:

1. Glanvill.
2. Bracton.
3. Britton.
4. Fleta.
5. Ingham.
6. Novae Narationes.
7. Natura Brevuum.
8. Littleton.
9. Doctor & Student.
10. Perkins.
11. Fitzherbert, N. B.
12. Stamford.
13. Old Tenures.
14. Plowden Repts. 2 Vol.
15. Dyer's Repts. 3 Vol.
16. Coke's Repts., 7 Vol.
17. Brooks' Abridgment.
18. Statham's Abridgment.
19. Fitzherbert's Ad'dt.
20. Book of Assizes.
21. Book of Entries

SUPREME COURT OF OHIO.

THE STATE OF OHIO ON THE RELATION OF WILLIAM M. SHINNICK, JR.,

v.
JOHN A. GREEN.

October 25, 1881.

The council of the city of Z., a city of the second class, consisted of eighteen members, duly qualified, who with the mayor were legally assembled to organize, as required by Sec. 1676, of the Revised Statutes. The mayor was acting as president and the election was proceeded with. A motion was made to elect S. clerk, objection was made to this mode of electing, which was overruled by the mayor, against which ruling nine members protested. On the adoption of the motion by a roll call, the nine protesting members refused to vote, so that the vote stood nine yeas and no nays. No other candidate was in nomination or voted for. One of the nine, not voting, objected, because no quorum voted, but the objection was overruled and S. was declared elected, to which the nine not voting protested. *Held:*

1. That it was competent to elect by a motion, there being no other person than the one named in the motion in nomination.

2. All the members being present and engaged in holding the election, members by refusing to vote when their names are called, cannot defeat the election, or divest the body of the power to elect.

3. In such case the legal effect of refusing to vote is an acquiescence in the choice of those who do vote, and this is so, although those refusing to vote object to the mode of voting, and on the ground that no quorum voted.

The object of this proceeding is to obtain the judgment of the court, as to whether the relator is the duly elected clerk of the City of Zanesville.

The defendant denies the relator's title to the office, and sets up his own title to the same.

Zanesville is a city of the second class, consisting of nine wards and eighteen councilmen. At the first regular meeting after the April election, to wit: April 25th, 1881, the nine members holding over and the nine members elect, met in the council chamber. The latter were duly sworn by the mayor, who then called the body to order and stated that the first thing in order was the organization of the new council. Such proceedings were had that the mayor declared against the protest of the nine members, that A. P. Stults was elected President.

Afterwards, at an adjourned meeting, John A. Fortune was declared elected President *pro tem.*, by like proceedings and against a like protest. The mayor then stated the next thing in order was the election of a clerk. It was moved that the relator be elected. Objection was made, that the motion was illegal, as no president or president *pro tem.* had been elected, and also, on the ground that it was not legal to elect by motion. The Chair overruled the objection and ordered the roll called on the motion. No other person was nominated and no motion was made to amend by inserting the name of any other candidate. Nine members voted *aye* and none voted against. The nine not voting were present but refused to vote because of the attempt to elect by motion.

The attention of the Chair was called to the fact, that a quorum had not voted, and therefore, it was claimed the motion was lost. The non-voting members being present, their names were

again called, but they declined to vote. The mayor then decided that the relator was duly elected, the nine not voting entered a protest against these proceedings, but did not offer to vote for any other person. It appears from the special finding, that during these proceedings all the members were present, nine of whom were protesting against the mode of electing by motion and declining to vote for or against such motion. Also that the nine members not voting, objected to the validity of the election, on the ground that no quorum voted, and that less than a majority voted for the relator. The same proceedings with like objections, were had, as to the election of president and president *pro tempore*, but as the present litigation relates only to the election of a clerk, it is unnecessary to state them in detail.

Some objection was made on the hearing as to the sufficiency of the bond given by the relator. As the bond is regarded as sufficient, and no point for report was saved by the court, a statement of this objection is not made.

Moses M. Granger for the plaintiff.

A. W. Train and G. L. Phillips for defendant. JOHNSON, J.

The new Council, to be organized, consisted of nine members holding over, and nine members elect. They assembled at the proper time and place. For the purposes of organization the Mayor was *ex-officio* president, authorized to swear in the new members, call the assembly to order and preside during the organization.

The nine new members were duly sworn, the Councilmen, all of whom were present, were called to order by the Mayor, who announced that the first business in order was the organization of the new Council. The Revised Statutes, sections 1675 and 1676, relate to this subject. No business can be transacted until such organization. As all the members were present, no question as to a *quorum* for the purpose of organization arises. The statute made it the imperative duty of the eighteen members then present and qualified to act, to "forthwith proceed to organize by electing a president and president *pro tempore* from their own number, a clerk, and such other officers as by ordinance may be provided." By section 1676, it is further provided, that in cities of the second class the Mayor shall be *ex-officio* president during such organization, and in case of a tie vote in the choice of an officer at such organization, the Mayor shall give the casting vote.

Two questions made during the proceedings of the Council, and in this court are:

1st, Was it legal to elect by a *motion*?

2d, Was the relator legally elected?

The statute contemplates an *election* and that each member of the electing body shall have a *vote* in the *choice* of any officer, and in case of a tie vote, that the mayor shall give the casting vote.

The statute provides that in the adoption of ordinances, resolutions and by-laws, the vote shall be taken by yeas and nays, and be recorded

on the Journal; and no contract, agreement or obligation shall be entered into, except by ordinance or resolution, nor any appropriation of money, except by ordinance [Rev. Stats. § 1693].

In these specified cases, and perhaps others, the mode of voting, is by yeas and nays, but the statute is silent, as to the *mode of voting*, in the organization of a Council.

"A vote is but the expression of the will of a voter; and whether the *formula* to give expression to such will, be a ballot or *viva voce*, the result is the same; either is a vote." People v. Pease, 27 N. Y., 45.

In the case at bar, the vote was by yeas and nays, on the adoption of a motion to elect the relator Clerk. It is essential to a valid election that all who are present, and are constituent members of the elective body, shall have an opportunity to vote. They all, in this respect, stand upon equal footing. As there was but one candidate in nomination, the vote on the motion was a vote for or against that candidate. If a majority voted for the motion, it was a clear expression that the person named in the motion was the choice of a majority of those entitled to vote. As no mode of voting, at such an election, is prescribed by law, any mode not forbidden by law which insures to each member the right to vote, and by which the will of the majority can be fairly ascertained, may be adopted.

The mode adopted was the one prescribed by statute, for the transaction of the most important business of the Council, we see no reason why it is not a fair mode of ascertaining the choice of the Council. Certainly this method, by placing the yeas and nays upon record, tended to a higher degree of accountability than by a ballot, though that mode of voting might have been adopted. If any member had a candidate to propose, he could have moved to amend by inserting his name and on this amendment, the vote of each member could have been had.

No question is made but that the relator, was qualified to be elected, and for aught that appears, the objections were not against him personally, but to the mode of taking the vote. If a majority of the eighteen had voted against the motion that would have been a clear expression of the will of the council against the relator. It is equally clear that if a majority voted for the motion he would be elected. We hold, therefore, that under the circumstances of this case, the mode of electing by motion, was authorized by law.

2. Was the relator legally elected?

All the members were present and duly qualified to act. All entered upon the duty of electing the officers necessary to an organization. They proceeded to discharge this duty, but differed as to the mode of voting. The mayor decided, correctly as we have seen, that it was proper to elect by motion.

Nine members which was one less than a quorum, and less than a majority of those present, voted for the motion, and nine refused to vote,

protesting against that mode of electing. The relator was eligible to the office, the mayor declared him duly elected, and the nine who did not vote protested against this decision. It does not appear, except inferentially, that those not voting and protesting, had any objections to the relator, or that they expressed any preference for another, but only as to the mode of his election, and the number of votes, by which he was elected, these being less than a quorum voting. Until an organization was effected, the powers of members were limited to the duty of electing the proper officers. After organization and in the transaction of business, the council, or the majority of those composing it may determine *when* to act as well as *how* it shall act. Here the law determines when the council shall act. The only discretion the members have is as to the mode of electing, and the persons to be elected. The council is charged with an important public trust. It is essential to the exercise of that trust that a speedy organization should be had. "They (the members present if a quorum) shall forthwith proceed to organize," is the unmistakable language of the statute.

Where, as in this case, the question involved is difficult of solution, any system of parliamentary tactics, or any conduct of members, however well meant, calculated to defeat such an organization, or any construction of the statute, leading to such result, will not be favored, unless clearly required by the terms of the law.

The body was duly constituted, to hold an election of clerk, only one candidate was before it for the votes of members, no question entitled to precedence was before the body, the election was being held, and those declining to vote must be deemed to acquiesce in the choice of those who do, though protesting against the mode of voting, the decision of the mayor that there was a quorum, and that the relator was elected. This is the settled rule of the common law as to elections in corporate bodies. Wilcox on Corporations, section 546 says: "After an election has been properly proposed, whoever has a majority of *those who vote*, the assembly being sufficient, is elected, *although a majority of the entire assembly altogether abstain from voting*; because their presence suffices to constitute the elective body, and if they neglect to vote, it is their own fault, and shall not invalidate the act of the others, but be construed an assent to the determination of the majority of those who do vote. And such an election is valid though the majority of those whose presence are necessary to the assembly protest against any election at that time, or even the election of the individual who has the majority of votes; the only manner in which they can effectually prevent his election is by voting for some other qualified person."

The same rule is stated with equal force and clearness in the text of Grant on Corporations 71 *; Angell & Ames on Corporations sections 126, 127; 2 Kyd on Corporations 12, 13.

These citations are high authority and should suffice. We have, however, carefully examined

the authorities cited in support of the text, as well as numerous other cases. They constitute an unbroken chain, and leave no room for doubt as to what the rule is, as settled by the highest authority, both in England and in this country. Some of these cases, we will notice.

Oldknow v. Wainwright, or *Rex v. Foxcroft*, 2 Burr, 1017, was a feigned action to try the right of election to the office of town clerk of Nottingham; that is, whether one Thomas Seagrave, was duly elected clerk. The whole number of electors was twenty-five, all of whom were summoned to an election. Twenty-one assembled at the time and place. Thomas Seagrave was nominated. No other person was put in nomination. Nine of the twenty-one voted for him, but twelve of them did not vote at all, and eleven of them protested against any election at that time, because, as they claimed, the office was already filled, and one "suspended his vote." "Lord Mansfield saw no doubt in the case," so the report says. "Here was an assembly *duly summoned*; one candidate was named; no other was named; they had no right to stop in the middle of the election."

Upon a re-argument, Lord Mansfield confirmed his former opinion. "He said the protesting electors had no way to stop the election when once entered upon, but by voting for some other person than Seagrave, or at least against him; whereas, here they had only protested against any election at that time."

Mr. Justice Wilmot cited a case, where out of eleven voters, five voted and six refused, and the court had held: "*That the six virtually consented.*" He also cited several other cases to the same point.

Lord Mansfield added: "Whenever electors are present and don't vote at all (as they have done here) they virtually acquiesce in the election made by those who do."

It would be difficult to find a case more like the one at bar.

This case was cited with approval by Denman, C. J., in *Gosling v. Veley*, 53 E. C. L. (7 A. & E.) 439; and again when the latter case was before the House of Lords, 4 H. of L. Cases 679.

In all the learned opinions in that justly celebrated case, the doctrine announced by Lord Mansfield, was approved, when limited to cases of *elections*, but it was held that where the question was the levy of a tax, or the transaction of other corporate business, a majority of those present must vote for it. In his opinion in that case, Baron Martin said, p. 739: "But I think the proceedings for the *election* of members of a representative body or of corporate officers, are substantially different from the proceedings of the body itself in the transaction of business."

As to this distinction between *business* of a corporation and an election, Lord Mansfield is cited as saying, in *The King v. Monday*, that there was no way of defeating a candidate being voted for at a legal election, but by voting for some one else, and he adds: "But in the busi-

ness of a corporation it is a different thing." The same question was again before the court.

This principle is adopted in *The Inhabitants of the First Parish v. Stearns*, 21 Rich, 148. The court there says, in speaking of corporate elections and of the cases decided as to the effect of not voting: "The principle which runs through them all, and is founded in common sense as well as supported by authority, is, that a majority of the legal voters who choose to vote always constitutes an election. It has been holden that where a majority expressly dissent, but do not vote, the election by the minority is good." See, also, *Booker v. Young*, 12 Grattan 307, where the case of *Oldknow v. Wainwright* is cited with approval, in *The King v. Bellringer*, 4 Term 810. In that case Lord Kenyon says, in speaking of an election by a definite body: "It is not necessary that they should all concur in the election or other act done; but they must be present, and the election at such a meeting is in point of law an election by the whole."

So far as we have been able to learn, the doctrine, laid down by Lord Mansfield and repeated in all the text books has never been questioned.

In holding, as we do, that the relator was duly elected, we do not contravene the well settled rule, that in all deliberative bodies, the majority must govern. We simply hold: that the law cast upon each member of Council, the duty of voting for some one—that by being present and keeping silent, when called on to vote, they are presumed to acquiesce in the vote given. This acquiescence creates the presumption that the choice of those voting is the choice of a majority of all present and not voting.

It is claimed by counsel for defendant that it is the well established rule of parliamentary practice that the mayor could not go beyond the roll-call, which shows only nine present, to determine that there was a quorum. This rule is claimed to be, that "When the roll call discloses the absence of a quorum, the chair cannot go outside of the record in deciding as to the presence of a quorum." *Const. Man and Digest*, 2d Session, 46th Congress, 338. The same *Digest*, page 103, lays down the rule as quoted from 2d *Hastkell*, page 125, 126, (a very high authority on this subject) as follows: "And whenever, during business, it is observed that a quorum is not present, any member may call for the House to be counted, and being found deficient business is suspended."

Whether the rule relied on is a *rule* adopted by the House of Representatives or is a *decision* upon parliamentary law made by the Speaker, we are not advised, nor is it necessary to inquire, as no such rule is made part of the law governing municipal corporations. We may add that we do not go outside of the record of the Council to learn that all the members were actually present.

We are not called on to discuss parliamentary rules which are adopted by deliberative bodies, for the convenient and orderly dispatch of busi-

ness. They form no part of the statute laws of the State.

In the absence of any statute making such a rule part of the law of the land, we must look to the reason and object of the statute, as construed in the light of the well settled principles of the common law.

Judgment for the relator.

Boynton, C. J., was absent.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

INGHAM & BROS.

v.

GEORGE LINDEMANN, ASSIGNEE, & C.

OCTOBER, 25, 1881.

1. Under the act of 1859 "regulating the mode of administering assignments in trust for the benefit of creditors," mortgaged chattels in possession of the assignor (mortgagor) pass to the assignee and become assets in his hands to be administered, notwithstanding the condition of the mortgage was broken before the assignment. *Lindemann v. Ingham Bros.*, 36 Ohio St. 1, approved.

2. After the sale of such property by the assignee, under an order of the probate court, where an action is brought by the mortgagee against the assignee for the conversion of the property to his own use, reasonable attorney fees in defending the trust should be allowed to the assignee from the proceeds of the sale of such property.

3. In determining the amount of such allowance, the court is not concluded by the amount actually paid or by the opinion of witnesses as to the value of the services.

4. No allowance should be made to such assignee for the expense of employing an auctioneer, unless the court directing the sale, is of opinion, under the circumstances, that the services of an auctioneer were necessary.

Petition in error to the Probate Court of Hamilton County, and cross-petition in error by defendants in error.

On the 2d day of April, 1874, Jacobi & Schoeule executed and delivered to Ingham & Brothers a mortgage upon certain goods and chattels, to secure the payment of four promissory notes, for \$1,019.89 each, payable, with interest, at the rate of 8 per cent. per annum, in two, four, six and eight months, respectively, which mortgage was duly filed.

On the 29th of April, 1874, the mortgagors, who retained possession of the mortgaged property, executed and delivered to George Lindemann a deed of assignment, conveying among other things the mortgaged property, in trust for the benefit of their creditors, which trust was duly accepted and administered by Lindemann under the direction of the Probate Court of Hamilton County, in accordance with the statute in such case made and provided.

While the mortgaged property was in the hands of the assignee and before its sale by him, the mortgagees, notified the assignee of their mortgage and demanded of him the possession of the mortgaged property which he refused to transfer.

Afterward, on the 9th of June, 1874, the assignee sold the mortgaged property at public auction for the sum of \$1,767.94.

On the 19th of August, 1874, Ingham & Brothers

commenced an action in the Court of Common Pleas of Hamilton County against George Lindemann to recover the value of the mortgaged property, on the ground that he wrongfully converted the same to his own use. This action was defended on the ground that the alleged conversion was the due and proper administration of the trust aforesaid, in pursuance of the statute.

That action was finally determined in favor of the assignee by this court, and is reported in 36 Ohio St. 1.

Afterward, on the 12th of January, 1881, the final report of the assignee came on to be heard in the probate court, on exceptions filed thereto by Ingham & Brothers, and it was found by the court that the assignee was "entitled to and should receive an allowance of reasonable attorney's fees and counsel fees by him incurred and paid, in and about defending the said action of said Ingham & Brothers against him, the said George Lindemann, in the said court of common pleas, and for prosecuting his petition and suit in error to reverse said judgment of said court of common pleas in the district and supreme courts," which amount the court found to be \$340, and ordered the balance, (less costs on exceptions to report), of said \$1,767.94, to be paid to Ingham & Brothers.

To the allowance of attorney's fees, Ingham & Brothers excepted, and Lindemann, assignee, excepted to the refusal of the court to allow him from said fund the sum of \$209, amount paid to auctioneers for selling the mortgaged property, and for fixing the attorney's fee at \$340, the same being less than the amount actually paid by him.

A petition in error and a cross-petition alleging the respective matters excepted to, have been allowed to be filed by the parties—the plaintiffs in error claiming that the probate court erred in allowing the defendant any sum on account of attorney's fees, and the defendant claiming that the court erred in not allowing a greater sum, and also in not allowing him fees paid to the auctioneers.

Yaple, Moos & Pattison for plaintiffs in error.
McILVAINE, J.

The arguments of counsel in this case have brought into review the decision in *Lindemann v. Ingham*, 36 Ohio St. 1, in which it was held, that, under the act of 1859, "regulating the mode of administering assignments in trust for the benefit of creditors," an assignee, who had come into possession of mortgaged chattels after condition broken and had sold the same under an order of the probate court, was not liable, in an action by the mortgagee, for converting the property to his own use. That in such case, the right of the mortgagee is transferred to the proceeds, and that the rule of non-liability is the same whether the proceeds of sale were greater or less than the mortgage debt. Without doubting that in the absence of the statute, the mortgagee after condition broken, would be entitled to the possession of the property as against the mortgagor or his assignee, a majority of the court are still

satisfied that by virtue of the statute, the assignee coming into possession of mortgaged property, by virtue of the assignment, has the right to administer the same under the direction of the probate court, whose duty it is, in distributing the proceeds, to adjust priorities of rights.

This construction of the statute being settled, it follows that the assignee should be allowed necessary and reasonable expenses incurred in defending his right to administer the mortgaged property as trust assets. And this principle, applied to the case before us, authorized the court below, to allow the assignee a reasonable attorney fee, paid by him in defending the action brought by the mortgagees for the alleged conversion of the mortgaged property by him to his own use: And as between the plaintiffs and other creditors of the assignor, whose representative the assignee is, nothing can be plainer than that this expense should be paid from the proceeds of the mortgaged property.

By the cross-petition in error, the defendant claims, that, whereas the amount actually paid by him on account of such attorney's fees was \$500, which sum, according to the testimony offered, was the fair value of such services, the court erred in allowing him a credit of \$340 only.

In making a reasonable allowance for attorney's fees, the court was not concluded either by the amount actually paid or by the testimony offered as to the value of the services. That testimony as to the value of such services should be considered by the court is clear enough, but it does not follow, that the court was bound to adopt the opinion of others as to the reasonable value of such services. If the mind of the court was not satisfied by such aid as was thus furnished, it was its duty to resort to such other information as practice and experience afforded, in connection with such proofs, for the purpose of forming its judgment as to the real value of such services; and its judgment thus enlightened, and free from all suspicions of bias, should not be disturbed.

Nor was there error in refusing to allow to the defendant the compensation by him paid to auctioneers. A trustee, whose duty it is under the direction of a court to make sale of property, should perform the duties of auctioneer himself, unless in the opinion of the court the services of a professional auctioneer is deemed necessary. The presumption is that every one charged, by law, with the performance of a duty is capable of performing the same. And where such officer is allowed compensation for the performance of a duty, he must perform it himself, or employ others at his own expense. The suggestion of a usage or custom to the contrary is of no avail. The record does not show the existence of such usage or custom; but if it did, it could not have the force of law, as it is unreasonable that an estate, in ordinary cases, should be twice charged for the same service. It may be, no doubt, that peculiar circumstances will justify, in some cases, the employment of an auctioneer; but in such cases, the authority to make the employ

ment should be obtained from the court directing the sale. Here no such direction was given, and, it is to be inferred from the refusal to allow the expense, that in the opinion of the court, the employment in this case, was not necessary. Judgment affirmed.

WHITE, J., dissented, adhering to his dissenting opinion in the case as reported in 36 Ohio St. 1.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

JAMES CULLEN ET AL.

v.

EZRA BIMM ET AL.

Oct. 25. 1881.

1. If a vendee refuse to accept personal property tendered in accordance with the terms of the contract of sale, he is liable in damages for the difference between the contract price and its market value; and the fact that the vendor, against the objection of the vendee, made an invalid sale of the property to himself, and thereafter treated it as his own, does not change the rule, nor defeat the action, where the same is brought to recover damages for non acceptance of the property by the vendee.

2. In an action for refusing to accept a lot of ice containing several hundred thousand cubic feet, which by the terms of the contract of sale was to be merchantable, the court charged the jury that the plaintiff could not recover unless it appeared that the ice as a lot was of merchantable quality, "fit for the ordinary uses to which ice is put," and such as would "fairly pass in market." *Held*, that in refusing to charge that *all*, that is, every part of the ice should be merchantable, the court did not err.

3. In such action, the defense being that the ice was not merchantable, a letter of the seller was offered in evidence to show a request to the purchaser to examine the ice. The letter contained a statement that the ice was not merchantable, which statement was corrected in a subsequent letter of the seller, also properly in evidence: *Held*, that the reception of evidence offered by the seller to show on what information the first letter was written, afforded no ground for a reversal of the judgment.

Error to the Superior Court of Cincinnati.

August 8, 1873, Ezra Bimm and Christian Herchelrode brought suit in the Superior Court of Cincinnati against James Cullen and Charles B. Russell, partners as James Cullen & Co. The cause was tried to a jury on the issues made by the petition, answer and reply, and a verdict was rendered at the March term, 1877, in favor of Bimm and Herchelrode, for \$7,142. A motion for a new trial was overruled and judgment was rendered on the verdict. A bill of exceptions was taken, embodying a portion of the evidence, certain requests for instruction to the jury, and the charge as given, with exceptions to the refusal to charge as requested, to the charge given, and to the reception of certain evidence. The judgment was affirmed in general term of the Superior Court, and on leave Cullen & Co. have filed this petition in error in this court.

The action was prosecuted on a contract in writing between the parties, dated July 14, 1871. By the contract it was agreed that Bimm and Herchelrode should, during the winter of 1871-2, fill their two ice houses, at Dayton, with ice

taken from their artificial lake, and have the same in readiness for Cullen & Co., by March 1, 1872, at which time the ice was to be measured, and Cullen & Co. were then to receive the keys of the houses and pay for the ice at the rate of one dollar and twenty-five cents for every fifty cubic feet. The same contract applied, on the same terms, to the ice taken from the lake in the winter of 1872-3, possession of the houses to be given and payment to be made on March 1, 1873.

In the petition it is alleged that the ice of 1871-2 was received and paid for by Cullen & Co. on March 1, 1872, and that this action is prosecuted for their refusal to receive the ice of 1872-3. Performance of the stipulations of the agreement, on the part of Bimm and Herchelrode, and a resale of the ice at public auction, after notice to Cullen & Co., are alleged, and it is stated that on measurement of the ice in the houses, on March 1, 1873, in pursuance of the contract, the number of cubic feet was found to be 395,988. The ice having at such resale brought a much less sum than the contract price, judgment is asked for the difference, and the petition also contains allegations sufficient to warrant a recovery of damages for a refusal to accept or pay for the ice.

Cullen & Co. admit that, on March 1, 1873, they refused to receive the ice then in the houses, but they aver, as a reason for such refusal, that it was inferior, and not such as they contracted to receive. As a part of their answer, they also filed a counter-claim, in which they seek to recover damages for defect in quality and deficiency in quantity with respect to the ice received March 1, 1872; but by consent of parties this counter-claim was docketed as a separate case.

McGuffey, Morrill & Strunk and George Hoadly for plaintiffs in error.

Young & Gottschall and Stallo & Kittredge for defendants in error.

OKEY, J.

The record does not purport to contain all the testimony. We must assume, therefore, that the verdict was supported by sufficient evidence, and simply inquire whether there was error in matter of law.

1. Whether Bimm and Herchelrode could have held the ice for Cullen & Co. and recovered the contract price, is a question which we need not determine. *Hadly v. Pugh*, Wright 554; *Dayton, etc. T. Co. v. Coy*, 13 Ohio St. 84, 90; *Shawhan v. Van Nest*, 25 Ohio St. 490; *Benjamin on Sales* (2 Am. ed.) § 788, bear upon it. Assuming that there was a breach of the contract on the part of Cullen & Co., Bimm and Herchelrode had at least two remedies, either of which they might pursue. They could treat the property as their own, and if its market value, at the time of the breach, was less than the contract price, they might by action recover the difference and a sum equal to the interest; or, after notice to Cullen & Co., they could sell the ice, on the theory that the property in,

but not the possession of the ice had passed to them, and if the amount thus realized was less than the contract price, they could by action recover such deficiency and a sum equal to the interest thereon. In the petition a recovery is sought upon the ground that there had been such resale and was such deficiency; but it appears the real transaction was a resale by Bimm and Herchelrode to themselves at thirty cents per ton. Whether a purchase by an agent or trustee at his own sale is, in the absence of statutory provision, void or only voidable [as to which see *Eastern Bank v. Taylor*, 41 Alabama, 93; *Bassett v. Brown*, 105 Mass. 551; *Wadsworth v. Gay*, 118 Mass. 44; *Marsh v. Whitmore*, 21 Wall. 178; 1 Williams' Ex. (6 Am. ed.) 719, 720, note] is a question which we need not determine, for Cullen & Co., upon being informed of such resale, objected to it, and thereby effectually avoided it. The pleadings, however, are clearly sufficient to warrant a recovery according to the facts, which are, that Bimm and Herchelrode treated and disposed of the ice as their own, and that the market price was less than the contract price on March 1, 1873. The fact, relied on by Cullen & Co., that, subsequently to March 1st, the market price of the ice advanced beyond the contract price, is of no importance. Bimm and Herchelrode were entitled to the benefit of such advance. *Bridgeford v. Crocker*, 60 N. Y. 627; *Hayden v. Demets*, 53 N. Y. 426; *Quick v. Wheeler*, 78 N. Y. 300. Nor can Cullen & Co. maintain the further positions they assume, that by making such resale, Bimm and Herchelrode converted the property of Cullen & Co. to their own use, or became their trustees. Objection to such resale having been made by Cullen & Co., it became and was wholly invalid; and hence Bimm and Herchelrode were not, and in reason could not be, in any worse position than they would have occupied, if no attempt had been made to resell the ice.

2. The contract required that the ice should be merchantable. But the court refused to charge, as requested by Cullen & Co., that "unless the plaintiffs have proved by a fair preponderance of testimony, that all the ice contained in the ice houses of the plaintiffs, at Dayton, and tendered to the defendants, and by them refused, was, on March 1, 1873, merchantable ice, they cannot recover." To this refusal, Cullen & Co. excepted. Evidence was offered tending to show that the two top tiers of ice in both houses contained impurities, and were only fit for cooling purposes; but evidence was also offered to show that those tiers are never intended for consumption, and that they usually melt before any ice is removed from the houses. It also appeared that some other parts of the ice were not wholly free from impurities.

In view of the evidence and the charge given, we think the court properly refused the charge requested. The jury must have found that the top layer and the layer next to it, in each house, was not intended for consumption, and that they melted before Cullen & Co. would have had

occasion to remove any ice from the houses. And the existence of impurities in some other portions of the ice did not necessarily render the lots sold unmerchantable. In determining whether property like this is merchantable, some regard must be had to quantity. The rule upon the subject may be illustrated by a familiar example. Thus, if A sells to B six sound apples, the tender of six apples, one of which is to any extent unsound, may not be a compliance with the contract; but where the sale is of a barrel of sound apples, the tender of a barrel of apples might be a compliance with the contract, although one apple in the barrel was to some extent unsound. Large lots of ice entirely free from impurities perhaps cannot be found. The court said to the jury the contract, as to the character of the ice, was complied with on the part of Bimm and Herchelrode, if the ice, as a lot, was of a merchantable quality, "fit for the ordinary uses to which ice is put," and such as would "fairly pass in market, not alone at Dayton, but everywhere." This was a proper construction of the contract. *Hamilton v. Gan-yard*, 34 Barb. 204, S. C. 3 Keyes, 45. Indeed, the expression in the contract that the ice must be merchantable, is only what the law would have required in the absence of such express provision. *Benjamin on Sales*, [2 Am. ed.] § 656; *Leake on Contracts*, 407. As the evidence is not set forth, we must assume that the ice was merchantable, within the rule stated by the court.

3. The remaining objection is the alleged error of the court in permitting John W. Herchelrode, son of one of the plaintiffs below, to testify what information he gave his father, the father having testified that he wrote a certain letter—offered in evidence—on information given to him by his son. In order to determine as to the force of the objection, it will be necessary to set forth certain matters appearing in the record.

On December 4th, 1872, the plaintiff, Herchelrode, wrote to Cullen & Co., at Cincinnati, which was their place of business: "My son reports the ice six inches thick. * * * I am told it is not very clean—could not be called merchantable. * * * I think it will pay you to come up by first train to-morrow, and see the ice and its condition. Mr. Bimm is of the same opinion. * * * We may secure the ice on our own account, should you not agree to have it put up in its present condition."

On the next day Cullen Co. answered: "Our contract calls for ice not less than six and one-half inches, good merchantable ice. Of course we want that kind of ice if we can get it."

On December 16, 1872, Bimm and Herchelrode wrote to Cullen & Co.: "We have been cutting ice on Friday and Saturday, and find it to be very nice and clear. We were quite disappointed to find it so clear. It is about nine inches thick. * * * If you think best to come up and see the quality while we are at work, it may satisfy you much better than our writing. * * * We would like to have your opinion."

On the trial these letters, among others, were offered in evidence by Bimm, and Herchelrode. Herchelrode then testified that he had no knowledge of the condition of the ice at the time he wrote the letter of Dec. 4, 1872, but obtained the information on which the letter was based from his son, John W. Herchelrode, who testified that he knew nothing about the writing of the letter of December 4th, except that his father said to him that he had written such a letter. No objection was made to the introduction of this evidence, written or verbal. Probably it was not subject to any objection. *Watson v. Moore*, Car. & K. 626; *Roe v. Day*, 7 Car. & P. 705; *Bryant v. Lord*, 19 Minn. 396. Bimm and Herchelrode then asked John W. Herchelrode this question: "What was the information you gave your father, upon which this letter was written?" To that question Cullen & Co. objected, but the court overruled the objection, and they excepted. He answered: "I stated that about fifteen or twenty feet from shore their was dock sced collected; that I supposed the ice was not in good condition. I told him it was six or six and a half inches thick at that time * * * Didn't suggest to my father to write to Cincinnati."

It is doubtful whether the reception of this evidence would afford ground for reversal, even if it was not strictly admissible, for it is difficult to see how Cullen & Co. were injured by it. The testimony, related, not to the quality of ice, but to the information which the son had communicated to his father. Herchelrode did write to Cullen & Co., on December 4, 1872, that the ice was not merchantable. How he got his information was unknown to them. They would have been warranted in regarding the statement as true. But twelve days thereafter, Herchelrode informed them that he was mistaken; that the ice was merchantable. In both letters he requested them to come and see for themselves. The material matter for them was, not the information on which the letters were written, but the truth of the statements contained in the letters. But the letters were properly offered in evidence for the purpose of showing that Cullen & Co. had been requested to make an examination of the ice before and during the time that it was taken from the lake; and as the earlier letter contained a statement which Bimm and Herchelrode claimed was inserted by mistake, the testimony of the plaintiff, Herchelrode, was offered to show that in writing the letter he acted solely on information received from his son, and the son was called to show the information really given to his father. This tended to show the mistake, as well as the good faith of Bimm and Herchelrode; and while the testimony was of no great importance, in view of the questions before the jury, we are not satisfied that its reception affords any ground for reversing the judgment.

Judgment affirmed.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

OHIO COAL COMPANY

v.

GEORGE DAVENPORT.

1. A creditor of an alleged fraudulent vendor cannot prove the acts or declarations of such vendor made after the sale and delivery of the property against the purchaser for the purpose of impeaching his title.

2. It is incompetent for a witness to state his opinion upon a question of law; but, where the intent with which an act done by him is drawn in question, he may testify as to such intent.

Error to the District Court of Washington County.

Replevin of 190 tons of railroad iron by plaintiff in error against defendant in error.

The property had been seized by the defendant as sheriff of Washington county under an execution for \$3,389.91 in favor of Hoffman, Thompson & Co. against the Marietta Coal and Iron Co. on the 2d day of March 1876, as the property of the defendant in execution and, at the same time, taken from the possession of the plaintiff in replevin. The plaintiff claimed title by purchase and delivery of the property from the Marietta Coal and Iron Company, on the 28th of February preceding, in consideration of \$8,500, to wit: An existing indebtedness of \$2,833.34 from the vendor to the plaintiff, and two notes for \$2,833.33 each, on that day executed by the plaintiff for the Marietta Coal and Iron Co., payable in 6 and 9 months.

The defendant claimed that the plaintiff's purchase was made with intent to defraud the creditors of the vendor. The good faith of this purchase was the only matter in dispute between the parties. In the court of common pleas a verdict and judgment were rendered for the defendant. This judgment was affirmed by the district court. It is now sought to reverse these judgments for errors, which are sufficiently stated in the opinion.

Ewart, Sibley & Ewart for plaintiff in error.

1. The question of fraud depends upon the motive. The purchase must be *bona fide*.

2 Kent, * 512—513.

Benj. on Sales, § 488.

2. "A party may testify directly to the intent with which he did an act, when the intent is a fact material to the issue."

Cortland v. Herkimer, 44 N. Y. 22.

Kerrains v. The People, 60 N. Y. 221.

Moore v. Davis, 49 N. H. 45, 6 Am. 460.

Lombard v. Oliver, 7 Allen 155.

Graves v. Graves, 45 N. H. 323.

Thatcher v. Phinney, 8 Gray 146.

Seyman v. Wilson, 14 N. Y. 567.

McKown v. Hunter, 30 N. Y. 626—628.

Flak v. Chester, 8 Gray 506.

2 Wharton on Evidence, § 955.

3. As to the wrongful admission of testimony see Broom's Legal Maxims * 857; Starkie on Evidence * 83—85 (9th Am. Ed.); Jacobs v. Putnam 4 Pick. 108.

W. P. Richardson and Loomis & Alban for defendant in error.

McILVAINE, J.

On the trial in the court of common pleas, the plaintiff having offered evidence tending to prove the contract of purchase as above stated, the defendant offered an entry

appearing in the books of the Marietta Coal and Iron Co. as follows:

Feb. 28, 1876, Ohio Coal Co..... \$8,500 00

TO MANUFACTURED IRON.

180 gross tons 1st class 30th rails @ \$45..... 8,100 00
10 gross tons 2d class 30th rails @ \$40..... 400 00

\$8,500 00

BILLS RECEIVABLE.

Your notes Feb. 28th, 6 months,.....\$2,833 33
" " " " 9 " 2,833 33—\$5,666 66

And defendant also offered to prove by the clerk of the Marietta Coal & Iron Co. that these entries were made by him, under the order of the president of the company about one week after the date thereof and after the date of the contract for the sale of said iron to the plaintiff; but did not offer to prove that the plaintiff had knowledge of the fact, time, or circumstances of the entries. This testimony was admitted against the objections of plaintiff. This testimony should have been rejected. It related to facts which were not part of the *res gestae*. They were acts and declarations of the vendor after the sale and delivery of the property. Nothing more. They were not competent to affect the plaintiff's title previously acquired. The introduction of such proof cannot be justified on the ground that it was necessary to show fraud on the part of the vendor, as well as on the part of the purchaser. Fraud on the part of the vendor, if not participated in by the purchaser, was immaterial. And yet, its admission, as substantive proof, may have been prejudicial to the plaintiff. This testimony was, no doubt, offered for the sake of an inference that the plaintiff's purchase was not in fact made until after the levy, and although it did not tend legitimately to prove such fact, it is nevertheless plain that the jury may have been misled by it.

And further upon the trial, it having been shown that one Selden Grouger, (who was also a witness in the case), had acted as sole agent for the plaintiff in making the purchase of the iron from the Marietta Coal & Iron company. The plaintiff, for the purpose of proving the good faith of said agent and the plaintiff in the transaction, asked said witness the following questions: "State whether or not the purchase of said iron was made with the intention in good faith to make the Ohio Coal Co. (plaintiff), the owner of it?" Also, "State whether or not you intended in any way, in said transaction, the purchase of said iron, to defraud the creditors of the Marietta Coal & Iron Company, by the purchase of said iron?" To each of which questions an objection by defendant was sustained. The grounds of objection do not appear in the record; and if the objection was to the form of the question, the ruling of the court should be sustained, as each question involved a conclusion of law, upon which it was not competent to take the opinion of the witness. But if the ground of objection was that the witness was not competent to testify as to the intent or motive which influenced the purchase, the ruling of the court was clearly wrong. Whenever the intent with which an act is done becomes the subject of inquiry, the person performing the act, if competent to testify to the act itself, is competent also to testify as to the intent. Whatever may be thought of the truthfulness of such witness, it is clear that his means of knowledge are ample; and certainly it is no objection to the competency of a witness, that his means of knowledge as to the fact, to

wit: the intent, surpass the means of any other witness as to the same fact.

Judgment reversed.

[This case will appear in 37 O. S.]

CUYAHOGA COUNTY COMMON PLEAS.

OCTOBER TERM, A. D. 1881.

JOHN HUNTINGTON

v.

MARIN KREJCI, SECOND NATIONAL BANK OF CLEVELAND, OHIO, ET AL.

National banks are not controlled by State usury laws—Remedy for taking illegal interest—Extent of forfeiture—Set-off.

1. The statutes of Ohio upon the subject of usury do not affect National banks.
2. The remedies given by the act of Congress known as the National Currency Act for the taking of illegal interest are exclusive.
3. Where illegal interest has been received by a National bank upon the discount of negotiable paper, the bank can recover only the face of the note without interest. So far as interest has been paid, it cannot be set off or deducted, but must be sued for as a penalty; but what has not been paid cannot be recovered.

This case was heard by the court upon the issues made between defendant, Krejci, and the Second National Bank of Cleveland, Ohio. The opinion states the case.

McMath, Weed & Dellenbaugh, for the Second National Bank.

Willson & Sykora, for Krejci.

WILLIAMSON, J.

The issues made in this case between the defendant, Krejci, and the Second National Bank of Cleveland, require a construction of the act of Congress, known as the National Currency Act. It appears that some years ago Krejci borrowed of the Second National Bank the sum of \$3,975. The original loan has been renewed from time to time, and new notes given, upon which interest was paid at the rate of nine per cent. per annum, a rate in excess of that allowed by law. The interest thus paid amounts to \$851.02. The question presented is whether or not this amount is to be applied as a payment upon the principal of the note.

"In relation to usury, and the rights and liabilities of the parties participating in the offense, Congress has assumed to make provision, and the provision so made must be regarded as exclusive. In this respect, the Act of Congress prescribes the only rule, and over it the legislative power of the State has no control." *Higley v. First National Bank*, 26 O. S. 75.

The Act of Congress, after limiting the rate of interest to be taken, declares:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of inter-

est has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

In *Higley v. First National Bank*, it was held that the knowingly taking or receiving by a National Bank, of a rate of interest greater than that allowed by law upon a loan of money, does not entitle the person paying the same, to have it applied as a payment of so much of the principal in an action brought to recover the principal debt more than two years after such payment was made. In that case the court of common pleas deducted from the amount sued for by the bank, twice the amount of the usurious interest paid within two years before filing the answer; but the bank did not assign this as error, and the supreme court therefore said that whether the rebatement was properly allowed was not a question before them. The reasoning of the court, however, indicates that it was not regarded as a proper allowance. Counsel for Krejci, however, contend that such an allowance was approved, in *Bank of Cadiz v. Slemmons*, 34 O. S. 142. But a careful examination of that case shows that the effect of a payment of usurious interest was not considered. The defendants had not paid interest, but it was computed and carried into the note, and the court decided that payments made on a note embracing illegal interest would be applied in payment of the principal, and if a note was renewed, the illegal interest on both notes would be disallowed.

But if this decision were as contended, I think it would be inconsistent with *Barnett v. Muncie National Bank*, 98 U. S. 555, which I should be obliged to follow. In a suit on a bill of exchange, it was claimed as a first defense that more than the amount of the bill had been paid as usurious interest on a large number of notes, which were arranged in series for the purpose of evasion, but in reality represented a continuous loan varying in amount and all paid but the bill in suit. The second defense was that a certain amount had been paid as usurious interest upon the series of which the bill in suit was the last renewal, and this should be applied as a payment. The third defense was substantially a repetition of the first, but ended with a prayer for the recovery of double the amount of interest paid as a penalty. The supreme court held that demurrers to the first and third defenses were properly sustained. The second defense was evidently like the claim made here by Krejci, and the demurrer to it was overruled in the circuit court, but whether properly so or not was not decided by the supreme court. In passing upon the other demurrer, however, the court say:

"Two categories are thus defined, and the consequences denounced:

"1. Where illegal interest has been *knowingly*

stipulated for but *not paid*, then only the sum lent, without interest, can be recovered.

"2. Where such illegal interest *has been paid*, then twice the amount so paid can be recovered in a *penal action of debt*, or suit in the nature of such action against the offending bank, brought by the persons paying the same or their legal representatives. * * * * * In the first defense, the payment of the usurious interest is distinctly averred, and it is sought to apply it by way of offset or payment to the bill of exchange in suit. In our analysis of the statute we have seen that this could not be done. Nothing more need be said upon the subject." The third defense was held fatally defective for the same reason. Under the rules thus announced, it is clear that the illegal interest paid by Krejci cannot be applied in reduction of the principal of his notes.

But it is clear, also, I think, that the bank can recover only the face of the notes, without interest. If unaffected by an illegal contract, the notes would "carry with" them interest from the date of maturity; but as illegal interest was knowingly taken, all interest after maturity, as well as before, is forfeited. In other words, the interest-bearing power of the note is destroyed. So far as interest has been paid, it cannot be set off or deducted, but must be sued for as a penalty; but what has not been paid cannot be recovered. This is in accordance with the decision in the Circuit Court of the Western District of Pennsylvania in *First National Bank v. Slauffe*, 1 Federal Reporter 187. After quoting from *Barnett v. National Bank*, McKennon, J., says:

"It is thus declared that the effect of a mere stipulation for illegal interest by a National bank is to deprive it of the right to recover more than 'the sum lent, without interest,' but surely, the 'receiving' of illegal interest in furtherance of a stipulation to that effect cannot place the bank upon any better footing. It will undoubtedly preclude the recovery by the debtor of the penalty for an usurious payment by way of set-off against his debt, but it cannot invest the creditor with a right to recover what the law declared he shall forfeit by reason of his unlawful agreement."

In this case, therefore, the bank is entitled to recover the exact sum lent, \$3,975.

NEW YORK COURT OF APPEALS.

BRUMMER v. COHN.

Oct. 4, 1881.

An assignment of a policy in favor of a married woman upon the life of her husband as security for a loan to the husband, is void under chap. 80, Laws of 1840.

An endowment policy is within the terms of that act.

To bring such an insurance within the operation of the Act of 1840, it need not appear from the terms of the policy or be shown by extrinsic evidence that it was the intention of the assured to avail herself of the provisions of that Act.

The fact that the premium paid may have exceeded the sum limited in the statute, does not affect the rights of the wife against the assignee.

Digest of Decisions.

PENNSYLVANIA.

(Supreme Court.)

GETZ'S APPEAL.

The grant of a right to construct a railroad carries with it, by necessary implication, the right to construct all works and appendages usual in the convenient operation of a railroad. Sidings are among such works.

The Phila. and Reading Railroad Co., by virtue of the general railroad law of Feb. 19, 1849 (P. L. 81), of sect. 17 of the Act of April 13, 1846 (P. L. 322), extended to said company by the Act of April 12, 1864 (P. L. 396), and of the Act of March 20, 1860 [P. L. 471], is authorized to construct sidings leading to manufacturing or mining establishments held by private owners, and for this purpose may take, by virtue of the delegated power of eminent domain in it reposed, the interjacent lands belonging to other parties.

The right of running sidings to such private establishments, and of taking the necessary land for the purpose, is clearly within the constitutional power of the Legislature to confer, because the public interest is thereby subserved by reason of the increased facilities afforded for developing the resources of the State and promoting the general wealth and prosperity of the community.

GRAY'S APPEAL.

Judgment—When not conclusive—Estoppel—Power of Auditor—Interest.—A. contracted to sell a piece of land to B. for a sum certain, payable in installments without interest. The contract contained a confession of judgment by B. to A. for the whole purchase-money, and a provision that "payments might be anticipated in sums of not less than \$500, when a corresponding interest would be allowed." Several installments being due and unpaid, A. entered up judgment, issued execution, and sold the property.

Held, That, in the distribution of the proceeds of this sale, the proper method for an auditor to compute the amount due to A. was what A. had shortly before admitted it to be, viz., to take the amount of unpaid installments, add to this the interest on the installments overdue, and then deduct the interest on the installments not yet matured.

It also appeared that A. had some time before the sale, represented to C., who had been B.'s counsel, that his [A.'s] claim was only to a limited amount, on the faith of which C. had purchased judgments against B. subsequent in lien to A.'s judgment.

Held, That, as against C., A. was estopped from claiming from the proceeds of the sale any greater amount than he had represented to C. was due him.

MCGETTRICK'S APPEAL.

Auditor—Power of, to pass on validity of deed conveying interest of distributee of fund—Orphans' Court.—Where an auditor is appointed to distribute the proceeds of the sale of real estate, of a decedent, and the share of a distributee is claimed by virtue of a deed conveying all said distributee's interest, the validity of which deed is contested by the distributee upon the ground that it has been fraudulently obtained, it is competent for the auditor to pass upon the validity of such deed and to make distribution accordingly.

DELAWARE, LACKAWANNA, AND WESTERN R. R. Co. v. HILL.

Foreign attachment—When plaintiff is entitled to judgment upon answer of garnishee.—Where the answers of a garnishee in foreign attachment to interrogatories admit the possession of assets, but suggest they are claimed by other parties, and an interpleader is awarded and framed between the plaintiff in the foreign attachment and the other parties, claimants; upon the issue raised by such interpleader being tried and a verdict rendered for plaintiff, judgment may at once be rendered on the answers of garnishee to the interrogatories.

In such case the interposition of the plea of nulla bona will not entitle the garnishee to a trial of the question of his liability, or of the right of plaintiff to the fund, that question being already decided by the interpleader.

GROSSER v. HORNING.

Married women—Contracts—Bond and warrant to secure loan for purchase-money of real estate void—Feme sole trader—When married women not liable as such—Sole and separate use—Powers under instrument creating—Construction of—When not exercised—Mortgage.—The bond and warrant of a married woman given to secure a loan of money employed in purchasing real estate are void.

A married woman living apart from her husband but not engaged in any trade or business is not liable as a *feme sole trader*.

Real estate was conveyed to A. in trust for the sole and separate use of B., a married woman. The deed conferred upon A. a power to mortgage with B.'s consent to pay off any part of the purchase-money. The purchase-money was borrowed from C. and paid to the vendor, A. and B. entering into a joint bond and warrant to C. for amount thereof:

Held, That the instrument creating the trust conferred upon B. no power to execute such bond and warrant and that therefore as to her, she being a married woman, the same was void.

ALABAMA.

(Supreme Court.)

SAMUEL J. BOLLING ET AL. v. WALTER TATE.

Sureties on an injunction bond, conditioned to pay the defendant all damages and costs he

may sustain by the wrongful suing out of the injunction, are liable for reasonable attorney's fees and costs in the court in which such suit is brought, and also for all necessary fees and costs in the Supreme Court in the event an appeal is taken, notwithstanding the condition of the bond was to pay the defendant all damages sustained in the event the Chancellor dissolved the said injunction.

Ferguson v. Baber, and Bullock v. Ferguson are overruled.

JOHN P. DICKERSON v. FRANCIS CONNIFF ET AL.

Contracts with executors, trustees or guardians for improvements to be made on the premises of the *cestui que trust* impose upon such executors a personal liability merely, and does not bind the land, unless such improvements be for repairs, or they are expressly provided for in the instrument creating the trust. Any interest such trustee may have in the trust estate improved, unless exempt from legal process, is liable for the claim for such improvements.

E. A. STEELE ET AL. v. H. C. GRAVES ET AL.

Where an administrator makes a final settlement of his administration, whose account is properly stated and accepted, but no order for distribution is made, and subsequently he is appointed administrator *de bonis non* and charges himself as such with the decree against him as the original administrator, which charge is allowed by the probate court auditing the account: *Held*, That the sureties on the original bond are released, and no execution can issue against them either by themselves or jointly, with the sureties on the second bond. The last named sureties are alone liable.

CHARLES ROBERTS v. STATE OF ALABAMA.

On trials for homicide where the circumstances in evidence raise a case of self-defense, proof of uncommunicated threats recently made are admissible for the purpose of showing the *quo animo* of the attack making the killing one of self-defense.

Uncommunicated threats are frequently admitted corroborating communicated ones already in evidence. They are also admissible to show who was the first assailant.

MICHAEL W. SHERRY v. JESSE D. BROWN.

Where under an execution from a justice's court lands which embraced the homestead are levied on in default of personal property, the right to claim exemption is waived unless filed with the constable making the levy.

MATTHEW J. TURNLEY ET AL. v. ALEXANDER B. HANA.

A court of chancery will not protect one in the tortious possession of lands although he may have a perfect title to the same.

MARY ANN KING v. JOSEPHINE MARTIN *et al.*

Records—Proof of—A record is proved merely by its own production and inspection, whether of the original or of a copy, and where authenticated transcript discloses a clerical error in a copy of a record formerly before the court, it is said by means of such authenticated transcript, to correct itself.

Civil Law—Rights of heirs under the same.—Under the civil law, heirs acquire *co instanti* all the rights of the deceased ancestors, including that of possession, which is held to be continuous in the person of such heir. Where the rights of an heir are once fixed by the action of a proper court in the State of Louisiana in regard to the validity of a will, they are not changed because of the appointment of administrator on the estate of the testator, who subsequently brought funds into and died in this State.

Idem. Right of wife to sue alone. The *lex fori* governs as to all forms and remedies and modes of proceedings in legal actions, but the right of the wife to bring suit for her "separate estate" applies only to her separate estate created by the laws of the State of Alabama, and not to property acquired under the laws of another State.

ILLINOIS.

(Supreme Court.)

THE BENEVOLENT ASSOCIATION OF THE PAID FIRE DEPARTMENT OF CHICAGO v. JOHN A. FARWELL, COMPTROLLER, &c.—Opinion by DICKEY, J., affirming. Filed Sept. 28, 1881.

1. *Statute—Repeal by other statute taking its place*.—The various provisions in the charter of the city of Chicago, and amendments thereto, for the setting apart of a portion of the fire insurance rates annually received by the city, and the Act of March 5, 1867, creating the Benevolent Association of the Paid Fire Department of Chicago, and giving it the management of the fund arising from such source, &c., if not otherwise repealed before the time, have all been superseded by the Act of May 24, 1877, entitled "An Act for the relief of disabled members of the police and fire departments in cities and villages," which was intended as a revision of all the statutes on that subject.

2. This association never held a vested right to the fund which, by a clause in its charter, was directed to be paid over to it by the comptroller of the city. As to that fund, this corporation was merely created or selected as a public functionary to manage and apply the same, and it was liable to be cut off or changed at the will of the State.

WILLIAM B. OAKLEY ET AL. v. EDMUND B. HURLBUT.—Opinion by DICKEY, J., reversing and remanding. Filed Sept. —, 1881.

1. *Cloud on title—Jurisdiction of court of equity to remove*.—Under our law a court of chancery will not entertain a bill to remove a cloud upon the title of a complainant, unless he is in the lawful possession of the land, or the land is unoccupied.

2. *Chancery—Laches, when a defense*.—After a delay of more than fourteen years from the sale of land for taxes, permitting the purchaser to pay taxes and make improvements on the land, the former owner will be precluded from having the sale set aside in equity for a fraudulent combination, preventing competition at the sale, in the absence of any excuse being shown for the delay.

THE WROUGHT IRON BRIDGE COMPANY, OF CANTON, OHIO, v. THE COMMISSIONERS OF HIGHWAYS OF TOWN OF UTICA. SAME v. COMMISSIONER OF HIGHWAYS OF THE TOWN OF DEER PARK.—Opinion by MULKEY, J., affirming. Filed Sept. 26, 1881.

1. *Evidence—Under general issue in assumpsit.*—Under the general issue in assumpsit it devolves upon the plaintiff to prove the defendant's promise as charged in the declaration by direct proof, or to show by the evidence a state of facts from which the law will imply such promise.

2. *Pleading—Sufficiency of declaration admitted by pleading the general issue.*—By pleading the general issue in assumpsit the defendant, as a general rule, impliedly admits the legal sufficiency of the declaration, and the right of the plaintiff to recover, upon proof of the facts therein charged. But there are cases in which notwithstanding this implied admission, the declaration will be insufficient to support a judgment for the plaintiff.

3. *Practice—Finding of facts by Appellate Court is final and conclusive.*—The decision of the Appellate Court upon all questions of controverted facts is made final and conclusive upon this court by the statute, except as to certain classes of cases enumerated therein.

4. *Same—What questions of fact are not reviewable.*—The statutory provision making the judgments of the Appellate Courts "final and conclusive as to all matters of fact in controversy," embraces not only the principal facts upon which a right to recover is claimed, but also the evidentiary facts, or facts which are mere evidence of the principal facts. In other words, it includes the ultimate facts to be proved on the trial, together with all subordinate facts offered as evidence of their existence.

5. *Same—Inference as to the facts from a finding against plaintiff.*—Where an issue or issues of fact are found against the plaintiff by both the Circuit and Appellate Courts, the legal inference is that the plaintiff failed to prove the principal facts upon which his right to recover rested; in other words, that the evidentiary facts did not sustain the principal or ultimate facts.

6. *Practice—Decisions of Appellate Court not conclusive on questions of law.*—If, during the progress of a trial, the court improperly admits or excludes evidence, or otherwise commits error, except in passing upon questions of fact in its final determination, and such erroneous ruling, or other error is preserved in the record, and the Appellate Court fails to correct it, it may be done in this court.

7. *Same—Mode of presenting and preserving questions of law on a trial by the court.*—In a trial by the court alone, if the counsel has any doubt as to the correctness of the court's view of the law of the case, he should prepare and submit written propositions of law as he understands it, to be held or refused by the court, and thus preserve for review any erroneous view of the law applicable to the case which the court may entertain.

8. *Same—General objection to evidence goes only to its competency, etc.*—Objections of a general character to the admission of evidence will be regarded as going only to its competency or relevancy.

WILLIAM TRUESDALE ET AL. v. THE PEORIA GRAPE SUGAR COMPANY.—Opinion by DICKEY, J., affirming. Filed Sept. 26, 1881.

1. *Injunction—Laying railroad track in street by consent of city.*—A court of equity will not take jurisdiction to restrain the laying of a railroad side-track by a company in the public street in front of its property to connect with the main track of a railway, under license by the city council, by ordinance, on a bill by private individuals owning property in the vicinity, but not abutting on the part of the street to be used.

2. *Streets—Damages by laying railroad track in.*—Any damages that may be sustained by property owners in a city by reason of the construction of a railroad track under the license of the city holding the fee of the street, must be sought in an action at law.

ABIAH G. WEBSTER v. ANNIE E. NICHOLS ET AL.—Opinion by DICKEY, J., affirming. Filed Sept. 26, 1881.

1. *Leasehold—Purchaser of, takes subject to burdens on*

assignor.—The purchaser of a leasehold estate by a transfer of the lease will be held to notice of all the provisions of the lease, and as having assented to them, and in equity must be bound to bear the burdens attached to the estate.

2. *Chancery—Jurisdiction—Enforcing payment of note by assignee.*—When vacant lots have been leased at a yearly rental, the contract reserving a lien upon all improvements to be made upon the same for the rent, the insolvency of the lessee and his assignment of the lease to a non-resident, who neglects to pay the rent, suffers the property to be sold for taxes, and threatens to remove the improvements, will give a court of chancery jurisdiction to enforce payment of the rent by sale of the improvements, and the appointment of a receiver to collect rents of the occupants under the assignee.

3. *Lien—By contract on property not in being at the time.*—Courts of chancery will recognize the force of contracts for the creation of a lien on personal property not at the time in esse, and enforce them, when there are no intervening rights to be affected. The statute relating to chattel mortgages has no application to such a case.

4. *Lease—Assignee when bound by readjustment of rent on renewal as per original lease.*—Where a lease of lots for a term of years, provided for a removal for a like term, upon the expiration of the first term, the amount of the rent to be adjusted by the County Court by an appraisal of the property, and a purchaser of the leasehold estate was notified of the proceeding to readjust the rent, and attorneys employed by her were heard in the name of the original lessee, and she acquiesced in the rate so fixed by paying rent under the renewal, such assignee of the lien will be held bound by the new rate.

5. *Contract—Damages recoverable for failure to pay taxes.*—When a lessee of premises agrees to pay all taxes upon the premises, but neglects to do so, and they are sold for taxes, the lessor will not be limited under the contract to a recovery of the amount of the taxes due at the sale, but may recover the sum paid by him in redemption. By neglecting to pay the taxes the lessee becomes chargeable for all the consequences naturally arising therefrom.

There are more than a thousand cases on the calendar of the Supreme Court of the United States—as much work as the Court could properly dispose of in five years; this statement is sufficient to satisfy every reflecting person of the absolute necessity of immediate legislation respecting this Court.—*Washington Law Reporter.*

SUPREME COURT OF OHIO.

JANUARY TERM, 1881.

Hon. W. W. BOYNTON, Chief Justice; Hon. JOHN W. OKEY, Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Judges.

TUESDAY, November 1, 1881.

GENERAL DOCKET.

No. 634. **Lake Shore & Michigan Southern Railroad Co. v. John C. Hutchins, guardian &c.** Error to the Court of Common Pleas of Cuyahoga County. Reserved by the district court.

McILVAINE, J. *Held:*

1. A petition by a guardian alleged that his wards were owners in fee simple of a certain woodland, that the timber thereon was cut down and removed by a person unknown and without any authority whatever, and that the same was taken, used and possessed for its own use and without any authority whatever by a certain railroad company, which company was afterwards consolidated with other railroad companies, under and by the name of the defendant, and that by reason of the conversion by said first named company his wards were greatly damaged, &c., praying judgment against the consol-

dated company, &c. *Held*: That on demurrer, the petition stated sufficient facts to constitute a cause of action for the conversion of personal property.

2. Where a discretionary power to sell lands is given by a will to the testator, such discretion cannot be delegated. But where an attorney in fact of such executor assumes to make such sale, the subsequent receipt of the purchase money, by the executor, is an adoption and ratification of the sale, and is equivalent to the exercise of the discretion by the executor himself.

3. A judgment determines the rights of the parties according to the facts stated in the pleadings; and if, after issue joined, a change takes place in the rights of the parties, it must be shown by supplemental pleading, otherwise it should be disregarded.

4. In an action for the conversion of chattels against an innocent purchaser from a person who had previously converted the property to his own use, and had afterward added to its value by his own labor, the measure of the damages is the value of the chattels when first taken from the owner, whether the first taker was a willful or an involuntary trespasser. *L. S. & M. S. R. R. Co. v. Hutchins*, 32 Ohio St. 571, approved.

Judgment reversed for error in the charge restricting the damages to the value of the trees while standing, instead of their value when severed from the land, unless defendant in error waives the error in the charge. If such waiver is entered within 30 days, judgment will be affirmed.

BOYNTON, C. J., and WHITE, J., dissented from the fourth proposition.

87. *Swift's Iron and Steel Works v. Dewey, Vance & Co.* Error to the Superior Court of Cincinnati.

OKEY, J.

1. D. agreed in writing to deliver to S. a certain quantity of iron ore, at a specified price per ton, "on the landing at C.," and gave him an order therefor, and S. brought an action on the agreement, alleging that D. refused to deliver the ore: *Held*, it is competent to show that by the settled, uniform usage at C., well known to the parties when they contracted, one holding such order is entitled to have the ore taken from the pile on the landing and placed in his boats; that ore is not permitted to be removed, nor is it practicable to remove it, in any other manner; and that the ore is weighed when it is carried in the boats to its destination, and then payment therefor is made.

2. In an action for refusing to deliver ore, prosecuted on an agreement in the same form, it appeared that the seller resided at another place, where he refused to deliver such order, and informed the purchaser that he would not comply with the agreement: *Held*, that it was not necessary for the purchaser, after such refusal by the seller, to take boats to C. for the ore, or demand the ore at C., the purchaser being able and willing to comply with such agreement as it existed in view of the usage. Judgment affirmed.

78. *The Western Union Telegraph Company v. Giles O. Griswold et al.* Error—Reserved in the District Court of Cuyahoga County.

BOYNTON, C. J. *Held*:

1. While a telegraph company may, by special agreement, or by reasonable rules and regulations, limit its liability to damages for errors or mistakes in the transmission and delivery of messages, it cannot stipulate, or provide, for immunity from liability, where the error, or mistake, results from its own negligence. Such a stipulation, or regulation, being contrary to public policy, is void.

2. Where in an action against the company for damages resulting from an inaccurate transmission of a message, such inaccuracy is made to appear, the burden of proof is on the company to show that the mistake was not attributable to its fault or negligence.

3. The plaintiff's agent sent to them from Woodstock Ontario, a message in these words:—"Will you give one fifty for twenty-five hundred at London. Answer at once, as I have only till night." The court instructed the jury that the message was not in cipher or obscure, within the meaning of a stipulation in the agreement under which the message was sent, that the company "assumed no liability for errors in cipher or obscure messages."

Held,—That the instruction was correct. Judgment affirmed.

MOTION DOCKET.

No. 151. *Henry Roney v. John W. Cornell*. Motion to dismiss cause No. 289 on the General Docket for want of printed record as required by the statute. Motion granted.

155. *German Aid Society v. Anna Kummer*. Motion to dismiss cause No. 1026 on the General Docket for want of printed record as required by statute. Motion granted and counter motion for leave to file printed record overruled.

183. *Andrew S. Core v. The West Virginia Oil and Oil Lands Company*. Motion to dismiss cause No. 1110 on the General Docket for want of printed record as required by statute. Motion overruled.

184. *Andrew S. Core v. The West Virginia Oil and Oil Lands Company*. Motion to dismiss cause No. 1096 on the General Docket for want of printed record. Motion overruled.

187. *W. W. Gilliland et al. v. Eva Reynolds et al.* Motion to dispense with printing in causes Nos. 1197 and 1198 on the General Docket. Motion granted.

188. *Cyrus H. Coy v. Phillip W. Smith*. Motion to dismiss cause No. 937 on the General Docket for want of necessary parties. Ordered, that plaintiff in error make the stockholders charged by the decree, defendants in error within 60 days, otherwise the petition will be dismissed.

189. *J. B. Brading et al. v. John Zollinger et al.* Motion to dismiss cause No. 639 on the General Docket for failure to comply with former order of the court respecting printing of record. Motion granted.

190. *Andrew S. Core v. West Virginia Oil and Oil Lands Company et al.* Motion to extend time for filing printed record in No. 1096 on the General Docket. Motion granted and leave to file printed record in ten days.

191. *Andrew S. Core v. West Virginia Oil and Oil Lands Company*. Motion to extend time for printing record in No. 1110 on the General Docket. Motion granted and leave to file printed record in ten days.

193. *Levi Croll et al. v. Village of Franklin*. Motion to take cause No. 867 on the General Docket out of its order. Motion overruled.

194. *J. H. Devereux et al. v. Hugh J. Jewett, as trustee, et al.* Motion for leave to file a petition in error to the Court of Common Pleas of Franklin County, and to take cause out of its order for hearing. Motion granted. Stay bond \$50,000.00 conditioned to pay all damages defendants may sustain if the order sought to be reversed shall be affirmed.

195. *David Curtiss, administrator, v. Martha E. Gregory*. Motion for leave to file a printed record in cause No. 1124 on the General Docket. Motion granted, printed record to be filed by December 1, 1881.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Nov. 2, 1881.]

1204. *Ohio ex rel. Attorney General v. William H. Vanderbilt et al. Quo Warranto*. Hon. Geo. K. Nash for the State.

1205. *Joseph A. Moore v. James H. Dunn*. Error to the District Court of Brown County. Loudon & Young for plaintiff; Thomas & Thomas for defendant.

1206. *Isaac Robb v. J. N. Morrow et al.* Error to the District Court of Highland County. Alphonso Hart for plaintiff.

1207. *Henry S. Call et al. v. The Manufacturing Association, Seymour, Sabine & Co.* Error to the District Court of Putnam County. Krauss & McClure for plaintiffs; C. J. Swan for defendants.

1208. *Gertrude March et al. v. Aaron Albert*. Error to the District Court of Knox County. W. C. Cooper, and McClellan others for plaintiffs; Devin & Curtiss for defendant.

1209. *Jacob C. Yoho v. Thomas McGover*. Error to the District Court of Noble County. Hunter & Mallory for plaintiff; Belford & Okey for defendant.

Ohio Law Journal.

COLUMBUS, OHIO, : : : NOV. 10, 1881.

HON. NICHOLAS LONGWORTH arrived in Columbus, Monday evening last, and yesterday took his seat as one of the Judges of the Supreme Court.

UNIVERSAL MARRIAGE.

In the connubial joys to which every age and nation bears witness, the vast majority of this globe's inhabitants must have participated, from one era to another, with a certain voluntary adjustment of the reciprocal burdens, such as relieved both husband and wife of a sense of bondage to one another. And thus have the inequalities, the hardships of marriage codes proved less in practice than in literal expression. For whatever the apparent severity of the law, human nature, or love's divine instinct, works in one uniform direction, namely: towards uniting the souls once brought into the arcana of married life in an equally honorable companionship. Woman's weakness has been her strongest weapon; where her influence could not overflow, it permeated; and if her life had been, legally speaking, at her husband's mercy, her constant study to please has kept him generally merciful. She has not been superior to her race and epoch, but, on the whole, as well protected, as well advanced in her day as those of the other sex. Except for this, the wife's lot must have been miserable indeed, even under the most civilized institutions ever established. Codes and the experience of nations in this respect show strange inconsistencies: laws at one time degrading to woman, and yet marital happiness; laws, at another, elevating her independence to the utmost, and yet marital infelicities, lust, and bestiality.

Marriage among the ancient nations, and in the rudest types of modern society, tends to exclude from the world the individual woman at an early age, that she may with docility fulfill the desires of her lord, and bear him children. He may be a polygamist, and enjoy concubines, but her chastity, her singleness of devotion, is rigidly insisted upon. His life may be public, but hers is strictly private. He sits in the market-place, while she stays at home: her veil disguises her features whenever she goes abroad; domestic service, cookery, trifling accomplishments, constitute, with religion, her sole education. Her daughters she trains up to be as compliant to man's rules as herself; and her husband, meantime, invested with the power of life and death over wife and daughters, is applauded by society if he slays the former when she is guilty of adultery. In the East, among both Jews and Moslems, the husband is to this day permitted to divorce his wife at sole discretion, being

merely required to give her a writing which states the fact and the cause of casting her off; and the only native women with genuine social freedom in India have been the prostitutes. (See Van Lennep's Bible Lands; Butler's Land of the Veda.)

Nevertheless, inclination aids religion in keeping the Eastern widow reverential towards her deceased spouse; for his sake the Hindoo relict devotes the rest of her life to misery, and, until the British government interposed, against her own wishes, would burn herself upon his funeral pile. Jewish history supplies illustrious examples, from both sexes, of domestic love and confidence. And the most superb mausoleum this world contains was built by a sovereign of India to commemorate to posterity the virtues and worth of his departed spouse. (Ibid.)

The Roman Empire, the successor of a once robust republic, absorbed gradually into its jurisprudence all the treasured wisdom of the heathen world. Here we may contemplate the most remarkable series of experiments ever performed upon the institution of marriage. Polygamy was unknown; and by solemn rites, emblematic of the mystic union of mind and body, the individual man and woman were set apart for one another in primitive times to become partners for life. But in those earlier rude but progressive centuries, both under Numa and the consuls, the Roman union was legally unequal; the husband took a young girl in marriage when he could readily mold her to his will, and exercised the Oriental jurisdiction of life and death, being lord of her person and sole master of her acquisitions. In the new servitude which she embraced when she left her father's house to become a *materfamilias*, the Roman maiden acquired, as Gibbon expresses it, the strange character of sister to her own children and of daughter to her husband and master. (4 Gibbon's Rome, chap. 44.) Nevertheless, all contemporary narratives attest the purity of domestic life among the republican Romans, the health and vigor of their progeny, and, what is of more significance, the strong and wholesome influence which woman exerted in the family as educator of both husband and children, and in the State itself. Rulers were deposed and the government reconstructed to avenge the sullied honor of a wife or virgin daughter. So powerful had woman's influence become after the Punic triumphs, and in the palmy days of the republic, that her wishes were indulged for a freer and more equal marriage relation before the law. The old nuptials, formerly celebrated by the pontiffs, fell into disuse; and man and woman subscribed to a marriage contract which protected the wife's estates against the husband, prohibited mutual gifts, and rendered the misconduct of either spouse a just ground for legal redress. Marriage and religion now became in a measure disconnected, and the sexes embarked their affections for the first time upon a sort of rational partnership for conjugal purposes,

wherein the more delicate spouse became transformed from legal pupil to legal companion of the stronger. (Ibid.)

From this new experiment might have been anticipated the happiest results: mutual elevation and refinement, the household directed by a combined intelligence, children born and reared under equal parental counsels, connubial peace fortified by justice, the adoration of woman increasing as her angelic mission to society became enlarged. Such, however, was not the actual issue. The depravity of one sex increased with the depravity of the other. Matrimonial interests clashed; the sanctity of the home declined rapidly; the humbler conjugal duties were ill performed; upon unwelcome children were visited the sins of parents who had married out of ambition, pleasure, the greed of dowries, or absurd caprice, and who rebelled equally at a touch. For more than five hundred years previous, the husband had scarcely ever exercised his tyrannical privilege of putting away the wife; but now, the novel principle being established that marriage, like other contracts, might be readily rescinded for cause on either side, the divorce practice became enlarged, to the disgrace alternately of one and the other spouse, until, long after the republic had collapsed under the prodigious load of marital unfaithfulness, gross materialism, sensuality, unbridled desire, a mouldering patriotism, and that universal corruption of manners and morals which foreign conquest hastened rather than retarded, a line of Roman emperors might be seen relaxing and repressing in turn the license of divorce, and applying various nostrums to the diseased core of society. Males were obviously reluctant to marry, when Augustus urged them on the subject. Restrained, moreover, by maxims which equally forbade incest and foreign intermixture, so far as contracting legal marriage was concerned, the proud Roman citizen had meantime habituated himself to concubinage, enjoying in the companionship of some faithful consort of humbler rank many of the comforts usually associated with domestic life, without risking his independence upon an equal marriage with an imperious woman of his own station. It was by means of this secondary sort of union, which for nine centuries of the empire scandalized the noble matrons of Rome, that men manifested their natural preference for partners in life whom they might command, but to whose faithfulness and soft endearments their hearts were sure to yield. The philosophic Antoninus, best of rulers, set the example of such connections; and the concubine, inferior in station, doubtless, to the wife, but yet far superior to the prostitute, saw her offspring sometimes legitimated by later nuptials, or an act of adoption, and legally distinguished under all circumstances from the miscellaneous procreation of those vile, child-destroying times by the epithet of *natural*, and by partial rights of legal succession. (4 Gibbon's Rome, chap. 44.)

"A specious theory," observes the historian,

"is confuted by this free and perfect experiment, which demonstrates that the liberty of divorce does not contribute to happiness and virtue. The facility of separation would destroy all mutual confidence, and inflame every trifling dispute; the minute difference between a husband and a stranger, which might so easily be removed, might still more easily be forgotten." (Ibid.)

Whether, in setting at naught that identity of interests which is essential to domestic happiness, the later Roman scheme was fatally defective, or this conjugal decay was due to causes more latent, need not here be discussed. Certain it is, however, that wide-spread incestuous intercourse, licentiousness most loathsome and unnatural, followed in the wake of marital independence; and as the interests of husband and wife began to diverge, the bonds of family affection became weakened. When the empire sank into utter dissolution, woman possessed a large share of cultivation and personal freedom, yet she had touched the lowest depths of social degradation.

This degradation it became the mission of the Christian Church to correct, during the lapse of the Dark Ages, by restoring the dignity of marriage—exalting it, in fact, to a sacrament, and almost utterly prohibiting its dissolution. The community or partnership system, moreover, which applies in modern times to the property of a married pair in countries like France, Spain and Italy, where the influence of the Roman jurisprudence continues, is something distinct from the civil law on separate property which prevailed in the age of Justinian. (See 1 Burge Col. & For. Laws, 202, 263.)

The law of England and the United States on this topic is now undergoing a remarkable change, and its principles are quite unsettled at the present time with reference to the rights and obligations of the married pair. This confused state of the law of husband and wife is exhibited in a contest still going on between two opposing schemes for adjusting the property-rights of the married parties. The one is the common-law scheme; the other resembles that of the civil law. The former is at the basis of our jurisprudence, English and American. The latter has had a powerful influence in modern times, moulding the doctrines of the equity tribunals and shaping recent legislation.

What are familiarly known as the "married women's acts," the product of our American legislation since 1848, and more recently engrafted upon the code of Great Britain, aim to secure to the wife the independent control of her own property, and the right to contract, sue and be sued without her husband, under reasonable limitations. These acts, therefore, substitute in a great measure the civil for the common law. It may be laid down that the common law, in denying to the wife the rights of ownership in property acquired by gift, purchase, bequest, or otherwise, did her injustice, and that a radical change became necessary; and this is

shown, not only in the legislation of our States, but by the fact that the equity tribunals gradually moulded the unwritten law of England so as to secure like results.

This enlargement of the property rights of a married woman leads, in the United States, to practical abuses; but, regarded by itself, it cannot be pronounced mischievous, so long as legislators and courts pursue their new course with circumspection. For, should men of self-respect, avoiding collision with rich wives, turn as a last resort, to poor girls instead, our marriage relations would be blessed indeed. One great danger to be apprehended, however, from all legislation of this sort is, that it will weaken the ties of marriage by forcing both sexes into an unnatural antagonism, teaching them to be independent of one another, and to earn their own living apart; another, that vulgar ambition and sensuous desire will corrode the hearts of both man and woman, overlaying the better impulses of their being. The raging sexual passion will be fed, but not the sacred flame. Individualism will usurp the place of idolatry. Minds desirous of moving worlds will despise love and the quiet hearth-stone.

And such, indeed, has been the later tendency in the United States, as we may assume it to have been in the Roman commonwealth. We are taught to regard our "married women's property acts" as part of a social revolution similar to that which Cato the Censor vainly resisted two thousand years ago. Partaking in this great modern republic, of the impulses of the age towards freedom of the individual, woman is seen advancing her standard and demanding what no government ever yet accorded, and human nature itself proscribes: that in the community all men be regarded as brothers and all women as sisters, and that the sexes be allowed to jostle through life shoulder to shoulder, all persons working out the manifest destiny of this three-score span with equal opportunities. Equal opportunities, indeed; the one united, the other wishing to regard that as a physical incident which nature makes the chief function of her life. It is not equality but superiority, of which proud spirits are emulous. Legislators, however, yield one point after another, some from conviction of justice, more from policy, or that very courtesy to the sex which contradicts their professions. Education moulds the intellect while it refuses to cultivate the morals. Religion is kept at the gate until the liberal mind can weigh impartially the respective merits of Brahminism, Atheism and Christianity, which it never will, because the investigation is irksome. The penurious farmer is encouraged by his own daughters to let them see life; he throws them upon the world, like his sons, to sink or swim, and gets rid of their support. Youths of both sexes forsake home and the simple pleasures of the country and hurry to the perilous allurements of the populous cities. As clerks, shop-waiters, factory operatives, but by no means in domestic service, American women mingle promiscuously with

men, and the sexes throng in every avenue to public or private preferment, the one cheapening the service of the other, all rivals and fellows, with the slightest possible barriers to a dangerous intimacy. Licentious prints inflame the passions; the press propagates festering scandals; women discuss upon the rostrum, before a mixed audience, social problems at whose mention their grandmothers would have blushed.

With all this sexual freedom, we find that, while intemperance may have decreased in the United States, licentious crimes are on the increase; some theorists, indeed, upholding, in the spirit of freedom, the right of prostitution by common consent of parties. Marriages, too, are inconsiderate; divorce laws become lax, and divorce is constantly invoked to free those from the compact whose self-will, petulance, sordid taste, or roving passion furnishes no slight element towards rendering the matrimonial life unhappy. In the regulation of the household, the choice of visitors or guests, and the education of children, the conjugal pair pursue a distracted rule. Even the "property acts" of our States tend to loosen the marriage singleness of purpose, by encouraging the wife to go out one way to make her fortune while the husband goes another to make his; a policy commendable, perhaps, in theory, but in practice perverting the rule of nature that the one who bears and nurtures the children and cares for them has not only a sphere which she alone can fill, but earns rightful support from the other, whose out-of-door toil is manliest when bestowed in order that wife and children may share in the recompense.

There is no social stability, no inseparable barrier, between barbarians and the civilized. The race, vigorous in mind and body, rises to predominance, and sinks when that vigor is lost. Tacitus saw in the savage Germans, not the Romans' masters, yet a race of men who respected the counsels of their women, and loved them with tenderness. But the freedom of the German wife was not that of the Roman. Later still, the Anglo-Saxon home has been proverbial, for peace and purity, with the man as the "house-band," binding all parts together. Marriage, notwithstanding all the female disabilities of coverture, stood well at the common law. Nor is it probable that, in the American Union, well-ordered households, happy spouses, thriving offspring, are now in greater proportion to the population than at the commencement of this century. On the contrary, the progress of the present experiment in sexual freedom strikingly resembles that of Rome. In New England, where the woman's cause receives the strongest intellectual impulse, and the females outnumber males in population the proportion of divorces to marriages has alarmingly increased between 1860 and 1880; men, and probably women, incline more and more to celibacy, while among those united in wedlock the size of the family decreases. Couples whose parents and grandparents had families of a dozen or more children, produce now hardly more than one or

two. (Dr. T. D. Woolsey, Dr. Nathan Allen, and others, in various recent publications, have commented upon these startling statistics. North American Review, June, 1880.) What makes the parallel more marked, continence has not accompanied the condition of celibacy. Apart from the abandoned criminal class stand the women divorced from unhappy marriages, and maidens who are pushing in life for themselves, both classes assailable because deprived of those social safeguards which all their sex need. One perceives in public comparatively little of that manly courtesy and deference to ladies which was formerly characteristic of Americans. Meantime, as statistics show us, infanticides and abortions multiply, and the number of children born out of wedlock increases in proportion. In a word, indications are strong that in an old settled section of this Union, where the marriage relation was once remarkably pure, as well as prolific, men, as in the age of Augustus, are beginning to decline marriage for the sake of concubinage. Their selfishness declines the responsibilities, and their self-respect the possible mortifications, of wedlock with a dual government. Nor, probably, is this the drift of social events in New England alone.

The conclusions to which the writer's investigation upon this subject conducts him are these: Marriage is a relation divinely instituted for the mutual comfort, well-being, and happiness of both man and woman, for the proper nurture and maintenance of offspring, and for the education in turn of the whole human race. Its application to society being universal, the fundamental rights and duties involved in this relation are recognized by something akin to instinct, and often designated by that name, so as to require by no means an intellectual insight; intellect, in fact, impairing often that devotedness of affection which is the essential ingredient and charm of the relation. Indeed, the rudest savages understand how to bear and bring up healthy offspring. Legal and political systems are accretions based upon marriage and property; but in the family, rather than individualism, we find the incentive to accumulation, and in the home the primary school of the virtues, private and public. At the same time, marriage affords necessarily a discipline to both sexes; sexual indulgence is mutually permitted under healthy restraints; women's condition becomes necessarily one of comparative subjection; man is tamed by her gentleness and the helplessness of tender offspring, and for their sake he puts a check upon his baser appetites, and concentrates his affection upon the home he has founded. Such is the conjugal union in what we term a state of nature. And now, while man frames the laws of that union, as he always does in primitive society, he regards himself as the rightful head of the family, and lord of his spouse; and somewhat indulgent of his own errant passions, he makes the chastity of his wife the one indispensable condition of their joint companionship. She, on her part, more

easily chaste than himself, views with pain whatever embraces he bestows upon others of her sex. Her personal influence over him, always strong, enlarges its scope as the State advances in arts and refinement, until at length woman, as the maiden, the wife, and the matron, becomes intellectually cultivated—a recognized social power in the community. Yearning now for a wider influence and equal conditions, her attention strongly concentrated upon the marriage relation, she seeks to make the marriage terms equal. First, she desires her property secured to her own use, whether married or single; and, indignant at the remedies afforded under the law for wifely wrongs, demands the right of dismissing an unworthy husband at pleasure. Moreover, as a mother, she claims that the children shall be hers not less than the father's. These first inroads are easily made, for what she demands is theoretically just. But just at this point the peril of female influence is developed. Woman rarely comprehends the violence of man's unbridled appetite, or perceives clearly that, after all, in the moral purity and sweetness of her own sex, such as excites man's devotion and makes home attractive, is the fundamental safeguard of life and her most powerful lever in society, besides the surest means of keeping men themselves continent. She forgets, too, that to protect that purity and maintain her moral elevation, a certain seclusion is needful, which seclusion is highly favorable to those domestic duties which nature assigns as her own. More is granted woman. The bond of marriage being loosened, posterity degenerates, society goes headlong; and the floodgates of licentiousness once fully opened, the hand must be strong that can close them again.

Happiness, we may admit, differs with the capacity, like the great and small glass equally full, which Dr. Johnson mentions. Yet marriage is suited to all capacities, and men and women are the complement of one another in all ages, neither being greatly the intellectual superior of the other at any epoch, but the man always having necessarily the advantage in physical strength and the power to rule. The best-ordered marriage union for any community is that in which each sex accepts its natural place; where woman is neither the slave nor the rival of man, but his intelligent helpmate; where a sound progeny is brought up under healthful home-influences. The worst is that where conjugal and parental affection fails, and all is discord and unrest—a sea without a safe harbor. To the household, stability may prove more essential than freedom, and woman's *status* more dignified or more degraded, as the case may be, than the law assumes to fix it.

In fine society and the Church should, while elevating woman, reconcile her to those functions—life-giving, life-preserving, educational, and refining—to which nature consecrates her being. Marriage should be held the universal state of honor, a state of security, a state economical for all men, as compared with pampered

celibacy. Both sexes should be encouraged in constancy, affection, and interdependence. The policy of every government should be to encourage and strengthen matrimony, before public sentiment shifts in the direction of requiring concubinage to be legalized in its stead. Such is the force of the sexual passion, we may feel assured, that when marriage has ceased to attract mankind, the mistress has usurped the place of the wife, even prostitution may become the secret protest of mankind against a prostituted marriage.

JAMES SCHOULER.

Southern Law Review.

SUPREME COURT OF OHIO.

SWIFT'S IRON AND STEEL WORKS

v.

DEWY, VANCE & Co.

November 1, 1881.

1. D. agreed in writing to deliver to S. a certain quantity of iron ore, at a specified price per ton, "on the landing at C.," and gave him an order therefor, and S. brought an action on the agreement, alleging that D. refused to deliver the ore: *Held*, it is competent to show that by the settled, uniform usage at C., well known to the parties when they contracted, one holding such order is entitled to have the ore taken from the pile on the landing and placed in his boats; that ore is not permitted to be removed, nor is it practicable to remove it, in any other manner; and that the ore is weighed when it is carried in the boats to its destination, and then payment therefor is made.

2. In an action for refusing to deliver ore, prosecuted on an agreement in the same form, it appeared that the seller resided at another place, where he refused to deliver such order, and informed the purchaser that he would not comply with the agreement: *Held*, that it was not necessary for the purchaser, after such refusal by the seller, to take boats to C. for the ore, or demand the ore at C., the purchaser being able and willing to comply with such agreement as it existed in view of the usage.

Error to the Superior Court of Cincinnati.

On September 17, 1873, Dewy, Vance & Co. brought suit in the Superior Court of Cincinnati, against Swift's Iron and Steel Works, a corporation, on the following instrument:

"Alex. Swift, Pres. Office of Swift's Iron and Steel
Geo. E. Clymer, Vice Pres. Works No. 28 W. Third St.,
Edwin Swift, Treas. Masonic Temple.

"CINCINNATI, October 1, 1872.

"A. Swift, Esq., Cincinnati, Ohio:

"DEAR SIR:—We propose to deliver to you on the landing at Carondelet, 1,000 to 1,200 tons Iron Mountain ore, near St. Louis, you to take it, away during 1872, paying for the same \$5.50 per ton, cash—it being understood that you are to deliver to us next spring, at the same place, the same quantity of ore at the same price.

"Yours truly

(Signed,)

"DEWY, VANCE & Co.

"Accepted:

(Signed,)

"ALEX. SWIFT, Pres't.

The plaintiff sought in the action to recover damages from the corporation for its refusal to deliver to them ore in the spring of 1873.

The corporation admits the non-delivery of the ore in the spring of 1873, and its failure to

draw an order for ore on the Iron Mountain Company, but denies the plaintiffs are entitled to recover, because the contract is entire and they failed to deliver to the corporation ore in the fall of 1872, in pursuance of the contract; and for the further reasons that the plaintiffs did not demand the ore to be delivered in 1873 at the proper time or place, did not have any boat at Carondelet landing to receive it, and were not ready and willing to pay for such ore; and, by way of counterclaim, the corporation asked damages for such failure to deliver ore in 1872. To this counterclaim there was a reply.

A verdict was rendered in favor of Dewey, Vance & Co. for \$3,090; and the cause having been reserved to the general term on a motion for a new trial, the motion was overruled, and judgment was rendered on the verdict. On leave, this petition in error was filed to reverse the judgment.

The material facts, either admitted or shown by the evidence, are as follows: During the year 1873, and during many preceding years, Dewy, Vance & Co. was a firm engaged in the manufacture of iron at Wheeling; Swift's Iron and Steel Works was a corporation engaged in the manufacture of iron and steel at Cincinnati and Newport; and the Iron Mountain Company was a corporation at St. Louis, having a monopoly of the kind of iron ore mentioned in the above agreement.

The Carondelet landing referred to in the contract is owned by the Iron Mountain Company, is situated on the Mississippi river within the corporate limits of St. Louis, and the company owns all the ore ever placed thereon. The ore is kept in a pile, from which the boats of the company's customers are loaded. No particular part of the ore is set apart to any customer, but the loading is done from that part of the pile nearest the boats. The ore is not weighed at the landing, but the weight is estimated by the displacement of the boats when loaded, a memorandum of the weight thus approximated is made, and that governs in the settlement and payment, if the ore or any part of it is lost in transit; but if none of it is thus lost, the actual weight is ascertained when the ore arrives at its destination, and payment is then made.

The Iron Mountain Company, during the fall or early part of winter in each year, sends a circular letter to each of its customers, fixing the price of ore for the ensuing year. The price so fixed remains unchanged during such year. In the fall of 1871, the company fixed the price of ore for 1872, "on the landing at Carondelet," at five dollars and fifty cents per ton. Ore ordered in pursuance of such circular must be taken away during such succeeding year, as the contract is cancelled, at the end of such year, as to any ore not removed. The company never permits ore to be taken from the landing in any other manner or upon any other terms than as above stated; but where a customer who has agreed to take ore, gives orders to others for part or all the ore he contracted for, the company

fills such orders, but still looks to the customer for payment.

This mode of dealing with respect to Iron Mountain ore at Carondelet landing, has been for many years uniform, invariable and well known, and the parties to this suit were familiar with the usage, when the agreement was made, and contracted with reference to such usage.

As early as May, 1872, Swift's Iron and Steel Works had exhausted all the ore due to it for that year, under its contract with the Iron Mountain Company made the preceding autumn. In that month and again in August, Mr. Swift applied to the company for more ore, but the company refused, as it had contracted with others for all it could deliver during 1872. In that condition of things, Mr. Swift applied to Dewey, Vance & Co. That firm had contracted with the Iron Mountain Company for more ore than it could use during 1872, and knowing that the contract would be cancelled on January 1, 1873, as to any ore not taken away in 1872, it was willing to let Swift's Iron and Steel Works have ore, provided it could obtain, in the spring of 1873, an equal quantity of ore at the price prevailing in 1872, that is, at five dollars and fifty cents per ton, for it was then manifest that the price for 1873 would be much higher, and in fact, in the fall of 1872 the Iron Mountain Company fixed the price of ore for 1873 at ten dollars per ton. Under these circumstances, the contract of October 1, 1872, was made at Cincinnati and for the reasons stated, it was advantageous to both parties. An order was at the same time delivered to Mr. Swift in the following form:

"Alex. Swift, Pres. Office of Swift's Iron and Steel
Geo. E. Clymer, Vice Pres. Works, No. 26 W. Third St.,
Edwin Swift, Treas. Masonic Temple.

"CINCINNATI, October 1, 1872.

"Iron Mountain Co., St. Louis, Mo.

"GENTS: Please deliver to the order of A. Swift, Esq., one thousand to twelve hundred tons of iron ore out of the quantity contracted for by us, and oblige, yours truly,

"DEWEY, VANCE & CO."

The Iron Mountain Company was immediately informed of such order, and the amount of ore therein specified was placed on its books to the credit of Swift's Iron and Steel Works.

The water in the Ohio and Mississippi rivers was low in October and the early part of November, 1872, and no boats were sent for the ore. Later in November and during December, the rivers became so full of ice that it was impossible to remove the ore by boat during that year. Swift's Iron and Steel Works applied to the Iron Mountain Company, while the river was thus filled with ice, for leave to remove the ore in some other manner than by boats, but the Iron Mountain Company declined to grant the request, and the ore was never obtained. In fact, there is no other practicable way by which to remove ore from the landing than by boat.

As already stated, no ore was delivered to Dewey, Vance & Co. under the agreement, nor did they receive any order on the Iron Mountain

Company for ore. They demanded of Swift's Iron and Steel Works repeatedly, at Cincinnati, during May, 1873, compliance with the agreement as to the delivery of ore in the spring of 1873, insisting on an order on the Iron Mountain Company for such ore. The only reason given for non-compliance with the demand was the alleged non-compliance by Dewey, Vance & Co. with their agreement to deliver ore in 1872. Dewey, Vance & Co. were ready and willing to pay for the ore according to the custom already stated, that is, according to weight as ascertained on arrival of the ore at its destination, or in case of the loss of ore or any part of it while in transit, according to its weight as ascertained by displacement, in the way stated.

The objections of Swift's Iron and Steel Works to a recovery on the part of Dewey Vance & Co., and the grounds of recovery on the part of the former on their counterclaim, are presented in exceptions to the refusal of the court below to give certain instructions to the jury, and in exceptions to certain portions of the charge given. So far as it is necessary to state these exceptions, they will be found in the opinion of the court.

Headly, Johnson & Colston and John Johnston, for plaintiffs in error.

No valid usage was shown. *S. W. Freight and Cotton Press Co. v. Standard*, 44 Mo. 71; *Ober v. Carson*, 62 Mo. 209; *Inglebright v. Hammond*, 19 Ohio 337; *Edie v. East India Co.*, 2 Burr 1216; *Homer v. Dorr*, 10 Mass. 26; *Frith v. Barker*, 2 John 327, 335; *Thompson v. Riggs*, 5 Wall. 663; *Robinson v. U. S.* 13 Wall. 363; *Savings Bank v. Ward*, 100 U. S. 166, 206; *Randall v. Smith*, 63 Maine 105; *Eager v. Atlas Ins. Co.*, 14 Pick. 141; *Reed v. Richardson*, 98 Mass. 216; *Warren v. Franklin Ins. Co.*, 104 Mass. 518; *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. 187; *Bargett v. Orient Ins. Co.* 3. Bosw. 385; *Minnesota Central R'y Co. v. Morgan*, 52 Barb. 217; *Bank of Commerce v. Bissell*, 72 N. Y. 615; *Rapp v. Palmer*, 3 Watts, 78; *Raisin v. Clark*, 41 Md. 158; *Deweese v. Lockhart*, 1 Texas 535; *The Pacific, Deady*, 17; 6 South. L. Rev. (N. S.) 845; *Schooner Reeside*, 2 Sum. 569. And see *Tilley v. County of Cook*, 103 U. S. 146, 162.

Follett & Cochran, for defendants in error.

The usage shown is part of the contract. *Broom's Leg. Max. Ch. x.*; 2 Parsons on Con. 499, 535; *Starkie on Ev. *710*; *Wigram on Ex. Ev. 57*; *Thompson v. Riggs*, 5 Wall. 663; *Barnard v. Kellogg*, 10 Wall. 384; *Robinson v. U. S.* 13 Wall. 363; *Bradley v. Packet Co.*, 13 Peters 89; *Reed v. Ins. Co.*, 95 U. S. 23; *U. S. v. Peck*, 102 U. S. 64; *Doane v. Dunham*, 79 Ill. 131; *Lyon v. Culbertson*, 83 Ill. 33; *Bailey v. Benseley*, 87 Ill. 556; *Scudder v. Bradbury*, 106 Mass. 423; *McMasters v. Penn. R. Co.*, 69 Pa. St. 374; *Lucy v. Green*, 84 Pa. St. 514; *Brackett v. Egerton*, 14 Minn. 174; *Rindschoff v. Barrett*, 14 Iowa 101; *Karmuller v. Kootz*, 18 Iowa 352; *Hovey v. Pitcher*, 13 Mo. 191; *Sontier v. Kellerman*, 18 Mo. 509; *Patter-*

son v. Candan, 25 Mo. 13; Gray v. Clark, 11 Vt. 885; 1 Taylor's Ev. 178; 2 Ib. 990, 1002; Story on Sales, § 230; 2 Phillips on Ev. 726, 787; 1 Greenleaf's Ev. §§ 292, 295; 2 Ib. § 251; Gibson v. Stevens, 8 How. 384; Corbett v. Berryhill, 29 Iowa 157; Boorman v. Johnson, 12 Wend. 573; Stapenhorst v. Wolff, 35 Sup. Ct. N. Y. 25; Heald v. Cooper, 8 Greenl. 32; Cushing v. Breed, 14 Allen 376; Lockhart v. Bonsall, 77 Pa. St. 53; Carter v. Phil. Coal Co., 77 Pa. St. 286; How v. Barker, 8 Col. 608; Edwards v. Smith, 62 Mo. 119; Hall v. Smith, 16 Minn. 58; Hunter v. Salt Co., 14 Mich. 98; Douglass v. Garrett, 5 Wis. 85; Rice v. Cutter, 17 Wis. 351; Lamb v. Klaus, 30 Wis. 94; Lowber v. Bangs, 2 Wall. 737. And see Wiggleworth v. Dallison, 1 Smith's Led. Cas. 546; Benj. on Sales (2 Am. ed) § 215, note; Leake on Con. 196; Anson on Con. 238; Bishop on Con. §§ 571, 572.

OKEY, J.

The question presented in this case is whether a purchaser of iron ore, to be delivered at a specified place, may be bound by usage as to the manner of delivering and place of weighing and making payment for the ore.

The written contract sued on is, as we have seen, an agreement on the part of Dewey, Vance & Co., defendants in error, to deliver to Swift's Iron and Steel Works, plaintiff in error, "on the landing at Carondelet," at five dollars and fifty cents per ton, cash, one thousand to twelve hundred tons of Iron Mountain ore, to be taken away by the latter during the year 1872; and, also, an agreement on the part of the latter to deliver to the former, in the spring of 1873, at the same place and price, the same quantity of ore. If the parties are bound by the terms of this contract, unaided by extraneous testimony, it is clear that the judgment is erroneous. The plaintiff in error demanded the delivery of the ore, at the place named in the contract, and within the time there stated, and was then able and willing to pay for it, while the defendants in error did not demand ore at Carondelet, in the spring of 1873, nor were they there ready to pay for it. Under such circumstances, looking alone to the face of the agreement, the defendant in error would not be entitled to recover, but the plaintiff in error could maintain an action. Extraneous evidence, however, shows the rights and obligations of the parties to this instrument to be very different from those implied in the absence of such evidence. Such evidence shows, as we have seen, that there is a uniform, settled custom at Carondelet, well known to the parties, and with reference to which they contracted, according to which a party holding such an order for ore as the plaintiff in error had, may present it to the agent of the Iron Mountain Company, at the landing, and have placed in his boats, from the pile there collected, the ore specified in the order, the Iron Mountain Company being the owner of the landing and the ore thereon; and that payment is made when the ore is carried by the boats to its place of destination and there weighed, unless the ore or

part of it is lost in transit, in which case payment is made according to the weight estimated from the displacement of the boats at the time they are loaded. It further appears, that it was well known to both parties to the contract, at the time it was made, that the Iron Mountain Company never permits ore to be removed from the landing in any other manner or upon any other terms or conditions; indeed, that there is no other practicable mode of removing such ore. The question, therefore, is whether it was competent to show such facts by such evidence, the plaintiff in error objecting; for if it was, the plaintiff in error, not being able or willing to remove the ore by boat, cannot recover damages for a refusal to deliver to it such ore.

Extrinsic evidence is admissible to show that the parties to a written agreement have contracted upon a common basis of usage, applicable to the business in which the contract is made, whereby they have impliedly assented to certain conditions not mentioned in the contract. With respect to usage of the character relied on here, it must appear, in order to be valid, that when the contract was made, such usage was uniform, well established, and known to the parties; but that the agreement is on its face free from ambiguity, or that such agreement with, and the same agreement without the incidents annexed, imports very different rights and obligations, affords no valid objection to such evidence. In *Humfrey v. Dale*, 7 E. & B. (90 Eng. C. L.) 266, Lord Campbell said: "In a certain sense, every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If by the side of the written contract *without*, you write the same contract *with* the added incident, the two would seem to import different obligations and be different contracts." And see *Myers v. Sarl*, 3 E. & E. (107 Eng. C. L.) 306. The usage, however, must not be inconsistent with the words of the agreement, nor must it be unreasonable; but the usage here shown seems not to be obnoxious to either of these objections. *Cuthbert v. Cumming*, 10 Hurl. & Gord. 809, affirmed, 11 Ib. 205.

The cases relating to usage of this character seems not to be in entire harmony. It is difficult to extract from them any more definite rules by which to determine the validity of such usage than those already stated. It is some times difficult, moreover, to determine whether the law, in a particular case, will or will not permit such proof. Each case must be determined by itself, aided by such light as may be derived from the judgments in other cases where the facts are analogous. Upon consideration of the cases cited in argument, and others, we unite in holding that the proof offered in this case to show usage was competent; and there being no substantial conflict as to the facts, the rights of the parties are determined by such proof. As the plaintiff in error never demanded the ore upon the order, though the defendants in error wer

able and willing to deliver it, in pursuance of the contract with such incidents annexed, a right to recover damages, with respect to the ore of 1872, never accrued to the plaintiff in error; and, for the same reason, it is wholly immaterial whether the covenants in the agreement should be regarded as dependent or independent. So, it is immaterial whether the court properly construed the contract, in charging the jury that if Dewey, Vance & Co. were entitled to recover, one thousand tons of ore would be the basis of such recovery; for if the construction was erroneous, the error was favorable to the plaintiff in error. And these views likewise dispose of the remaining question, as to the right of the defendants in error to recover for the failure of the plaintiff in error to deliver to them ore in the spring of 1873, and sustain such recovery; for the ore could only be obtained on the order of the plaintiff in error; and when the defendants in error, at Cincinnati, in the spring of 1873, demanded such order, the plaintiff in error refused to give it, or to comply with the contract, the defendants in error being at the time able and willing to comply with the agreement in accordance with its terms and such annexed incidents. In view of these facts, the defendants in error were not required to demand the ore at Carondelet in the spring of 1873, or have boats there to receive it. *Lowry v. Barrelli*, 21 Ohio St. 324. And this is not inconsistent with *Mowry v. Kirk*, 19 Ohio St. 375, or *Simmons v. Green*, 85 Ohio St. 104.

The rulings in the court below are not inconsistent with the views here expressed, nor is there any error in the record, and therefore the judgment will be affirmed.

Judgment affirmed.

[This case will appear in 37 O. S.]

Digest of Decisions.

WISCONSIN.

(*Supreme Court.*)

MERRIAM v. LYNCH AND OTHERS. Filed September 27, 1881.

1. *Replevin*.—A judgment in replevin will not be reversed for a refusal to receive in evidence of appellant's title a former valid judgment in replevin between the same parties, where the identity of the property in the two suits was directly submitted to the jury upon evidence of a doubtful character, (including the former writ of replevin, and the return of the officer thereon,) and the jury were instructed that appellant was entitled to recover if the property was the same.

2. Where A. undertakes, in a lawful manner, to remove chattels, as his own, from the possession of B., and the latter objects to his doing so, denying that A. has any property there, this is equivalent to a formal demand and refusal,

ROGERS v. ROGERS. Filed September 27, 1881.

1. *Deed—Delivery*.—The legal effect of the delivery of a deed of conveyance by the grantor to the grantee, with intent to pass the title, is not altered by its subsequent re-delivery to and destruction by the grantor.

2. The grantee in a deed is not affected by a declaration of a trust as to the lands conveyed, made by the grantor in a separate paper, not referred to in such deed, nor assented to or even known by the grantee when he took the title.

REILEY v. TIMM, Filed September 27, 1881.

Slander.—While in slander, under section 2678, Rev. St., mitigating circumstances not pleaded cannot in general be shown by affirmative proof, still, where plaintiff has put in evidence a fact not pleaded by him, tending to create an inference of express malice, defendant may rebut that inference by evidence explanatory of such fact.

MESSER v. OESTREICH. Filed September 27, 1881.

1. A deed executed since the Revision of 1878, in the form prescribed for a warranty deed by section 2208, Rev. St., must be regarded as containing the covenants named in that section.

2. Where the description in a deed of the land conveyed is otherwise uncertain, evidence will be admitted of the state of the property when the deed was executed, to aid in its construction.

3. Where a deed purports to convey a strip of land of a certain width along a line already located, but without prescribing the lateral boundaries or designating the particular portion of the strip traversed by such line, if the grantee thereupon goes into possession under such deed, and designates the lateral boundaries by substantial fences, and continues in the exclusive possession for many years with the acquiescence and consent of the grantor, this is a practical construction of the deed, binding upon the parties and those claiming under them.

4. It seems that such a deed with full covenants of warranty, for a valuable consideration paid, would be valid as a covenant, and, if executed to a railroad company, would authorize it to appropriate such a strip of land of the width named, along the line already located, as might be necessary to the construction of its contemplated road; and that, after such actual appropriation of the land, the grantor would be estopped from denying that he had conveyed it.

5. A prior valid deed to a railroad company and its assigns of a strip of land along the line of its railroad, for the uses and purposes of said company, is a breach of the covenant of seisin, in a subsequent deed by the same grantor to a third person of the parcel of land which includes such strip, although the company is in occupancy of the strip for the purposes of a railroad when such subsequent deed is executed. *Kutz v. McCune*, 22 Wis. 598, and *Smith v. Hughes*, 50 Wis. 620, distinguished.

6. The railroad company, under such a deed, has not a mere easement in the land, but the absolute title, subject at most to forfeiture for nonuser or misuser; and as the value of such possible forfeiture is not susceptible of proof, it seems that the amount to be deducted therefor from what would otherwise be the measure of damages for the breach of a covenant of seizin in the second deed, would be merely nominal.

7. Where the title fails to only a part of the land conveyed, the grantee may recover, in an action on the covenants of seizin and right to convey, (or upon an agreement to convey,) such a proportion of the whole consideration paid as the value of the part to which the title fails bore to the whole purchase price at the time of the purchase, with interest thereon during the time he has been deprived of the use of such part, not exceeding six years.

GUMZ, ADM'R, v. C., M. & ST. P. RY. CO. Filed September 27, 1881.

1. *Railroad—Negligence—Compulsory Nonsuit.*—A railroad company is liable for injuries suffered in this state by one of its agents or servants from negligence of any other agent or servant thereof, without contributory negligence on his part, (section 1816, Rev. St. ;) and in case of his death from such injury the action may be brought by his personal representative.

2. Where there are two or more lines of action, any one of which may be taken, and such an agent, with ordinary skill, in the presence of imminent danger, is compelled immediately to choose one of them, and does so in good faith, the mere fact that it is afterwards ascertained by the result that his choice was not the best means of escape is not sufficient to charge him with negligence.

3. In this action for injuries from negligence the court did not err upon the evidence (stated in the opinion) in nonsuiting the plaintiff.

CRAMER AND OTHERS v. HANAFORD AND ANOTHER. Filed September 27, 1881.

1. *Directory Statute—New Trial.*—So much of section 2863, Rev. St., as defines the time (20 days after the term of trial) within which the judge must "file his decision in writing," is merely *directory*.

2. Written exceptions to the judge's findings cannot be considered on appeal unless incorporated in the bill of exceptions. Section 2870, Rev. St.

3. Where the findings are so indefinite, inconsistent and contradictory as not to authorize judgment for either party, a new trial will be ordered.

4. Under the statutes of this state a married woman, having at the time no separate estate, may purchase property of any person other than her husband, entirely on credit, and thereby make herself liable in an action at law for the contract price.

MICHIGAN.

(Supreme Court.)

PORT HURON v. McCALL. Filed October 12, 1881.

Bonds—Municipal Powers.—Under the provision in the charter of Port Huron which empowers the common council to "issue new bonds for the refunding of bonds and evidences of indebtedness already issued," the common council may issue new bonds to raise money for the satisfaction of judgments.

Municipal powers are to be construed strictly; but the reason for strictness has little application when they are of a nature to concern no one but the people of the municipality; as for example, when they relate merely to a change in the form of municipal indebtedness. The question in such a case is, what was probably the legislative intent in granting a power?

If a city has obtained money on a particular construction of a power, and then adopts a different construction to avoid payment, it is proper to give some weight to the first construction, if the question is one of doubt.

DAY v. WALDEN. Filed October 12, 1881.

Easement.—An easement executed by grant is not lost by neglect of enjoyment for 20 years or more, in the absence of any evidence of occupancy adverse to it.

Whether the owner of an easement who has permitted another without objection to make valuable erections which cannot be enjoyed consistent with his use of the easement, is not by his apparent acquiescence estopped from claiming the easement afterwards, *quære*.

An easement to take water on one tenement to be used for operating a mill on another, when created as an easement appurtenant to the mill and not to any described parcel of land, is lost when the mill goes to decay or is destroyed and not rebuilt.

CUDDY v. HORN. Filed October 12, 1881.

Injury—Common Carriers.—The rule by which one who rides in a private conveyance is presumed to control or be identified with the driver and to have no right of action for any injury done him by a collision caused by the driver's negligence, cannot apply to passengers in public conveyances, such as railway cars or steamboats, even though they have chartered the conveyance.

The master of a vessel cannot relieve himself of responsibility for its safe management by surrendering its control to a charterer.

Where a passenger in a conveyance can have no control over those in charge of it, he cannot be held to be so identified with them as to be considered a party to their negligence.

Passengers on a steam-yacht chartered for their use, but not under their control in matters of navigation, have a right of action against its

owners for injuries caused them by the negligent management of those in charge of it.

An act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them without concert, renders them liable either jointly or severally.

If a passenger upon one vessel is injured by its collision with another in consequence of the negligence of the officers of both, he has a right of action against them jointly, and it is for the jury to fix the liability where it belongs.

Where evidence tends to make out a case for the plaintiff, its force and effect is for the jury, and the supreme court will not attempt to review or weigh it.

The limited liability act of Congress exempting ship-owners from personal liability for injuries caused by the negligence of those in charge of their vessels, does not apply to boats navigating streams connecting the great lakes.

QUINNIN v. REIMERS. Filed October 12, 1881.

Village Plats—Where both parties to a suit respecting lands trace title through conveyances made with reference to a recorded plat, it is immaterial that the plat was never properly acknowledged.

Where in platting a village it turns out that by mistake the blocks are not so long as the plat represents, the deficiency must be apportioned between the lots of the block according to their apparent size as shown by the map.

And this rule will be applied notwithstanding the explanations upon the plat state that all lots are of full size except those made fractional by a named street; it appearing that according to the plat such street made certain lots fractional, and such last-mentioned lots evidently being all the explanations intended to except.

EGGLESTON v. WAGNER. Filed October 12, 1881.

Real Estate—Contract of Sale—Assenting the Signing of Instrument.—Where one is present and dictates or assents to the signing of an instrument in his name, and upon his behalf, it is a signing by him, and the authority of the person performing the manual act need not be in writing.

A proposal for the sale of real estate, to make the description sufficient within the statute of frauds, need not be so particular as to render a resort to extrinsic evidence unnecessary, but the terms may be abstract and of a general nature, if sufficient to fit and comprehend the property which is the subject of the transaction, so that with the assistance of external evidence the description without being contradicted or added to, can be connected with and applied to the very property intended.

To constitute a contract of sale, where a proposition on one side, and an alleged acceptance on the other, is relied upon, the acceptance must be of the proposition as made, and the party cannot insist upon anything more than a compliance with the original proposal.

May 19th one partner made a proposal to sell

out to the other his entire interest in the partnership business for a certain sum, purchaser to assume all liabilities. Subsequently he consented to keep such proposition open until July 1st, subsequent business to be transacted on that basis. Before that date considerable changes took place. Indebtedness existing on May 19th was paid off, and the partner making the proposal purchased the interest of the other, the business in the meantime being continued. *Held*, that the proposal was for the interest as it stood on May 19th, and the person to whom made could not, by tendering on June 30th the amount agreed to be taken, insist upon a transfer of all the other party's rights as they existed on said last-named day, and that such tender and demand did not constitute an acceptance of the proposition so as to make a binding contract.

MINNESOTA.

(*Supreme Court.*)

STATE EX REL. MINNESOTA RAILWAY CONSTRUCTION Co. v. TOWN OF LAKE, WABASHA COUNTY.
Filed October 17, 1881.

Mandamus—Where a proceeding in *mandamus* was pending in this court on and before the seventh day of March, 1881, in which there then was and now is an issue of fact not finally heard or determined, the defendant, under the second proviso of chapter 40, Laws 1881, is entitled, upon the request of his attorney, to have the record therein transmitted to the district court of the county in which he resides. For such purpose a town is to be taken as residing in the county of which it is a part. The record to be transmitted consists of the original papers in the proceedings, together with certified copies or transcripts of such proceedings in this court as are not evidenced by original papers.

SIMPSON v. KRUMDICK. Filed October 12, 1881.

Charge to Jury.—If, in a charge to the jury, a general proposition stated to them is incorrect, but in the specific instructions, as applied to the facts of the case, the correct rule is stated, so that this court can see that the jury could not have been misled by the erroneous statement, such erroneous statement will be disregarded. Requests for instructions to the jury *held* to have been properly refused, where they assumed the existence of disputed facts.

FARNHAM and others v. TRUSSELL and others.
Filed October 17, 1881.

Husband and Wife—Fraudulent Conveyance.—The plaintiff claimed that certain lands were conveyed by defendant K. to one T., and by T. to K.'s wife, in fraud of plaintiffs, as K.'s creditors. The evidence reasonably tending to show that K. purchased the land for his wife, and as her agent; that the cash payment for the same,

as well as two deferred payments, were made with her money and separate property; that K. was indebted to his wife in a sum considerably exceeding the unpaid portion of the purchase money for which K. had given his note; that the title was originally taken in K.'s name, without his wife's knowledge or consent; and that the conveyance from K. to T. was made for the purpose, expressly understood and agreed upon between K. and his wife, that T. should convey to her, so that the title should come into her name, in pursuance of and to carry out the design of the original purchase,—*held*, that this was sufficient to warrant the trial court in finding, in effect, that the conveyances were not fraudulent as respects the plaintiffs, and that this action, which was brought to subject the land to their execution against K., should be dismissed.

STATE OF MINNESOTA *ex rel* LEE v. SCHAACK, County Auditor, etc. Filed October 12, 1881.

Mandamus—Redemption.—Before a writ of *mandamus* will issue to require a public officer to do an official act, there must be a demand upon him to do it. Where, at tax sale, land is sold as one tract, the owner of a part of the tract may redeem the whole, but he cannot redeem a part of it.

ILLINOIS.

(Supreme Court.)

ORRIN P. BISSELL v. THOMAS LLOYD ET AL.—Opinion by DICKEY, J., affirming. Filed Sept. 26, 1881.

1. *Lease—Construction as to extent that tenant should repair.*—Where the lessee of a store-room in a building undertakes to make all needed repairs and alterations in and about such room, the lessor, by implication, will be bound to keep the residue of the building in repair, so as to protect such room.

2. *Landlord and tenant—When tenant released from rent for want of repairs.*—When a party rents a room in a building for a store-room, undertaking to keep the building, except the particular room, in proper repair, and neglects to repair, so that the building leaks so badly as to render the store-room unfit for the use it is rented, and the lessee leaves the same on that account, the lessor will not be entitled to recover rent for the store-room after it is abandoned.

3. *Chancery—Relief when denied for laches.*—When a party purchasing a lot of goods from a surviving partner, agreed as a part of the consideration of the sale, to pay all the debts and liabilities of the late firm, a bill in chancery by one who had leased the firm a store-room, to enforce the payment of rent, after a lapse of more than eight years, from a repudiation of the claim for rent by the defendant, will not be enforced on account of the statement of the demand.

4. *Judgment—Does not bind one not a party.*—One not a party to a judgment against another, is not in any manner concluded by it, although he may have agreed to pay the indebtedness of the defendant.

THE FIFTH NATIONAL BANK v. THE VILLAGE OF HYDE PARK.—Opinion by DICKEY, J., reversing and dismissing. Filed Sept. 26, 1881.

1. *Trust—When stranger to fund is chargeable as a trustee.*—To charge a stranger to a trust fund as a trustee by reason of participation in a misapplication of the fund, upon the ground that the fund was used in pay-

ment of a private debt of the original trustee, it is necessary to show not only that the party sought to be charged was aware that the fund was a trust fund, but also that he was aware that the debt paid by it was at the time in fact a private debt, or such a debt that payment thereof could not lawfully be made out of such fund.

2. If a depositor pays his own debt to a banker by a check upon funds to his credit in a fiduciary capacity, the banker will be affected with knowledge of the unlawful character of the appropriation, and will be compelled to refund the *cestui que* trust, but the debt paid must be such as that the officers of the bank are aware that the same is really and in truth his own private debt.

3. Where a treasurer of a village borrowed money of a bank on his own note, secured by valuable collaterals, professing at the time to be borrowing the same for the village to pay off its warrants in anticipation of the collection of its taxes, and such money was placed to his account in bank as treasurer, and most of it applied in payment of village warrants, and after the receipt of the taxes he gave the bank a check upon the trust fund in payment of his note, and the bank in good faith believing the debt to have been incurred for the village, accepted the payment and surrendered the note and collaterals: *Held* that the payment could not be rescinded by the village, and the bank be held responsible for the money so paid it.

THOMAS MOORE v. PATRICK TIERNEY.—Opinion by DICKEY, J., affirming. Filed Sept. 26, 1881.

1. *Statute—Practice act does not apply to chancery cases.*—No part of the "act in regard to practice in courts of record" (Ch. 110, R. S. 1874) has any reference to the mode of procedure in chancery cases, except in so far as the language expressly, or by clear implication, refers to such procedure. That is regulated by the act relating to courts of chancery, except so far as is otherwise expressly enacted, or is necessarily implied by subsequent legislation.

2. *Practice—Supreme Court reviews questions of fact in chancery cases.*—The amendment of sec. 88 of the Practice Act in 1879, by which the class of cases which might be brought directly to this court was changed so as to exclude criminal cases below the grade of felony from the enumeration, and so as to add to the enumeration cases in which the construction of the constitution is involved, and cases relating to the revenue or in which the State is interested, has no effect upon consideration of questions of fact in chancery cases, there never having been any legislation on that subject in either sec. 88 or 89 of that act.

3. *Practice in Supreme Court—As to reviewing questions of fact.*—It has always been the practice of this court, in reviewing cases in chancery, to examine and determine for itself, the truth as to controverted questions of fact from the evidence in the record, and its duty to do so has not been changed by sec. 89 of the Practice Act or any other legislation.

ASAHEL GAGE v. MAHALA SCALES ET AL.—Opinion by CRAIG, J., affirming. Filed Sept. 26, 1881.

1. *Appeal—Whether a freehold is involved.*—A bill to set aside a deed for land made on a sale for taxes by one claiming title, on the ground of a redemption from such sale, in which suit the redemption is denied, involves a freehold, and an appeal lies from the Appellate Court.

2. *Redemption—From tax sale—Mistake of county clerk as to amount.*—When the owner of real estate sold for taxes applied to the county clerk to redeem the same, and paid the sum required of him by the clerk, and took a certificate of redemption, but the clerk by mistake failed to require the payment of taxes subsequent to the sale: *Held*, that a court of equity had the power to relieve the owner against the mistake of the clerk and protect the title of the owner, upon his paying the amount of the subsequent taxes.

3. Although redemption from a tax sale is a statutory right, yet a party at emptying in good faith to make it, may be relieved against the mistakes or frauds of the officers of the law, or of the purchaser. If he has attempted to redeem and has done all he was required to do by those entitled to receive the money, in such case

the sale will be discharged, even though in consequence of the mistake of the officer, he has paid less than the proper amount, if he will pay the deficiency.

4. *Redemption—Subsequent taxes, how found.*—On application to redeem land from tax sale while the tax books are in the hands of the collector, the county clerk can require the party to present a receipt showing the payment of subsequent taxes, or if they had been paid by the person holding the certificate, a statement from the collector showing the amount paid, by whom and when, and in this manner the proper amount necessary to redeem may be ascertained.

WILLIAM M. HOLMES ET AL. v. ARAMENTIA M. SMYTHE ET AL.—Opinion by SCHOLFIELD, J., reversing and remanding. Filed Sept. 30, 1881.

1. *Constitutional law—Special legislation—Of the act concerning law associations.*—The act of April 4, 1872, entitled "An act to enable associations of persons to become a body corporate to raise funds to be loaned only among its members," is a general law applicable to all the citizens of the State who choose to bring themselves within the relations and circumstances provided for by it, and is not within the prohibition of the Constitution (section 22 of article 4), which declares that the General Assembly shall not pass local or special laws "regulating the rate of interest on money," or "granting to any corporation, association or individual, any special or exclusive privilege, immunity or franchise whatever."

2. *Usury—Of contracts with an association organized under the act of April 4, 1872.* "to enable associations of persons to become a body corporate to raise funds to be loaned only among its members."—Where a person who is a member of such association obtains a loan of money therefrom, under the system of bidding the highest premium for the loan, as provided for in the act, coupled with other conditions authorized and prescribed therein, the transaction will not be regarded as usurious, although it may result that the borrower will be required, under the provisions of the contract, to pay a greater price for the use of the money advanced to him than would be allowable under the general law regulating the rate of interest. The contract being of such character that it is only upon the failure on the part of the borrower to perform its conditions that such result would follow; the obligation to pay an amount in excess of the legal rate of interest might be regarded as in the nature of liquidated damages, and not in any sense a regulation of interest upon money. This would be the proper view, even treating the transaction as a loan.

3. But a transaction of such character, being in its features and conditions in conformity with the provisions of the act, might rather be regarded as in the nature of a sale by the person to whom the money was advanced, or his shares of stock to the association, than as a loan.

THE PEOPLE EX REL. THE ILLINOIS MIDLAND RAILWAY CO., v. THE SUPERVISOR OF BARNETT TOWNSHIP.—Opinion by SHELTON, J., awarding alias writ of mandamus. Filed Sept. 30, 1881.

1. *Attorney-at-law—Presumption as to authority.*—Where a proceeding purports to have been instituted by the party whose name appears of record, by his attorney, who is an attorney of this court, the presumption of the authority of the attorney will prevail over the bare statement by the defendant to the contrary, unsupported by affidavit.

2. *Mandamus—Of an alias peremptory writ of mandamus to the successor in office.*—Where a peremptory writ of mandamus has been awarded against the supervisor of a town, commanding him to execute, in behalf of the town, certain bonds to the relator, and the officer has not obeyed the command of the writ, and his term of office has expired, an alias peremptory writ may properly be awarded against his successor in office to compel him to perform the acts which the former had been by the first writ ordered to perform. This is but a repetition of the writ against the same party represented by another person. It is not making a new party, or any amendment in the judgment or record, within any rule not allowing amendments. The duty upon the officer first commanded to execute it, is a continuing duty upon him and his successors in office until it is performed.

3. *Office and officer—Tenure of office—Effect of resignation as ending the term before successor is qualified.*—Where the tenure of an office is fixed for a specified period of time "and until a successor shall be elected or appointed, and qualified," the mere expiration of the specified period of time for the duration of the term of office will not operate to vacate the office, or to impair the powers of the officer to continue in the performance of the duties of the office, nor will the election or appointment alone of his successor have any such effect, for there must be superadded to the election or appointment of a successor, his qualification, in order to the complete divestiture of the prior incumbent of his official authority.

4. No distinction in this regard is to be taken between a resignation and the expiration of the time fixed for the holding of the office. A resignation and its acceptance, ends the term of office, the same as the expiration of the time of the tenure of the office does, and no more effectually. Whatever power there is in the latter case to act officially until the qualification of a successor must exist equally in the case of a resignation.

5. In this case a peremptory writ of mandamus was awarded to compel the supervisor of a town to execute, in behalf of the town, certain bonds to the relator. The supervisor did not obey the command of the writ. After his term of office expired and his successor was duly elected and qualified, a rule was entered against the latter to show cause why an alias peremptory writ should not be awarded to compel him to perform the acts which his predecessor in office had been by the former writ ordered to perform. The respondent, among other things, gave as a reason why the alias writ should not issue, that prior to the entering of the rule he had resigned his office of supervisor and his resignation had been accepted, and that his successor in office had been elected. But it did not appear that the person so alleged to have been elected, had qualified. So the rule was made absolute, and the alias peremptory writ was awarded against the respondent, notwithstanding his resignation.

DAVID B. HUTCHINSON ET AL. v. JOHN A. CRANE ET AL.—Opinion by WALKER, J., affirming. Filed Sept. 30, 1881.

1. *Party—Holder of notes indorsed in blank.*—Where the payee of a note delivers the same indorsed in blank to indemnify a member of firm as his security, and suit in equity is afterwards brought in the name of the firm to enforce payment of such note, the maker of the note cannot be heard to object that the suit is brought in the name of the firm instead of that of the individual partner. They will be presumed to be the legal holders as against the maker, who had no interest as to the party entitled to payment.

2. *Assignment—Of note by vendor of land carries his security.*—Where a bond is given for a deed to land to be made upon payment of the notes given for the unpaid price, the bond and notes will constitute one contract, and they will be treated in equity as a security, in the nature of a mortgage, and a sale and assignment of the notes will pass the security, which may be enforced in the name of the assignee.

3. *Deed—Set aside when possession obtained by fraud, without delivery.*—Where the purchaser of land under a bond for a deed, induced his vendor to make a deed to be left with the assignee of the notes given for the purchase money, for delivery only upon payment of such notes, and fraudulently obtains possession of such deed without payment, and puts the same upon record, such deed will be set aside as to him and a purchaser from him, with notice of the fraud, and the land be ordered sold for the payment of the notes.

JAMES W. LAMBERT ET AL. v. CATHARINE S. HARVEY ET AL.—Opinion by MULKEY, J., affirming. Filed Sept. 30, 1881.

1. *Will—Devise, when to take effect.*—When a testator directed that as soon as could advantageously be done after the death of his widow, all his notes, &c., be collected, and all his property, real and personal, be sold, and after paying the expenses of executing the will, his daughter, A, should be paid \$1,000, and the remainder of his estate be given to his daughter, B, if living when the will should be executed, but if not living, her part to

be given to her daughter, C, and appointed B his executrix: *Held*, that the disposition made by the will was not to take effect until after the death of his widow, and then the division was to be made with reference to the condition of things as then existing.

2. Where a will provided for the conversion of all the testator's property into money on the death of his widow, and its division among his two daughters, but directed that if his daughter B should not be living "at the time this will shall be executed," her share should be given to her daughter; *Held*, that the words "at the time this will shall be executed," referred to the time of converting the estate into money and distributing it under the will.

3. *Will—When property descends to heirs.*—When real estate is directed by a testator to be sold and converted into money after the happening of a certain contingency, and no disposition is made of such estate in the meantime, it will descend to the heirs-at-law of the testator, subject to sale under the power at the proper time.

4. *Will—Whether executrix takes legal title.*—Where the executrix of a will is directed to sell the testator's real estate and divide the proceeds of the sale between certain devisees, she takes only a power of sale, that being all that is necessary to execute the will, and no legal estate in the land.

JACOB A. GOODELL v. ROSWELL W. DEWEY.—Opinion by MULKEY, J., affirming. Filed Sept. 30, 1881.

1. *Chattel Mortgage—Mortgages may purchase at his own sale by consent of mortgagor.*—A purchase by a mortgagee at his own sale under a chattel mortgage will not be set aside and a redemption allowed, when the sale and purchase was made with the consent and under an understanding with the mortgagor.

2. *Sale under power in Mortgage—When made to mortgagee by consent will not be set aside.*—Where the mortgagor and his wife gave the mortgagee an absolute conveyance of the mortgaged premises in full satisfaction of the indebtedness, and the mortgagee, to avoid certain judgment liens, made a sale under a power in his mortgage of the property to one who immediately conveyed back to the mortgagee, without paying anything on the purchase, and the mortgagee then surrendered the notes and the mortgagor's deed, and received possession of the premises, and held them without any claim or objection by the mortgagor, for over three years, and it appearing that the property was worth but little more than the indebtedness, and no fraud or overreaching being shown, it was *held*, that a bill to set aside the sale and allow a redemption was properly dismissed.

CHARLES E. REYNOLDS v. MARY ANN McCURRY ET AL.—Opinion by MULKEY, J., reversing and remanding. Filed Sept. 30, 1881.

1. *Partition—Jurisdiction of subject-matter.*—Lands not held in joint tenancy, tenancy in common or co-parcenary are not subject to partition, either at common law or under the statute, and the court will have no jurisdiction of the subject-matter of a suit for partition, and therefore the proceeding will be absolutely null and void.

2. A bill by an infant to set aside a sale of his lands under a proceeding by his guardian to assign dower and for partition between the infant and his mother, which shows that an abundance of means for his support came to the guardian, and that such infant was the sole owner of the land, subject only to the dower of his mother, and that the guardian and mother entered into an unlawful combination for the purpose of converting his estate to their own use, under which a decree of sale was procured and the sale made, is not obnoxious to a general demurrer.

3. *Infant—Not bound to tender the purchase money paid to his guardian before avoiding guardian's sale.*—Where a guardian under a void decree sells the land of his ward, and appropriates the purchase money to his own use, the ward will not be required to restore to the purchaser the price paid by him as a condition precedent to having the sale set aside.

4. *Infant—When must restore consideration to repudiate contract.*—It is the general rule that when the con-

sideration of a conveyance by an infant has been expended so that he is not in a condition to restore it, he may, nevertheless, avoid the conveyance. It is only when he still has the consideration that he will be compelled to return it.

5. *Widow—Has no estate in her husband's lands before dower is assigned.*—Upon the death of the ancestor the law immediately casts the freehold of land upon the heir, subject to the widow's right of dower. Before assignment of dower, the widow has no estate in the land with the heir, but only a right of action.

ANDREW J. RICHARDS v. THE PEOPLE OF THE STATE OF ILLINOIS.—Opinion by MULKEY, J., affirming. Filed Sept. 30, 1881.

1. *Practice—Facts not open to consideration on error in this court.*—In a suit to recover a penalty for obstructing an alleged highway, depending upon the question of fact whether land at the place obstructed had been dedicated for a public road, this court on appeal or error is concluded by the finding of facts by the Appellate Court, and can only review questions of law properly preserved in the record.

2. *Same—Allowing security for costs after motion to dismiss.*—There is no error in allowing a plaintiff in an action upon a penal statute to file security for costs after a motion to dismiss the suit for want of such security.

LEWIS MONROE v. THORNTON L. VANMETER ET AL.—Opinion by CRAIG, J., affirming. Filed Sept. 30, 1881.

1. *Appeal—Whether a freehold is involved.*—When an interpleader is filed in an attachment suit, by a third person claiming title to the land levied upon, and the plaintiff in attachment claims that the defendant in the writ has a life estate, upon which an issue is formed as to the ownership of the land at the time of the levy, and a trial is had, a freehold is involved, and an appeal lies directly to this court.

2. *Curtsey—Requisites to estate by.*—There are four things necessary to make a tenancy by the curtesy—marriage, seisin of the wife, issue born and death of the wife. If no issue is born prior to the time the estate was abolished, July 1, 1874, the marriage, seisin and death of the wife, will not invest the husband with the estate.

3. *Will—Devise to a married woman, when excludes estate of curtesy in husband.*—When a testator provided in his will that no part of the property given should ever, in any event, be liable in whole or in part towards the payment of any debt of her husband, but that all of it should be held and kept free from such liability, it was *held*, that by necessary implication the husband of the devisee was excluded from any estate by the curtesy, even if that had not been abolished.

ANDREW RICHARDS v. THE PEOPLE, ex rel. ALFRED THOMPSON.—Opinion by MULKEY, J., affirming. Filed Sept. 30, 1881.

1. *Appeal—Whether freehold or franchise is involved.*—A bill to enjoin a party from obstructing a highway, the existence of which is denied, does not involve a freehold or a franchise within the meaning of the statute relating to appeals to this court and writs of error.

2. *Same—When it lies to this Court from Appellate Court.*—The statute making the right of appeal from the Appellate to this court depend in certain cases upon the amount in controversy, or of recovery in the court below, has no application when the object of the suit is not to recover a debt or damages, or some specific article of property, either personal or real. In all other cases an appeal lies to this court.

3. *Error—Reversing on facts in chancery suit.*—Where a number of witnesses have been examined orally on the hearing of a bill in chancery, and a finding had by the Circuit Court which is affirmed in the Appellate Court, the decree will not be reversed on the evidence, unless this court can see that the conclusion reached was clearly against the weight of the evidence.

THE PEOPLE EX REL. JOSEPH REAM, COLLECTOR, ETC. v. R. DRAGSTAN ET AL.—Opinion by SCHOLFIELD, J., affirming. Filed Sept. 30, 1881.

1. *Taxes—Jurisdiction of application for judgment.*—The making and filing the delinquent list, containing a description of the property against which judgment is sought for taxes, and the publication of notice of the application, are essential to give the court jurisdiction to render judgment.

2. *Same—Jurisdiction depending on description of land.*—Where land is described in the collector's delinquent list and in the notice of the application for judgment for taxes due thereon, as the north half of the N. E. quarter of sec. 1, giving no township and range, the court will have no jurisdiction, and any judgment for the taxes, even on a personal appearance of the owner, will be a nullity.

3. *Same—Waiver of defects in notice by appearance.*—The land owner by entering his appearance and urging general objections against the rendition of judgment for taxes, waives the right to object to the sufficiency of the notice of the application.

4. *Same—Appearance does not make proceeding in personam.*—The appearance of the taxpayer on an application for judgment against his land for taxes, and defending on the merits, does not change the proceeding to one in personam. It is still a proceeding in rem against specific property, and no personal judgment can be rendered. If the property is not described so that it can be found, there will be no error in refusing judgment against the same.

5. *Same—Judgment when erroneous, without objection or exception.*—When the error in a proceeding against land for taxes due thereon, is in the record itself, being a void description therein, so that a judgment against the land is a nullity, error may be assigned on the judgment, although no objection was made, or exception taken in the County Court.

JAMES M. FITZGERALD v. ELLEN FITZGERALD ET AL.—Opinion by SCHOLFIELD, J., reversing and remanding. Filed Sept. 30, 1881.

1. *Deed—Impeaching and overcoming certificate of acknowledgment.*—To impeach the certificate of the acknowledgment of a deed, the proof must show a conspiracy between the officer taking the acknowledgment and the grantee, or that the officer practiced imposition or fraud upon the grantor, and the testimony of the grantor alone is not sufficient to overcome the certificate and the officer's testimony in support of the same.

2. *Same—Evidence to impeach acknowledgment.*—The evidence to warrant the setting aside of a deed upon the ground that the acknowledgment was obtained through fraud, collusion or imposition, must, by its completeness and reliable character, fully and clearly satisfy the court that the certificate is untrue and fraudulent, and this is the rule as between the grantor and grantee

SUPREME COURT OF OHIO.

JANUARY TERM, 1881.

Hon. W. W. BOYNTON, Chief Justice; Hon. JOHN W. OKEY, Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Judges.

TUESDAY, November 8, 1881.

GENERAL DOCKET.

No. 680. *State ex rel. Attorney General v. John W. Merchant et al. Quo Warranto.*

WHITE, J. *Held:*

1. The right of the stockholders of a railway corporation to elect directors, is not affected by the sale of the property of the corporation by a receiver, under an order of court.

2. At a meeting of the stockholders, called for the election of directors, under section 8246, Rev. Stats., the right to choose the inspectors or judges of election, is vested in the stockholders; and the directors, against the

will of the stockholders present, cannot appoint such inspectors.

Judgment of ouster against the defendants, and the directors elected at the election held under the authority of the stockholders, adjudged entitled to the office under such election.

133. *Elias Thorne v. First National Bank of Wilmington.* Error to the Court of Common Pleas of Clinton County. Reserved in the District Court.

OKEY, J.

An instrument in the form of a warehouse receipt, executed by a debtor to his creditor, on property owned by the debtor, who is not a warehouseman, for the sole purpose of securing such creditor, is void as against other creditors, where the property remains in the possession of such debtor. *Gibson v. Chillicothe Bank*, 11 Ohio St. 311, distinguished.

Judgment affirmed.

Samuel A. Van Fossen v. The State. Error to the Court of Common Pleas of Muskingum County.

BOYNTON, C. J. *Held:*

A decree of divorce under a statute of another State authorizing a divorce between husband and wife, neither of whom is domiciled therein, is of no force or effect in this State where the parties were domiciled.

Judgment affirmed.

24. *Cleveland & Mahoning Railroad Co. v. Himrod Furnace Co.* Error to the Court of Common Pleas of Cuyahoga County. Reserved in the District Court. Judgment reversed for error in allowing damages for dockage, &c., at docks other than that of A. & G. W. R. R. Co., unless a remittitur be entered reducing the judgment to \$49,832.62. If such remittitur be entered judgment will be affirmed for said sum. To be reported hereafter.

250. *James W. Delay v. Jehiel Felton et al.* Error to the District Court of Vinton County. Settled and dismissed.

786. *Kate E. Adams v. City of Columbus et al.* Error—Reserved in the District Court of Franklin County. Plaintiffs ordered to file printed briefs in this cause and causes Nos. 787, 788, 789, 790, 791, and 792 by December 1, 1881.

MOTION DOCKET.

No. 198. *Lewis M. Dayton et al., Executors, &c., v. N. P. Bartlett, Administrator, &c.* Motion to dismiss No. 293 on the General Docket for want of printed record. Motion overruled and leave granted to file printed record by December 1, 1881.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Nov. 9, 1881.]

1210. *J. H. Devereux et al. v. Hugh J. Jewett, Trustee, &c. et al.* Error to the Court of Common Pleas of Franklin County. Harrison, Olds & Marsh for plaintiffs; George L. Converse and Ferguson & Perry for defendants.

1211. *The Pittsburgh, Cincinnati and St. Louis Railway Company v. Eliza Cahill, administratrix.* Error to the District Court of Muskingum County.

1212. *The Pennsylvania Company v. Eugene Peterman.* Error to the District Court of Stark County. Rush Taggart for plaintiff; J. Amerman and J. J. Parker for defendant.

1213. *W. B. Campbell v. Henry Rousheim.* Error to the District Court of Brown County. D. W. C. Loudon for plaintiff; White, McKnight & White for defendant.

1214. *Eden Park, Walnut Hills and Avondale Railroad Company v. The Walnut Hills and Cincinnati Street Railroad Company et al.* Error to the District Court of Hamilton County. Ramsey, Matthews & Ramsey, and Thomas McDougal for plaintiff; Paxton & Warrington and Stallo, Kittredge & Shoemaker for defendant.

1215. *Robert J. Clements v. Ferdinand Doerner.* Error to the District Court of Cuyahoga County. J. K. & A. C. Hard for plaintiff; Peter Zucker and L. A. Willson for defendant.

1216. *Spencer McCann v. Mary J. Keys et al.* Error to the District Court of Muskingum County. Train & Durban for plaintiff.

Ohio Law Journal.

COLUMBUS, OHIO, : : : NOV. 17, 1881.

OBITUARY.

FRANK F. RANKIN.

After a brief illness, Frank F. Rankin died, Tuesday evening last, in this city, in the 26th year of his age. The subject of this sad notice, though known comparatively little to the profession outside the city of Columbus, was well known to the members of the bar in this county, as one of the sturdiest types of manhood ever exhibited in our midst.

We knew him a few years ago, an awkward country boy, so to speak, as he emerged from school, and took his place among the toilers in this busy world. He was a hard worker in the press room of the Ohio State Journal, where one of the editors of this paper was at that time doing service as a member of the reportorial staff of that paper. While he labored physically, he busied his mind, and filled in his every spare moment in acquiring a knowledge of books, which soon resulted in his being placed among the local news gatherers and writers of the Journal. While thus employed he continued his studies further and entered earnestly upon the study of the law. Last spring he was admitted to the bar, by the Supreme Court, standing high in the large class examined.

He was always a hard worker, always willing to lay his hand to whatever of good or profit he could find to do. He was honest and upright in all his dealings, and though a young man, had established himself staunchly in the confidence of the public.

He was frugal, economical, strictly temperate and regular in his habits, and manly in his religious principles. His short life, had in it, examples of emulation for the young men of today, and shows forth how much can be made by a careful and considerate use of time and strength given us here, for the battle of life. He was a noble specimen of energetic, honest manhood, and as we have admired his character, so do we mourn among his many friends, his early taking away.

Vol. 36 O. S. Reports has been at last completed by the printers, Banks & Bros., New York. The work is not up to the standard of excellence achieved by Messrs. Robt. Clarke & Co., while the contract was with them.

SUPREME COURT OF OHIO.

THE STATE EX REL., ATTORNEY GENERAL,
v.
JOHN W. MERCHANT ET AL.

November 8, 1881.

1. The right of the stockholders of a railway corporation to elect directors, is not affected by the sale of the property of the corporation by a receiver, under an order of court.

2. At a meeting of the stockholders, called for the election of directors, under section 3248, Rev. Stats., the right to choose the inspectors or judges of election, is vested in the stockholders; and the directors, against the will of the stockholders present, cannot appoint such inspectors.

Judgment of ouster against the defendants, and the directors elected at the election held under the authority of the stockholders, adjudged entitled to the office under such election.

Quo Warranto.

This is an information in the nature of quo warranto brought by the Attorney General against John W. Merchant and others, defendants, to oust them from the office of directors of The Columbus, Washington and Cincinnati Railway Company, a corporation organized under the laws of this State.

The petition sets forth the names of Thomas Smith and others, who claim to be entitled to the office of directors of said corporation and avers their right thereto.

It appears that the defendants were the directors of said corporation elected at the annual election held on the first Monday of January, 1879. On the first Monday of January, 1880, being the day for the annual election, no election was held; and that afterwards due notice was given in accordance with the statute by certain stockholders of the holding of an election for directors at a time and place specified. A meeting of stockholders was held in accordance with the notice. After organizing, the stockholders present, elected inspectors, or judges of the election, and also a clerk, who were all duly sworn. Whereupon the judges declared the election open and proceeded to receive the votes of stockholders. The election thus held resulted in the election of Smith and others, who are averred in the petition, as above stated, to be entitled to the office of directors of said corporation.

There were present at the meeting a quorum of the directors elected in 1879, who claimed the right to hold the election. Before the inspectors, or judges and clerk elected as above stated, were sworn, John W. Merchant, President of the board of directors, appointed from the members of the board, judges to hold the election, he also appointed a clerk and then declared the election open. At this election stockholders voted. The election thus held by the directors resulted in the election of the defendants. Both sets of directors took the oath of office.

It does not appear from the pleadings that any election has since been held.

It also appears that on the 9th of September,

1878, the court of common pleas, on the application of certain bondholders, appointed a receiver, who took possession of the assets of the company and subsequently, under an order of said court, the railroad of said company with its equipments and appurtenances was sold as an entirety.

Nesbitt & Martin for plaintiffs.

Charles Darlington for defendants.

WHITE, J.

The appointment of the receiver, and the sale of the property of the railway company have no bearing on the question before us. These facts did not work a dissolution of the corporation, and while the corporation continued it was competent for the stockholders to elect directors.

The only other question for determination is, whether the election held by the directors or that held by the stockholders is the valid one.

The statute on the subject is as follows: "Unless the regulations of the corporation otherwise provide, an annual election for trustees or directors shall be held on the first Monday in January of each year; if the trustees or directors are, for any cause, not elected at the annual meeting, or other meeting called for that purpose, they may be chosen at a members' or stockholders' meeting, at which all the members or stockholders are present in person or by proxies, or at a meeting called by the trustees or directors, or any two members or stockholders, notice of which has been given, in writing, to each stockholder, or by publication in some newspaper printed in the county where the corporation is situate, or has its principal office, for ten days; and trustees and directors shall continue in office until their successors are elected and qualified." Rev. St. § 3246.

There were no regulations of the corporation governing the election of directors. The claim of the Attorney General is that at the meeting of the stockholders for the election of directors, the right of choosing the inspectors or judges of the election was vested in the stockholders; while the defendants claim that the right was vested in the directors. We think the position of the Attorney General is correct; and that the directors in assuming that function against the will of the stockholders present, mistook their duty and exercised a function not warranted by law. The election, therefore, which they undertook to hold is invalid. The election held under the authority of the stockholders was legal; and the persons declared elected at the election last named, having been duly qualified, were entitled, under the statute, to hold the office until their successors were elected and qualified. The pleadings show no subsequent election.

Judgment of ouster rendered against the defendants; and the persons chosen as directors at the election last mentioned adjudged entitled to the office under such election.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

ELIAS THORNE

v.

FIRST NATIONAL BANK OF WILMINGTON.

November 8, 1881.

An instrument in the form of a warehouse receipt, executed by a debtor to his creditor, on property owned by the debtor, who is not a warehouseman, for the sole purpose of securing such creditor, is void as against other creditors, where the property remains in the possession of such debtor. *Gibson v. Chillicothe Bank*, 11 Ohio St. 311, distinguished.

Error to the Court of Common Pleas of Clinton County. Reserved in the District Court.

In 1876, Elias Thorne brought suit in the Court of Common Pleas of Clinton County, against the First National Bank of Wilmington. The cause was submitted to a jury, on the petition, answer and evidence, and a verdict was found in favor of the defendant, and, after a motion for a new trial had been overruled, judgment was rendered on the verdict. All the evidence is set forth in a bill of exceptions, which is made part of the record. The material facts are as follows:

In 1871, S. M. Thorne, J. C. McMillan and J. H. McMillan formed a partnership and engaged in the business of slaughtering hogs and packing pork, under the firm name of Thorne, McMillan & Co. The business was carried on at Wilmington, Clinton county, and the partnership continued until the spring of 1874.

On November 6, 1873, Elias Thorne loaned to the firm \$2,600, on December 3, 1873, \$2,600, and on December 22, 1873, \$8,000, to be used generally in their business. The first two loans were at sixty days and at the expiration of that time they were extended, and the last loan was at ninety days. It was understood, when these loans were made, that security for their repayment was to be given, and at the time the last sum was advanced, H. T. Davis became surety for that sum. As further security for the repayment of that sum, the firm executed and delivered to Elias Thorne, at the time the money was advanced, a certain instrument in writing, and on December 25, 1873, the firm executed and delivered to him another instrument as security for the payment of the sums first mentioned, which instruments are in the following form:

"Wilmington, Dec. 22nd, 1873.

"We have received from Elias Thorne, of Skaneateles, New York, on storage, six thousand and hams in process of curing, which we hold subject to his order, and to be delivered to him free of expense of curing, on presentation of this warehouse receipt, on which we have received an advance of (\$8,000) eight thousand dollars; said hams stored in our porkhouse, Wilmington, Clinton County, Ohio, in casks marked E. Thorne."

"THORNE, McMILLAN & Co."

"Attest: H. T. DAVIS."

"Wilmington, O., Dec. 25th, 1873.

"Received of Elias Thorne five thousand dollars (\$5,000), as an advance on fifty thousand pounds of hams, now in process of curing in our porkhouse, for which he holds two notes "twenty-six hundred dollars (\$2,600) each."

"THORNE, McMILLAN & Co."

S. M. Thorne, after testifying that the sum of \$8,000, was advanced to the firm by Elias Thorne, on December 22, 1873, at a bank in Wilmington, says: "We came out of the bank, and Elias Thorne and myself went directly to the porkhouse, and I delivered the hams to him." [Witness was told to state what was said and done, and he proceeded as follows:] "I pointed out the hams to him; they were on the first floor, and mostly in hogsheads, some in the front room, but most in the back room—100 hogsheads—something over 100,000 pounds; I pointed to the hams, and said to him, 'I make you a delivery of the hams;' I also said, 'I will mark them for you;' he replied, 'That is all right;' I marked some that afternoon and some more the next day, by marking on the hogsheads, in chalk, plainly, 'E. Thorne.' When I said I would mark them, and he replied 'All right,' he added that I could do so at some other time, as he was in a hurry. In the afternoon of that day I marked some of them by writing the name 'E. Thorne' with chalk, and the next day I marked some more the same way, in all a half dozen or a dozen of the outside casks. The casks or hogsheads were all in the main part of the building. All the hams embraced or mentioned in the warehouse receipt were separate and apart from all other hams and meats in the house. A few days afterward, and while he was still here in Wilmington, we gave him another receipt to cover what we called the five-thousand-dollar loan; it was the receipt which has been offered in evidence, bearing date, Dec. 25th, 1873."

In February and March, 1874, without the knowledge or consent of Elias Thorne, the hams were shipped by the firm to Pittsburgh, where they were sold, and the proceeds of the sale, \$7,025.32, were applied by the firm in satisfaction of money due from the firm to that bank. This debt to the bank existed at the time such warehouse receipts were given. The suit was brought to recover the money so received by the bank.

The firm was never engaged in the business of warehousemen.

The court charged the jury, among other things, that if it appeared that the papers called warehouse receipts were in fact given by the firm to Elias Thorne "simply by way of security for a loan of money made by him to them, and not otherwise," then that the bank, which was a creditor of the firm at the time, was not liable.

L. Pope and J. S. Savage, for plaintiff in error.

Hoadly, Johnson & Colston, W. B. Telfair, and M. Hayes, for defendant in error.

OKEY, J.

The verdict was right unless the charge was wrong. But the charge, as we shall see, was right. Clearly the hams were not held by Elias Thorne in pledge, for, to constitute a pledge, he must have received and retained possession of the property. Nor was this, as against the bank, a valid deposit by a bailor with a bailee, for the reason hereinafter stated. Nor, as to the bank, which does not claim under the instruments executed to Elias Thorne, were such instruments warehouse receipts, for the firm was not engaged in the business of warehousemen, and the property belonged exclusively to the firm.

There is nothing in the statutory provisions relating to warehouse receipts, in force in 1873 and 1874, which affects the question before us. 1 S. & C. 420-424; S. & S. 93, 94. In several states, however, and in England, the rights, duties and liabilities of persons with respect to such instruments, are regulated by statutes, and in construing those statutes, the courts have considered the general subject. See *Cochran v. Ripy*, 13 Bush, 495; *Sexton v. Graham*, 53 Iowa, 181; *Price v. Wisconsin*, etc. Ins. Co. 43 Wis. 267; *Sewing Machine Co. v. Heller*, 44 Wis. 265; *Insurance Co. v. Kiger*, 103 U. S. 352; *Harris v. Bradley*, 2 Dillon, 284; *McCabe v. McKinstry*, 5 Dillon, 509; *Yenni v. McNamee*, 45 N. Y. 614; *Adams v. Merchants National Bank*, 19 Am. L. Reg. N. S. 714; *Greenleaf v. Dows*, 12 Reporter, 545; *Johnson v. Roe*, 10 Central L. Jour. 328. See, also, *Edwards on Bail*, (2nd ed.) §§ 332, 333; 10 Cen. L. Jour. 421; *Daniel on Neg. Inst.* §§ 1713, 1714; *Benj. on Sales*, (2 Am. ed.) §§ 780, 781. The conclusion already stated, that the instruments in question are not warehouse receipts, was reached after a careful examination of these authorities.

The claim that, in so holding, the decision is inconsistent with *Gibson v. Chillicothe Bank*, 11 Ohio St. 311, is not well founded. In that case, as in this, the instruments claimed to be warehouse receipts were not such receipts, strictly speaking. But in that case it was claimed that *Gibson, Stockwell & Co.*, to whom the receipts were given, were the owners of the property, and evidence was offered to show such ownership. The true ground of that decision appears in the statement of the judge delivering the opinion, that the papers called warehouse receipts were given, "not to secure an indebtedness merely, * * * but on the contrary, that the plaintiffs, under a previous and subsisting contract, furnished and advanced the money for the purchase of the property, upon an agreement on the part of *Bartlett & May* to so pass to them the title thereto." The court below charged the jury that the receipts did not even tend to prove such ownership of *Gibson, Stockwell & Co.*, and in so charging clearly erred, and for that error the judgment was properly reversed. To that extent we fully recognize the case as authority. But in this case it is not pretended there was any agreement whereby Elias Thorne became owner of the property. Indeed, there was no

proposition on the part of the firm to give, nor on the part of Elias Thorne to receive, a lien upon or interest in the property now claimed to have been embraced by the receipts, until all the property had been purchased by the firm nor until such property had come to its possession, and, for aught that appears, payment therefor had been made.

The instruments not being as to third person's warehouse receipts, the question arises as to the interest Elias Thorne acquired in the property. We do not doubt that as to persons other than creditors of the firm, and subsequent purchasers and mortgagees in good faith, Elias Thorne acquired an interest in the hams. But the only interest he attempted to acquire was under those receipts, the acts called a delivery of the property having reference solely to perfecting his title under such instrument. The bank, however, was then a creditor of the firm. The statute in force at the time provided, "That every mortgage or conveyance, intended to operate as a mortgage of goods and chattels, hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be forthwith deposited as directed in the succeeding section of this act." 1 S. & C. 475; Rev. Stat. § 4150. In this case the place of deposit would have been the office of the township clerk. 3 Sayler, 2219.

Here was an attempt to create, by the instruments in question, a lien on the hams to secure the debt of Elias Thorne. There was no change of possession, much less a continued change of possession. There was no execution of a chattel mortgage on the property, much less a filing of such mortgage with the township clerk. The attempt was, therefore, within the inhibitions, and in conflict with the policy of the above section, and the lien so attempted to be secured was, as to the bank, a creditor of the firm, simply a nullity.

Another view of this case may be taken, equally satisfactory to all of us, and leading to the same result. Whether the bank, at the time it received the proceeds of the sale of the hams in payment of its debt, had knowledge that Elias Thorne held the alleged warehouse receipts, is a question concerning which the evidence is in direct conflict. The verdict, in view of the charge to the jury, is virtually a finding that the bank did not have such notice. The finding of a jury can only be disturbed when it appears from the evidence to be clearly wrong (*McGatrick v. Wason*, 4 Ohio St. 566, 575), and that we cannot say is shown by the evidence in this case. Elias Thorne having permitted the firm to retain the possession and control of the property, the firm sold it and paid the proceeds of the sale to the bank, which was one of its creditors, and, we are bound to say, ignorant of

the fact that Elias Thorne had or claimed any lien upon or interest in the property. That a bailor has, ordinarily, a remedy against a person who has converted his property to his own use, is not denied. *Roland v. Gundy*, 5 Ohio 202; *Knapp v. Hobbs*, 50 New Hamp. 476. But where a bailee, in violation of his trust, sells the property of the bailor, and applies the proceeds in payment of his (the bailee's) debt to a third person, who was ignorant of the breach of trust, the bailor cannot maintain, against such third person, an action for money had and received. *Kingsley v. Plimpton*, 17 Pick. 159; *Thatcher v. Pray*, 113 Mass. 291; *Culver v. Bigelow*, 43 Vt. 249; *Foster v. Green*, 7 Hurl. & Nor. 881. In this view the verdict is right, even if the instruments relied on should be regarded strictly as warehouse receipts.

Judgment affirmed.

[This case will appear in 37 O. S.]

Digest of Decisions.

NEW YORK.

(Court of Appeals.)

WINCH v. THE MUTUAL BENEFIT ICE CO. Decided October 4, 1881.

Contract—Damages—Interest.—By the terms of a contract, defendant agreed to deliver and plaintiff to take a certain quantity of ice per year for five years at a stipulated price; one dollar being fixed as liquidated damages for each ton which either party respectively might fail to deliver or take. In 1873, at defendant's request, plaintiff omitted to take the specified quantity. In an action for a breach, *Held*, That the request operated as a release of plaintiff's agreement; that defendant was not entitled to recover the liquidated damages for such omission nor justified in failing to deliver the contract quantity for the following year, and that plaintiff was entitled to recover for the amount defendant so failed to deliver.

The contract provided for yearly settlements. *Held*, That plaintiff was entitled to interest on the damages of each year from the end of the year.

KECK ET AL. v. WERDER. GRAY, ASSIGNEE. Decided October 4, 1881.

Appeal—Bankruptcy.—An order denying a motion to set aside a valid judgment for a mere irregularity or for fraud or collusion is discretionary and not appealable to the Court of Appeals.

If an assignee in bankruptcy does not seek to come in and defend an action while the same is pending, but through laches or even excusable neglect omits to apply until after judgment has been rendered and executed, it is discretionary with this court, on a summary application, to

set aside the proceedings for the purpose of letting him in.

WALKER v. SPENCER. Decided October 4, 1881.

Agency—Accounting—Appeal.—Defendants, under a contract, whereby they were made sales agents and part owners with plaintiff of a medicinal compound, manufactured and sold said compound for eight years, kept the books under their control, and made payments to plaintiff, but refused his demand for an accounting and settlement. It appeared that they had on hand money liable to distribution and a large quantity of goods ready for sale and delivery. *Held*, That plaintiff was entitled to an account; that defendants were chargeable with the proceeds of sale as soon as received by their agents or employees, and are not discharged from such liability by the subsequent embezzlement of funds.

An appeal from an order denying a new trial can be entertained under § 190.

An appeal from an interlocutory judgment may be taken to General Term, but it cannot be reviewed by appeal to the Court of Appeals until after final judgment is rendered.

GILLETTE ET AL. v. BATE ET AL. Decided October 4, 1881.

Creditor's Bill.—A patentee cannot defeat a creditor's bill by proving want of utility or novelty of the patent, and his fraudulent assignee stands in the same position.

One J., who was insolvent, on the sale of a part of a patent, transferred the rest to his wife. A company was afterwards organized, to which the patent was transferred in exchange for stock. *Held*, That the stock when issued to J.'s wife, could be reached by his creditors, and that the appreciation in its value by the corporate management accrued to the creditors.

DAVENPORT, REC'R, v. MCCHESENEY. Decided October 4, 1881.

Chattel Mortgage.—Where the mortgagee under a chattel mortgage assumes to sell all the mortgaged property, and afterwards takes possession and claims the property under this title, the mortgagor may elect to treat the entire sale as valid, and hold the mortgagee liable for the proceeds of the sale in excess of the mortgaged debt.

An accommodation note is not a liability within the strict term of the mortgage.

Where such note was made after the foreclosure sale, and was not paid until after supplementary proceedings had been commenced against the mortgagor, *Held*, That the security was extinguished by the sale, and that the judgment creditors of the mortgagor had acquired an equitable lien on the surplus fund.

THE PEOPLE EX REL. CLAUSON, v. THE NEW-BURGH AND SHAWANGUNK PLANK ROAD CO. ET AL. Decided October 4, 1881.

Plank Roads—Constitutional Law.—The charter of a plank road company expired April 18, 1880. Prior to that time it took proceedings to reorganize, under Chap. 611, Laws of 1875. *Held*, That if it could reorganize under that act it would still be a plank road company, and its charter would only be extended under Chap. 135, Laws of 1876; that it could not take any benefit under the act of 1880, as it was adopted after the proceedings for reorganization were taken, and because at that time the company was not an existing corporation, but that the proceedings were validated by Chap. 551, Laws of 1881.

Chap. 135, Laws of 1876, is not a local act, either as it was originally passed, or as amended in 1879.

Where a plank road company owns the fee of a portion of its road, a provision in an injunction restraining it from exercising its corporate franchise, which prohibits it from interfering with free travel on said road, is improper; the public has no right to unobstructed travel over that portion, the fee of which is in the company.

SCOTT v. THE MIDDLETOWN, UNIONVILLE AND WATER GAP R. R. Co. Decided Oct. 4, 1881.

Contract—Evidence.—Defendant's president, without authority from the Board of Directors, bought certain rails and spikes. They were used in an extension of defendant's track without dissent by the Board. *Held*, That, defendant having received and used the property for the purpose for which it was designed, it amounted to an adoption and ratification of the act of the president, even though the directors did not know the terms of the contract.

Defendant's secretary, on cross-examination, testified that, so far as he knew, defendant did not procure any iron to lay the extension. *Held*, That it was proper to try to refresh the witness' memory by showing him his own letters, written to the vendor about the time of the delivery, and which showed that he knew the iron was to be furnished to defendant, and that the letters were admissible as part of the *res gestæ*.

POUCHER v. BLANCHARD ET AL. Decided Oct. 4, 1881.

Agency—Attorneys.—Defendants, having a claim against a vessel for towage, left it in the hands of a firm of attorneys for collection, without instructions as to the manner of doing so. The attorneys proceeded under Chapter 482, Laws of 1862, which had not then been declared unconstitutional, and seized and sold the vessel and paid the proceeds to defendants. In an action for con-

version; *Held*, That the attorneys were defendants' agents, and in determining by what method they would collect the claim acted within the scope of their authority; that under the law as held at that time they could not be charged with incompetency or carelessness, and that for their mistake in the remedy defendants were liable.

JORDAN v. VAN EPPS ET AL. Decided May 31, 1881.

Bar—Partition—Dower.—In an action for partition, plaintiff, as the wife of one of the owners of the premises, was made a party defendant and served with process, but failed to appear. A decree of sale was made, the premises sold, and defendant became the purchaser. In an action to recover dower, *Held*, That as plaintiff failed to set up her rights or make any defense in the partition suit she could not claim in this action that she was unlawfully deprived of her dower right, and that the fact that plaintiff's husband died before the decree of sale could not affect defendant's rights.

A judgment in an action of partition is binding upon all the parties, and an error of the Court in determining whether the case is a proper one for a partition or sale cannot be questioned collaterally. The judgment is final and conclusive as to all matters incident to or essentially connected with the subject matter of the litigation which the parties might have litigated and had determined, either as matter of claim or of defense.

BAXTER v. BELL, IMPLD. Decided Oct. 4, 1881.

Foreclosure—Evidence.—Certain partnership real estate stood in the names of A, B and C; D having entered the firm after its purchase. On selling out his interest, A conveyed his share in the real estate to B and C, and took back a mortgage from them. B and C took the conveyance for the benefit of themselves and D, and the firm continued under the name of B, B & Co. In an action to foreclose, defendants offered in evidence a composition agreement signed by all the creditors of the firm of B, B & Co., including A, and also offered to prove declarations by A when he signed that the amount opposite his name was for a deficiency on his mortgage; that the firm had fully performed as to all creditors except A, and that a tender of performance was made to A, which he refused. This proof was rejected. *Held*, Error; that the evidence offered was admissible, and if admitted would have created a bar to any judgment for deficiency.

The MUTUAL LIFE INS. CO. of N. Y. v. HOYT, IMPLD. Decided October 4, 1881.

Foreclosure—Taxes—Practice.—In an action to foreclose a mortgage a witness testified positively that plaintiff paid certain amounts for taxes and assessments, but, on cross-examination, testified that he did not pay

those amounts, was not present when they were paid, and had no personal knowledge about them. The court found that defendant failed to pay taxes and assessments, and that plaintiff paid them. *Held*, Error, that the testimony does not prove the existence of taxes and assessments, but only payments on account of what may or may not be valid taxes and assessments.

VIRGINIA.

(Supreme Court of Appeals.)

TYLER v. TOMS ET AL. December 17, 1880.

1. Where two commissioners are appointed to sell land, and they are required before proceeding to act, to execute a bond with security conditioned according to law, each executes a separate bond with the other as his surety. *Held*: This is not a compliance with the decree; and that, though the bonds were given in court.

2. The sale of the land is to be on a credit, and bonds to be taken for the several deferred payments; and the title to be retained. The sale is made, the bonds taken, and the sale reported to the court; but there does not appear to have been a decree confirming the sale. As the bonds fall due, the purchaser pays the money to one of the commissioners; and he deposits it, as collected, in a bank to his credit, as commissioner, not using it or mingling it with his own; but it is lost by the failure of the bank. *Held*:

I. The purchaser is bound to pay the purchase money of the land again.

II. The commissioner having received the money without authority to receive it, is liable to the purchaser for the amount so paid.

III. The commissioner may be proceeded against by rule in the cause, and an execution of *fiat facias* may be sued out against him for the money.

PETERSBURG SAVINGS AND INSURANCE CO. v. LUMSDEN. February 17, 1881.

1. By the statute, Code of 1860, ch. 57 §§ 21, 22, 24, a lien is created upon the stock of each stockholder, in a joint stock company for the balance due upon his shares of stock; and if assigned, which may be done with the consent of the company, the lien is not discharged, but the stock in the hands of the assignee for the balance which was owing by the assignor upon the shares when the assignment was made, or which may thereafter become due, may be sold by the company for such arrearages, just as it might have been sold if it had not been assigned.

2. The charter of a joint stock company provides for the payment of five dollars per share when the subscription is made, and the residue thereafter as may be required by the president and directors. And the corporation is made subject to the provisions of the Code, so far as they are applicable and not inconsistent with the charter. And by a by-law of the company each stockholder is required to give his note, satisfac-

torily endorsed, for his unpaid stock. A stockholder giving his note with an endorser for his unpaid stock, the unpaid note is still a lien on the stock, and the endorser is entitled to have the stock applied to his relief.

3. The statute gives no lien to the company on the stock of the stockholder for any other debts due from him, than that which is due for unpaid stock; and though a by-law of a company provides that the interest of any stockholder shall be liable for the payment of all debts which may be due from him to the company; and if there is more than one debt, the board of directors may prescribe which one or more of said debts shall be paid out of the stock of the debtor, this by-law can only apply to the interest of the debtor stockholder in the stock after the lien of the stock debt is satisfied. And the endorser on the stock note is entitled to have the stock applied to pay that debt in preference to the other debts due from his principal to the company.

LIBERTY SAVINGS BANK v. THOMAS CAMPBELL ET AL. July Term, 1881.

1. The rule is now settled that the authority of each partner to dispose of partnership property extends only to the business and transactions of the partnership, and any disposition of the property beyond such purposes, without the consent of the co-partner, is an excess of authority.

2. One partner cannot pledge or sell the partnership property, in payment of his individual debts, without the consent of his co-partner; and the title is not divested by such pledge or sale in favor of a separate creditor, even though the latter may not know it was partnership property.

3. J. and C. were partners and the owners of two bonds executed to them on a sale of land; the bonds were in the custody of J., who, to raise money for his private purposes, pledged them by an attempted assignment along with other securities to the Liberty Savings Bank, where he procured certain notes to be discounted and used the proceeds, sometimes for his own benefit and sometimes for the benefit of the firm. The Bank afterwards made collection on the bonds, and ultimately became the owner of them by purchase at public auction, where they had been sold as forfeited collateral. In a controversy between C. (representing the firm) and the Bank respecting the bonds and their proceeds, *Held*: That the Bank is equitably entitled to set off against C.'s claim the amount of money which the Bank paid out on J.'s checks, and which actually went to the discharge of the partnership debts, and it makes no difference that the money so checked upon by J. was the proceeds of notes discounted by the Bank for his private accommodation.

4. A commissioner's report not excepted to in the court below, cannot be impeached before the appellate court in relation to matters which might be affected by extraneous testimony.

REYNOLDS v. LEE. July Term, 1881.

The second clause of the will of J. F. was as follows: "I will and bequeath unto my beloved wife, Polly Frans, during her natural life or widowhood, all my estate, both real and personal, to hold or dispose of at her discretion. She is to dispose of the same equally with my children, as she has to spare, each one to account for what he receives, except my daughter Nancy, and it is my wish that she receive, after the death of my wife, the sum of one hundred dollars in money, exclusive of her proportional part of the estate; I also want my daughter, Susannah Lee, to hold what she has received heretofore and account for it." *Held*:

1. The widow took only an estate for her life in all the estate of her husband, both real and personal, subject, however, to his debts by the first clause of the will, remainder to his children equally, with a power to the widow to make equal advances to them (except to his daughter Nancy) in her life time of such of the property as she can spare; and the children are severally to account for what they have received, in the final division and distribution of the estate, after the death of the widow.

2. Notwithstanding the bequest is to the widow in express terms during her natural life, yet if by other clauses of the will she had been permitted to use and *dispose of the subject absolutely at her pleasure*, or if so much as may remain *undisposed of at her death*, had been given over at her decease (which implies a power of unqualified disposition), the devisee would be construed by a necessary implication of the testator's intention to take a fee-simple. *May v. Joynes et al.* 20 Gratt., 692; *The Missionary Society of the M. E. Church v. Calvert's adm'r et al.* 32 Gratt. 357. But the will in this case does not invest the widow with power to dispose of the property as she pleased, but only to dispose of such of it as she can spare, to his children equally, who are to account for what they receive as a part received in advance of what they would be entitled in remainder after the determination of the life estate.

3. It not appearing from the record that the appellant relied upon the statute of limitations by plea or in his answer, or in any form, by way of defence to a claim for rents, in the court below, it is too late to raise the objection in the appellate court.

SNOUFFER v. HANSBROUGH. July Term, 1881.

1. While it is true that directing an issue to be tried by a jury, is a matter of discretion by a court of equity, it is equally true that such discretion must be exercised upon sound principles of reason and justice. Both the awarding an issue when it ought not to be awarded, and the failure or refusal to direct an issue, when it ought to be directed, are subjects of review in an appellate court, and that court must judge whether the court below in either case, has soundly or unsoundly exercised its discretion.

2. An issue of chancery is directed in doubtful matters of fact, to satisfy the conscience of the court. It is not adopted as a substitute for omitted evidence, but in cases of doubt and difficulty produced by a conflict of testimony.

3. It may be affirmed as a general rule that where the evidence is conflicting and contradictory as to the *material* facts; where the right determination of the case depends upon the *credibility* of witnesses; where giving equal weight to the testimony on both sides, the chancellor cannot arrive at a definite and satisfactory conclusion, it is his right and his duty to award an issue to be tried by a jury, before whom the witnesses may be brought, where they can be seen and heard, where they can be subjected to public cross-examination and their credibility tested by their demeanor, capacity and sources of information.

4. An issue out of chancery is peculiarly proper in cases of alleged fraud, where the decision rests on the *credit* to be given to the witnesses.

CALIFORNIA.

(*Supreme Court.*)

PEOPLE v. O'NEIL. Filed October 8, 1881.

Alibi—Instruction.—Defendant was charged with robbery committed in San Francisco, and relied upon the defense of *alibi*. The Court instructed the jury: "As to the proof of an *alibi*, it is a proof admitted by the law; and in fact, when it is established, it is the most conclusive and logical of all defenses. If it is established to the entire satisfaction of the jury in this case that the defendant was in Waverly Place at the time this alleged robbery was committed, at that very instant, it follows necessarily and emphatically that he could not at that same instant have been on California street." *Held*, such instruction was not a direction that the proof in support of the defense of *alibi* must be made to the entire satisfaction of the jury.

Reasonable Doubt—Robbery.—A reasonable doubt of a defendant's presence at the time and place of an alleged robbery raises a reasonable doubt of his commission of the offense.

Instruction not Specific.—If a charge is not sufficiently specific, it is the duty of counsel to ask the Court to make it more specific.

PEOPLE v. LOPEZ. Filed October 8, 1881.

Empanelling of Trial Jury—Criminal Law.—The Court has power to order additional jurors summoned when the case requires it. (Sections 226, 227, C. C. P.)

Instructions.—A defendant cannot object to instructions given in the exact language requested by him.

Evidence in Case of Larceny.—Evidence tending to prove that other horses disappeared from the neighborhood at the same time as the mare and colt, with the larceny of which defendant was

charged, and tending to show that the others were found, with the mare and colt, in the possession of defendant, is admissible against a defendant charged with the larceny of such mare and colt.

THE PEOPLE OF THE STATE OF CALIFORNIA v. JOHN W. CAMPBELL. Filed September 20, 1881.

Constitutional Law—Information—Indictment.—No constitutional right of a defendant is impaired by changing the mode of procedure from indictment to information, and prosecuting him for a crime committed prior to the adoption of the present Constitution, by information provided for by the laws passed under such Constitution.

Jeopardy—Dismissal of Indictment.—The dismissal of an indictment is no bar to a subsequent indictment.

Evidence of Threats.—Threats, though communicated to defendant: *Held*, properly ruled out, there being nothing in the circumstances of the case attending the killing establishing a case of justifiable homicide, or that defendant was in imminent danger.

Technical Error.—A defendant must affirmatively show that a substantial right has been injuriously affected by an alleged error.

IN THE MATTER OF WILLIAM HOLLIS ON HABEAS CORPUS. Filed September 29, 1881.

Habeas Corpus—Void judgment Reviewable.—The question of the authority of a court to render a judgment of imprisonment in proceedings which are absolutely void, is reviewable upon *habeas corpus*.

Contempt—Imposition of Fine is a Judgment.—The adjudication of a contempt is an adjudication of a specific criminal offense; and the imposition of a fine therefor is a judgment in a criminal case.

Insolvency—Jurisdiction Over Adverse Claimants.—The insolvency court has no jurisdiction to order one not an officer of the court, nor a party to the insolvency proceedings, claiming adversely to the insolvent debtor, whether fraudulently or otherwise, to deliver over property to the receiver in insolvency. In such case the remedy primarily is by direct action at the suit of the receiver against the alleged fraudulent grantee or adverse holder.

Verification—Parties.—The verification of a person to an answer in the case does not make such person verifying, a party to the action. So held, where the President of an insolvent corporation-defendant verified the answer as required by law, that such President did not become a party-defendant to the action, but that the corporation was the sole defendant.

Order to Show Cause Does not Make a Person Defendant.—A mere order to show cause why a party should not be punished for contempt does not make such person a party to the proceedings in which the order is made.

ALABAMA.

(Supreme Court.)

ANN E. GEORGE ET AL. v. JANE A. GEORGE ET AL.

Bill of Review—Statute of non-claim.—A husband uses moneys belonging to the separate estate of his wife in the improvement of city property. The wife filed a bill to have a lien declared in her favor on this property, and the Chancellor decreed her an interest in the same. On a bill of review filed by the minor heirs it was held that the wife was merely asserting her fiduciary interest in the land, and that her claim was not a nominal demand, or such other interest as is included in the statute of non-claim, and might be enforced after eighteen months from the date of letters of administration.

Notice to guardian ad litem.—Where a guardian ad litem puts in the customary answer, and makes proper defenses, notice to him of his appointment is not indispensable.

MARY C. CONLEY ET AL. v. ALABAMA GOLD LIFE INSURANCE COMPANY.

Chancery Practice—Bill of interpleader.—To be entitled to relief under a bill of interpleader, the party thus seeking it must show that he stands not only indifferent between the claimants, that he is without interest in the controversy to be waged between them, but it must also appear that he is a mere innocent stockholder or depository, and that by no act of his has he contributed to the cause of the conflicting claims, and of double vexation.

JAMES McDONALD v. THE BATTLE HOUSE COMPANY.

Partnership.—The Battle House Company rented a hotel to one Mason, and was to receive as rents one-tenth of the gross receipts of the hotel.

Held, That such participation in the gross profits did not constitute this company a partner with Mason.

WM. OTIS v. McMILLAN & SONS.

Conveyances—Rights of lessee where reversion is sold.—Where the reversion is sold, either by the original owner or at execution or mortgage sale, subsequent to the lease, the rights of the lessee are not affected, as the purchaser is only the successor to the rights of the lessor; nor does such change of ownership authorize the lessee to annul his contract of lease. Where the tenant at execution sale buys the reversion, the payment of rent is merely suspended until after the time for redemption expires. When the time for redemption has expired, the lessee, as such purchaser, acquires a title in fee, which carries with it the rents, etc.

PETER MOORE v. THE STATE OF ALABAMA.

1. *Inferior Courts.*—Constitutional authority of Legislature to establish.—The constitutional author-

ity of the Legislature to establish courts of inferior jurisdiction in any county, city, or district of the State cannot be questioned.

2. *Idem.*—And where such jurisdiction has been conferred upon the Probate Judge of a county concurrent with the Circuit Court, it cannot be objected that he is not authorized by the act in question to preside in such inferior court.

3. *Idem.*—Constitutionality of act conferring jurisdiction, and legality of grand jury organized under.—Such act is plainly constitutional, and the grand jury which found the indictment was legally organized under its provisions.

4. *Witness.*—Incompetent to discredit by particular independent facts.—A witness may be discredited by attacking his general reputation or character, but particular independent facts cannot be introduced for this purpose.

Held, That a question asking one witness for the impeachment of another as to the latter's being indicted for burglary and seeking to evade arrest, was properly excluded from the jury on direct examination, but greater latitude is allowed on cross-examination.

5. *Witness.* Character of when assailed or otherwise impeached a question for jury.—Where the character of a witness is assailed or impeached as being unworthy of credit, it is entirely within the province of the jury, as the exclusive judge of the facts.

MARYLAND.

(Court of Appeals.)

GILL v. CARMINE. January, 1881.

Contracts—Of Trustee—Liability.—A trustee is liable upon any contract he may make for the benefit of the estate, although he makes the contract as trustee, under an order of court, for the sole benefit of the estate and with actual notice to the other party. Only by express agreement on the part of the other party to look to the trustee fund alone for payment can the trustee be relieved from personal liability.

NEW JERSEY.

(Court of Errors and Appeals.)

A. sold a farm to B., misstating the number of acres, taking a mortgage for a part of the consideration. B. sold, making a similar misstatement, to C., who assumed payment of the mortgage. On foreclosure by A., *Held,* that C. could not deduct his damages from the mortgage; that to authorize such deduction, the mortgagee and owner must be privies in contract.

Judge William Kennon, of St. Clairsville, O., who died of paralysis at the age of 84, spent half a century in important public labors.

MICHIGAN.

(Supreme Court.)

GOODSELL v. SEELEY. Filed October 12, 1881.

Exceptions to Charge of Jury.—When exceptions are taken indiscriminately to every paragraph of the charge, they will be treated the same as if one general exception had been taken to the whole charge; and if any part of the charge is correct the exceptions will be overruled.

After the jury had retired they returned into court and informed the judge that they had not agreed, but stood "eleven to one and divided on \$200." He thereupon told them "if that is the only difference it would be better for the county and the parties on both sides that one or both sides yield so as to come together. It would be unfortunate for all to have a disagreement when the difference is so small." *Held*, to be error.

LINN v. GILMAN. Filed October 12 1881.

Agent's Expenses.—Defendant was employed as traveling man for plaintiffs for a number of years at a certain salary and traveling expenses to be paid. His accounts for traveling expenses were rendered at the close of each trip and allowed without objection to their correctness. Subsequently the employment was terminated, and afterwards action was brought by plaintiffs for the recovery of certain amounts claimed to have been fraudulently added by the defendant to his accounts for traveling expenses, by which he had been allowed credit for moneys as expended which in fact never were expended.

Upon the trial plaintiffs offered evidence of traveling men and others as to what traveling expenses of the route traveled by defendant were during the times he was engaged upon that route, and that such expenses were less than those charged by defendant; (2) estimates of witnesses as to cost of road fare, hotel bills, 'bus fare, livery bills, and other expenses on the route traveled by defendant, showing that expenses charged by him could not have been legitimately incurred; (3) that defendant had, during the years he was in plaintiffs' employ, earned \$12,000; that he had supported his family and also bought property to the amount of \$14,000, and had no other source of revenue,—all of which offers were excluded and verdict ordered for defendant. *Held*, that the rulings were correct.

KIEFER v. GERMAN-AMERICAN SEMINARY. Filed October 12, 1881.

Grant of Land to Educational Corporation.—A grant of land was made by the state to an educational corporation, and by the grant it was provided that the proceeds should be devoted exclusively to the erection of buildings for the use of the corporation. A bond was given by individuals to the state to secure the performance of this provision. By consolidation with another corporation the donee secured all the buildings it needed, and afterwards appropriated all the proceeds of the lands to its general needs. The sureties in the bond to the state then filed a bill to restrain the misappropriation. *Held*, that the bill should not be sustained.

The design of the donation was to secure to the donee buildings for its corporate use, and if the corporation secured all it needed, it would be immaterial that they were secured by the donation of friends, or by the use of moneys before in its possession instead of using the precise moneys received on sale of the lands. And it is equally immaterial that the buildings were obtained without the use of any moneys.

The state intended its donation to be beneficial, and it is not to be presumed that it would present to the donee under any circumstances the alternative of expending the donation in useless buildings or forfeiting it. The state had a particular benefit in view, and is interested only in seeing that that benefit is secured.

MARCOIT v. MARQ., HOUGHT. & ONT. R. CO. Filed October 12, 1881.

Rulings—Railroads—Injuries.—Rulings cannot be made on errors on questions of fact, or on questions of law that have not been decided against the plaintiff in error, and if

such rulings were made, they could not bind the action of the jury on a new trial.

Negligence in injuries inflicted by railroad trains upon individuals is a question that depends upon the circumstances and can rarely, if ever, be absolutely defined as matter of law; and in determining whether there has been negligence all the circumstances must be considered together.

The care required of all persons doing business involving danger, must be such as is reasonably calculated to avoid serious consequences therefrom, so that if there are such consequences they may be considered as accidental only.

In an action for negligent injury negligence which did not contribute to the injury need not be regarded.

A case cannot be taken from the jury unless it is plain upon the strongest showing made by any of the witnesses, that there is no cause of action.

A case must be absolutely free from conflict before it can be taken from the jury.

Courts cannot assume that witnesses whom they most credit will be followed by the jury, and no matter how dissatisfied a court may be with the conclusions of the jury, it cannot usurp their functions.

The lookout upon the locomotive must be as efficient as the circumstances require, and especially so when the chances of access to the track are greater than usual.

It is a question for the jury whether a special train can be run without negligence at such a speed as to make it difficult to check its speed within a reasonable time and distance.

A railroad train ran over a child on the track. It appeared that there were visitors in the cab of the engine, and that the presence of strangers without leave was prohibited by rule. *Held*, that it was proper for the jury to consider the fact with other circumstances as bearing on the question of negligence.

The statutory regulations concerning the fencing of railways apply north of Saginaw river except that the statutory penalty for neglecting to build them is not in force. Act 96 of 1875.

WARWICK v. ELSEY. Filed October 12, 1881.

Damages—Declarations—Secondary Evidence.—In an action for damages for an alleged indecent assault the plaintiff testified that the assault complained of took place in her room. *Held*, that it was error to refuse to allow a witness sworn in her behalf to testify as to whether he had ever seen defendant in her room.

Certain hearsay evidence properly stricken out.

In such an action evidence of unchaste language and solicitations by defendant to plaintiff prior to the attempt complained of is admissible.

Declaration of one conspirator in regard to the conspiracy may be admissible against a co-conspirator although not made in his presence, but not until after the introduction of evidence showing the conspiracy.

To authorize secondary evidence of a witness' testimony by showing what he had testified to upon a former trial, it is incumbent upon the party offering such evidence to show that he has exhausted the best sources of information reasonably accessible to him to procure the witness himself or his evidence. While a large discretion must be left with a trial judge as to the style and general manner of his charge, the judge in this case perhaps went too far in stating the case on behalf of the defendant.

HEISTER v. LOOMIS. Filed October 12, 1881.

Criminal Law.—In an action for assault and battery the plaintiff averred that by reason of the battery he was greatly burdened and prevented from doing and performing his work and business and looking after and attending his necessary affairs and avocations. *Held*, that this allegation did not justify the reception of evidence that plaintiff, being a farmer, and having hay ungathered at the time of the injury, was troubled in getting help to save it and in consequence it was seriously injured.

It is not competent as an excuse for battery to prove that several days before it was committed plaintiff had used insulting language to defendant's wife, or had threatened the defendant.

The court in such case having properly excluded evidence of previous threats by the plaintiff, permitted the plaintiff to prove the negative—that at the time in question the plaintiff made no threats. *Held*, to be error, and well calculated to prejudice the defence with the jury.

COMAN AND ANOTHER v. THOMPSON. Filed October 12, 1881.

Legal Title to Land.—A transfer of the legal title of land without reservation passes the title to crops growing thereon at the time of such transfer, and a subsequent chattel mortgage of such crops by such grantor, who still remains in possession, will pass no rights as against one claiming under the grantee in the conveyance of the land.

LAMB v. JEFFREY AND ANOTHER. Filed October 12, 1881.

Mortgage.—One who files a bill to redeem from a mortgage must show by his bill that he has an interest in the equity of redemption.

But if he avers that he owns a certain mortgage which is a subsequent mortgage to that of complainant, and his bill is not demurred to, it may be sustained notwithstanding he fails to set forth such facts as show that his mortgage and that from which he seeks to redeem are mortgages in the same chain of title. Especially is this so when it appears that defendant has recognized his right to make payment, by receiving interest from him.

Costs must commonly be paid by the complainant when he files his bill to redeem, but they may be imposed upon the defendant if he unreasonably refuses to receive the money when it is tendered to him.

WEINMEISTER v. INGERSOLL.—Filed October 12, 1881.

Easement.—W. and I. owned a building in severalty, W. having the north half and I. the south. The building had a common entrance and stair-way to the second floor, but above the first story a partition wall divided it. W. having leased his portion to I. for a term of years cut doors, for the lessee's convenience, through the partition and ran a stair-way from the second to the third floor on his own premises. The only hall-way on the second floor was on I.'s side. When the lease expired I. plastered up the doors in the partition wall and refused to allow W. to use the hall-way on his side. There was no satisfactory showing that the arrangements made for the lessee's convenience were intended to survive the lease or that I. had estopped himself from objecting to W.'s use of his part of the premises thereafter. *Held*, that W. could not claim any easement in I.'s premises after the termination of the lease, and could not maintain an injunction bill to restrain I. from obstructing his use of the hall-way.

PATRICK v. HOWARD.—Filed October 12, 1881.

Administration.—It is suggested that there ought to be some statutory limitation upon the time allowed for taking out letters of administration.

On appeal from commissioners on an estate, the probate claim need not be put in the form of a declaration; the case cannot be enlarged, and no claim can be heard that was not passed on by the commissioners.

The circuit courts have no original jurisdiction over claims against estates.

On probate appeals from commissioners on claims against estates, it is the safer practice to confine the jury's attention to the items on which testimony is offered as they are introduced during the trial, rather than to permit pleadings to be read to them which include items that they cannot properly consider.

In prosecuting a claim against the estate of a son for articles converted by him while living on the estate of his father, a daughter of the plaintiff's intestate after stating that the mother "stayed right there at her own home" was asked "and [the son] took the whole thing and ran it and carried it on?" *Held*, that this question called for the deductions of an interested witness upon a subordinate issue which belonged to the jury, and that it led too far and its allowance was erroneous.

Where individual witnesses, in testifying to the reasons of several joint parties for delaying in the presentation of state claims, speak in the plural number, their testimony, so far as it involves merely the knowledge or opinions of others than themselves is hearsay.

Testimony that the family of an intestate continued to occupy the estate together, and one of the heirs paid the household expenses, does not warrant the submission of the question whether he claimed to own the property.

A witness who has denied making a statement properly identified cannot contradict impeaching testimony on this point by showing that he had no such idea as is expressed by such statement.

The amount of hay raised on a farm in a given year cannot be proved by showing the average acreage of grass land and its yield in other years.

The delivery of a deed is presumed from its having been executed, acknowledged and recorded and from possession by the grantee or beneficiary under it, unless there are facts against the presumption.

CHAPMAN v. COLBY.—Filed October 12, 1881.

Contract—Corporation.—In an action based on a contract made with a corporation chartered in another state, the court cannot take judicial notice of the laws under which the corporation was chartered, and they must be proved and its charter produced before the rights and liabilities of the parties can be determined.

Waiver of conditions of a contract is a question for the jury.

Failure to prove corporate character may be obviated by proof of dealings which recognize it, but such proof is not enough where the question is as to the existence of powers and privileges which are not necessarily implied by corporate existence but depend on the franchises actually conferred.

A foreign private corporation cannot establish a liability upon any act done by it as a consideration for a benefit to it, if it is an act which domestic corporations cannot do without authority of law (Comp. Laws, § 6543) such as its removal from place to place, or the establishment of branches, or the acquisition of real estate, or going into business outside of the scope of its granted powers.

In Michigan, courts take judicial notice of all statutes, and when they know under what law a corporation exists, they know its powers and the limitations thereon; but they can know nothing of the purport of a foreign law until it is proven.

In an action based on a subscription and an agreement for a substituted payment, the transactions relating thereto and the consideration and agreements for the subscription must be construed together in determining the obligations of the respective parties.

A declaration on the common counts can be amended on a new trial by the insertion of special counts.

JOHNSON v. LEE.—Filed October 12, 1881.

Homestead.—Notice to a homesteader of proceedings against him under the homestead act covers such matters only as are alleged in the complaint, and under such notice these are the only questions that can be passed on by the register of the United States land-office, or, on appeal from him by the commissioner of the general land-office and the secretary of the interior. And if a final ruling on a point not raised by the complaint shall have the effect of ousting the homesteader, he can file a bill in equity to compel a subsequent patentee, with notice, to convey to him.

PORTER v. NOYES.—Filed October 12, 1881.

Leases.—Leases of coal mining lands, for terms of 25 years with the privilege of renewal, were given in 1857 and 1858, but the lessees did not go upon the lands and ceased to pay rent in 1871, apparently thinking that the mines were not worth working. The owners regarding the leases as abandoned, no payments having been tendered for several years, did not bring suit for the rent but let the lands again to other persons at a higher rental. *Held*, on an injunction bill brought by the assignees of the original lease to establish their own title and restrain the later lessees from mining the lands, (1) that the owners had a right to regard the abandonment as final and to relet the premises; and (2) that the owners were necessary parties to a bill intended to destroy securities under which they were entitled to increased revenues, and should have been impleaded as defendants.

Equity does not favor the purchase of litigious titles or of stale demands revived after they were naturally regarded as abandoned.

JOHNSTON v. DIEBROW.—Filed October 12, 1881.

Impeaching questions—Damages.—Impeaching questions as to a conversation with a particular person at a place named cannot be put unless the time and substance of the alleged conversation are also pointed out.

Defendant in an action for criminal conversation introduced testimony to show that plaintiff's wife was subject to fits of stupor and insensibility and was afflicted with hysteria, and showed by experts that persons so troubled were subject to hallucinations and unreliable. *Held*, proper for the plaintiff to show by the evidence of relations and their neighbors that they were well acquainted with his wife and frequently at his house and never saw or heard of her having "unconscious spells."

Where an action is brought for criminal conversation and only one act is charged, the plaintiff is not confined to a specific date, but may show that it was committed at any time within the period of the statute of limitations; and this, too, whether the defendant does or does not rely on an *alibi*.

Exemplary damages for injury to the plaintiff's feelings are recoverable in an action brought by a husband for criminal conversation with his wife; and they need not be susceptible of proof at a money standard, but may be fixed by the jury in view of all the facts.

The right of a husband to recover exemplary damages for injury to his feelings because of an act of criminal conversation committed by defendant with his wife, grows out of the marital relation and is independent of the wife's right to recover damages on the same ground in an action brought by herself for the same wrong.

No more costs than damages, if the damages do not exceed \$50, are recoverable in an action brought by a husband for an assault upon his wife whereby defendant compelled her to an act of criminal conversation. Comp. Laws, § 7888.

PENNSYLVANIA.

(Supreme Court.)

APPEAL OF THE ZOOLOGICAL SOCIETY.

Corporation—Contract.—A charitable corporation has no more right to alter or vary, for its own advantage, the stipulations of a contract founded upon a valuable consideration, than a private individual would have under like circumstances.

Nor can it alter the plain construction of such a contract, to the disadvantage of the other parties thereto.

The equity powers of the Common Pleas cannot be invoked to enforce specific performance of a contract when full compensation can be had for the breach thereof in a suit at law. A contract for the issue of tickets of admission, which are procurable at a fixed price, is such a contract.

THE POTTSVILLE MUTUAL FIRE INS. CO. v. HORAN.

Insurance.—A policy of insurance warranted the representations made in the application, and conditioned that it should specify the contiguous buildings; defendant afterwards erected on the adjoining premises a frame house, but gave no notice to the insurance company.

Held, That he could not recover on his policy.

FRANKFORD AND BRISTOL TURNPIKE ROAD CO'S APPEAL.

Injunction.—A court of equity will not direct a mandatory injunction to issue against a turnpike company to compel it to take down a fence in front of complainant's property where there is not a clear case of present damage to complainant, and where his predecessors have acquiesced in its existence, and there is an adequate remedy at law.

GRAY'S APPEAL.

Judgment.—An auditor has the power to determine the amount still unpaid on a judgment. If a person states to another the amount due to him on a judgment, and thereby induces the other party to take a subsequent se-

curity, he is thereby estopped from denying such statements. Where the conduct of a party has been such as to induce action by another he shall be precluded from afterwards asserting, to the prejudice of that other, the contrary of that of which his conduct has induced the belief.

FIRST NAT. BANK OF CARBONDALE v. COWPERTHWAIT.

Parol agreement.—In the case of a parol agreement by one to purchase land for another at a sheriff's sale, followed by a breach of the contract to convey on the part of the purchaser, it has been uniformly held, that no resulting trust arises, unless the promisee had furnished the purchase money in whole or in part, or had, at the time of the contract, an actual estate or interest in the land, or a *bona fide* claim thereto. The wife of the owner of property has not such an estate or interest by reason of her possible dower interest.

WISCONSIN.

(Supreme Court.)

LE SAULNIER v. LOEW AND OTHERS.—Filed October 18, 1881.

Delivery of Deed—Fraud.—1. The legal effect of the execution and delivery of a deed, for the purpose of passing the title, is not changed by the facts that one object of the transaction was to save the expense and trouble of administering the grantor's estate after his death, and that the grantee, who was the grantor's wife, placed the deed, after delivery, where her husband equally with herself could have access to it.

2. The evidence of fraud in the execution of a conveyance, upon which it will be cancelled, must be clear and convincing; and none such is found in this case.

3. The defendant grantee is not estopped from now asserting her ownership of the land, although, being present when her husband executed a note now held by the plaintiff and endorsed thereon a statement that he owned the land, she did not then assert her ownership; the evidence satisfying the court that neither husband nor wife understood the real character of such note and indorsement.

JAMES v. CUTLER.—Filed October 18, 1881.

Deed—Reforming same.—1. In an action for reformation of a deed, averments that the description of the premises in the deed "was erroneous, and in fact does not describe the premises purchased by the plaintiff and intended to be conveyed by the defendant, and that such erroneous description was inserted in such deed, and the deed accepted by the plaintiff by mistake," with further averments stating precisely in what respect the description was erroneous, *held*, sufficient allegations that defendant sold and plaintiff purchased the lands alleged to have been omitted from the description in the deed, especially after an answer denying that plaintiff purchased or defendant sold any land other than that described in the conveyance.

2. Findings of fact by the trial court will not be reversed on appeal, except upon a clear preponderance of evidence.

3. In the absence of fraud a conveyance will not be reformed without proof that, previous to its execution, there was a mutual agreement for the sale and purchase of a parcel of land different from that described in the deed, and that the misdescription was inserted by mistake.

4. Where reformation is sought on the ground of mutual mistake only, and it appears that the sale was as alleged in the complaint, and that the deed was accepted through a mistake on plaintiff's part, and the evidence received without objection also shows clearly and satisfactorily that the misdescription was inserted *either through mistake or fraud* on defendant's part, the deed should be reformed.

ILLINOIS.

(Supreme Court.)

CARRIE KINGMAN v. JAMES G. HIGGINS ET AL.—Opinion by WALKER, J., affirming. Filed Sept. 30, 1881.

1. *Witness—Of party suing as heir.*—Parties suing to have a cloud upon their homestead removed which they claim as heirs of their deceased father, are competent witnesses to testify in their own behalf as to circumstances and facts which occurred after the death of the father of the defendants, who also claim as heirs.

2. *Chancery—Only proper evidence considered.*—On the hearing of a bill in equity the court will consider only such evidence as is competent.

3. *Homestead—Can be released only in the statutory mode.*—The homestead right can be released or waived only by a writing to that effect by the householder, acknowledged, as required by the statute, or by the surrender or abandonment of possession to a purchaser under a conveyance. It cannot be waived by any parol declaration not carried into effect.

4. *Same—Sufficiency of proof.*—On the claim of a homestead by the minor heirs of a deceased person the proof showed that the deceased occupied the premises up to the time of his death by residence thereon, that he was married, had children and that he lived with them on the premises as the head of the family, and that the land was not of the value of \$1,000: *Held*, that the proof was clearly sufficient and brought the case within every requirement of the statute.

5. *Same—Of minor heirs, how extinguished.*—When a homestead estate devolves upon the minor heirs of a deceased owner, it can be extinguished only by an order of court directing a release thereof.

6. *Same—Widow cannot release after her abandonment.*—After a widow has permanently abandoned the homestead of her deceased husband and the children of her husband by a former wife, taking her own infant child with her, she will have no interest in the estate of homestead to release, and any attempt on her part to do so, will be void as to the minor step-children remaining upon the premises, and they will succeed to such estate.

7. *Same—Right of widow to abandon or release children's right.*—The widow of a deceased householder being the natural guardian of her own infant child, may bind it by her abandonment or release of the homestead, but being under no obligation to support the minor children of her husband by a previous wife, and having no power or control over them, she has no power whatever to release or transfer their rights in the homestead.

8. *Practice—Evidence taken good against a new party.*—There is no error in admitting evidence already taken to be read in evidence on the hearing against one made a party after the same was taken. In such case if the new party is denied the privilege of cross-examining the witness whose testimony had been taken on a proper application, there would be error.

This was a bill in chancery, filed by John G. Higgins in his lifetime, against Carrie Kingman, to set aside a sale of his homestead, under execution, in which Carrie Kingman claims title.

The evidence in this case shows that in 1875, a judgment was rendered against John G. Higgins, father of appellees, in favor of the Johnson estate, and that the indebtedness was for goods and merchandise, and not for anything preferred by the statute as a lien upon the homestead rights of the said John G. Higgins, or his widow or heirs.

The evidence further shows, that John G. Higgins owned and lived upon, as a homestead, with his family, the lands in question, long prior to that time (1875), commencing about the year 1870, and so continued until his death, and that he died leaving Jennie Higgins, his second wife, and step-mother of the appellees, and Lou L. Higgins, a child of Jennie Higgins', and half sister of the appellees, all residing on the land as a homestead.

It further appeared that from the date of the judgment

up to the filing of the bill, and since, the premises was not worth more than \$1,000; and that shortly after the death of John G. Higgins, his widow took Lou L. Higgins, her infant daughter, and permanently removed to her father's, in a foreign county, abandoning the land and her step-children, the appellees.

After the death of John G. Higgins, his children, William W. Higgins, Mary L. Higgins, John T. Higgins and Robert G. Higgins, by a former wife, became parties to the bill as complainants. Afterwards, Jennie Higgins, the widow, and Lou L. Higgins, her infant child, were made defendants; shortly before the hearing, Jennie Higgins, the widow, conveyed all her interest in the premises to Carrie Kingman, releasing any claim she had to the homestead. It also appeared that Carrie Kingman denied her title or claim under the sale, under the judgment through her deceased father, Dudley K. Johnson, she being his only heir.

JOHN SEELEY WALLACE v. CYTHERA M. RAFFLEY ET AL.—Opinion by MULKEY, J., affirming. Filed Sept. 30, 1881.

1. *Specific performance—Contract must be satisfactorily proved.*—Courts of equity will not decree the specific performance of an alleged contract when there is a reasonable doubt as to its existence, or in other words, where it has not been clearly and satisfactorily established.

2. *Same—Of agreement to adopt a child.*—An agreement by the father of an illegitimate child with its mother to take, support and educate such child, and adopt it and make it his heir, is sufficiently specific to be specifically enforced. It requires the father to adopt such measures as will secure to the child the same interest in his estate it would have on his dying intestate, if a legitimate child.

3. *Contract—Consideration of agreement to adopt a child.*—The liability of a father to support his illegitimate child, and the surrender of its custody on the part of the mother at his request, afford a sufficient consideration for an agreement on his part to adopt and make the child his lawful heir, and such a contract is valid and binding.

4. *Statute of Frauds—What performance takes out of.*—When a contract of a mother of an illegitimate child to give its custody and keeping to the father, and surrender all claims on him and the child, has been fully kept and performed by the mother, it will take the agreement of the father to adopt the child or his heir out of the Statute of Frauds.

5. *Contract—Construed as to giving share of estate to son.*—A covenant by a party with his divorced wife for a good consideration, that any property he might have at his decease, should be so divided that his son by the divorced wife would receive the portion or share he would by the laws of descent, will not affect a previous contract by such party to adopt his illegitimate child, then being treated as a member of his family. Its object is to bind the party not to discriminate against his son in the distribution of his property by devising it to his other child or children.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Nov. 15, 1881.]

1217. *The City of Youngstown v. James E. Montgomery.* Error to the District court of Montgomery County. Volney Rogers for plaintiff; T. W. Sanderson for defendant.

1218. *James M. Wolf v. A. M. Thorne.* Error to the District Court of Clinton County. M. Hayes for plaintiff; LeRoy Pope and A. M. Williams for defendant.

1219. *Moses B. Tracewell et al. v. Edward D. Dodge.* Error to the District Court of Vinton County. E. A. Bratton for plaintiff.

1220. *James C. Elliott et al. v. S. B. Berry, Auditor, et al.* Error to the District Court of Butler County. S. Z. Gard, Israel Williams and McKemy & Andrews for plaintiffs; Thomas Millikin for defendants.

SUPREME COURT OF OHIO.

JANUARY TERM, 1881.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

TUESDAY, November 15, 1881.

GENERAL DOCKET.

No. 139. Jacob Taylor v. Joshua Binford et al. Error to the Court of Common Pleas of Mahoning County. Reserved in the District Court.

LONGWORTH, J.

C., being the owner of land, conveyed it, for a valuable consideration, to a Township Board of Education, its successors and assigns, for the use of school purposes only. Afterward the board, wishing to change the school-house site, sold the land at public outcry to T. C., having conveyed to B., entered—under his permission—as upon condition broken. In an action of trespass by T. against C—

Held, that the entry of C. was unlawful, the sale to T. not being in violation of the terms of the grant to the Board of Education by which the estate was expressly made assignable.

Judgment reversed and judgment in favor of plaintiff in error for \$50, and interest from May 21, 1877, and costs.

142. Cincinnati, Sandusky & Cleveland Railroad Company v. Eliza Cook. Error to the District Court of Logan County.

McILVAINE, J. *Held*:

1. The act of April 20, 1874 (71 Ohio L. 148), giving a penalty of \$150.00, to the party aggrieved by a railroad corporation for overcharging for the transportation of passengers or property, is not in contravention of the constitution.

2. A petition under said act against a corporation for demanding and receiving excessive fare in the sale of a passenger ticket to a person desirous of travelling on its road between the points named on the ticket, is not bad, on demurrer, for want of an averment that the purchaser of the ticket was, in fact, transported on the ticket for which excessive fare was exacted.

3. A petition under said act is not bad for want of an averment that the excessive fare was paid by the plaintiff in the due course of business, although judgment was not rendered thereon until after said act was repealed by the act of March 30, 1875 (72 Ohio L. 143), saving only pending actions and causes of action under the repealed statute, where the excessive fare was paid in the due course of business and not for the purpose of obtaining the penalty.

4. Several causes of action for penalties under said act may be united in the same petition.

5. Where such action stands for judgment on the petition, it is not error to refuse to empanel a jury to assess damages.

Judgment affirmed.

113. The Cleveland and Mahoning Railroad Co v. The Himrod Furnace Company. Error. Reserved in the District Court of Cuyahoga County.

JOHNSON, J.

The board of directors of a railroad company, who are authorized by the act of incorporation to construct, maintain and operate a railroad, and, for that purpose, are empowered to make contracts and "to do all acts needful to carry into effect the objects for which it was created," including the right to demand and receive for the transportation of passengers and property a compensation not exceeding a maximum rate, may, within that limit, make contracts for transportation for a fixed future period. Such a contract, if otherwise valid, is not *ultra vires* and void, for the reason that it binds the corporation for a fixed period of time.

Judgment affirmed.

No. 1192. The State ex rel. The Trustees of the Montgomery County Childrens' Home. v. The Trustees of the Ohio Soldiers' and Sailors' Orphans' Home. Mandamus.

WHITE, J. *Held*:

1. A statute declaratory of a former one has the same effect upon such former Act, in the absence of intervening rights, as if the declaratory Act had been embodied in the original Act at the time of its passage.

2. The legislative approval in the Act of April 19, 1881 (78 O. L. 309), of the construction given by the defendants, to the Act of April 13, 1880 (77 O. L. 187), requires the Ten Thousand dollars appropriated by the last named Act, to be distributed according to such construction, where no contracts had been previously entered into by the defendants for a different distribution of the fund.

Peremptory writ refused.

143. Pennsylvania Company v. John Wentz. Error to the District Court of Crawford County.

OKEY, C. J.

1. The power of a railroad company to make and enforce a regulation that one or more designated passenger trains on its road shall not stop at specified stations or places, is subject to legislative control; and by the act of 1852, § 26, as amended in 1867 (S. & S. 114; Rev. Stats. § 3320), such power is taken away as to municipal corporations containing three thousand inhabitants.

2. Where one traveling on a passenger train of a railroad company, presents to the conductor a ticket issued by such company, authorizing him to ride from one to another designated station, "only on such trains as stop regularly at both stations," and is ejected from the cars by such conductor between such stations, it will be no defense to the passenger's action against the company for damages, that by the regulations of the company, the train on which he was traveling did not stop at the latter station, if the ticket was issued since the passage of the act of 1867, and such station was in a municipal corporation which, at the time the ticket was issued, had a population of three thousand inhabitants, and the passenger believed when he took passage on the train that it stopped at both stations.

Judgment affirmed.

134. Isaac McKessin, Guardian &c., et al. v. Noah M. Runyan. Error to the District Court of Marion County. Judgment affirmed as to the removal of Runyan as administrator, and reversed as to the dismissal of the appeal from the judgment on exceptions to the amount, and costs divided between the parties.

145. William Marshall v. Hardin Harris. Error to the District Court of Shelby County. Dismissed for want of preparation.

146. Comfort A. Adams et al. v. Miles N. Gardner. Error to the District Court of Ashtabula County. Judgment reversed for error in dismissing the appeal, and cause remanded for trial. There will be no further report.

150. John Straiton v. L. E. Mulford. Error to the District Court of Lucas County. Dismissed for want of preparation.

MOTION DOCKET.

No. 195. Gertrude March et al. v. Aaron Albert. Motion for an order fixing the amount of stay undertaking in cause No. 1206 on the General Docket. Motion overruled.

196. Barnabas Jackson et al. v. Commissioners of Lorain County. Motion for a restraining order in cause No. 1007. on the General Docket. Motion overruled.

199. John Henwood v. Wilson Critchfield et al. Motion to dismiss cause No. 775 on the General Docket for want of printed record, and counter-motion for leave to file printed record. Motion to dismiss overruled and leave to file printed record within 90 days from November 3, 1881.

Mary C. Bierce et al. v. William W. Bierce et al. Motion in No. 1143 on the General Docket for the approval of publication of notice to defendants in error, of the filing of petition in error. Motion granted.

Cincinnati etc. Railroad Co. v. Eliza Cook. Motion in No. 142 on the General Docket to dispense with a printed record. Motion granted.

Ohio Law Journal.

COLUMBUS, OHIO, : : : NOV. 24, 1881.

"INFAMOUS."

We cannot believe that any enlightened patriot ever for a moment really hoped for a conviction of the Star Route Thieves. It would never do to have the bars of a prison stand between the social good fellowship of those who used stolen "soap" and those who by the use of stolen "soap" are high in office and prosperity. But the doubts and misgivings of the patriots never apprehended so flimsy a pretext of escape as the recent decision of Judge Cox, by which the thieves aforesaid were set free. There are many ways by which the administration of justice is hindered and criminals protected by those sworn to punish them. One popular method is for the Prosecuting Attorney to go before the grand jury and labor against the finding of a bill of indictment, saying that the law is unconstitutional or that a civil case is pending, that will decide the same point; or by any other convenient falsehood to prevent an indictment.

Where parties are once upon their trial by information or indictment, however, it becomes more difficult to free them, and some stranger methods are often resorted to.

Judge Cox, in this case, rescinded the order allowing an information to be filed, and quashed the information that had been presented. This set free the thieves who had stolen three million dollars of the Nation's money. In so doing he served the scoundrels a good turn, no doubt, but he did so at the expense of justice, and right and law.

Proceedings for the punishment of crime have been instituted by information constantly since crime was first punished by human laws. And from the information, the trial and the sentence of death passed by Judah upon Tamar, down to the trial of the Seventy Rioters in the 3d year of the reign of William and Mary the legality of the proceeding was never questioned, so far as history beareth witness. At the latter time, however, a fruitless attempt was made to set free a lot of cut-throats by having the proceeding by information pronounced illegal and an infringement of human rights. It was true then, as now, that "no rogue e'er felt the halter draw, with good opinion of the law."

Sir B. Shower, who made a special study of that course of proceeding in criminal cases, says of its legality (Show. Rep. 106): "As to information, in general, it has been incontestibly proved that this method of proceeding is no way contrariant to any Fundamental Rule of Law, but agreeable to it. It was the constant usage and had the approbation of the Judges and Lawyers of all Ages, and in all reigns." The indictment by a grand inquest or a grand jury was an outgrowth of the abuse of the prosecution for crime by information; but was never intended to supercede that entirely legal and consistent method until a date comparatively recent. Under a government such as ours the proceeding is as safe and as thoroughly consonant with the liberty of the people as the proceeding by indictment. It makes not one jot of difference to the accused, or upon the final verdict, whether he comes before the court upon an information, or an indictment. In neither case can he make a defence until put upon his trial, and the trial itself is precisely the same in both cases.

The Constitutional provision before Judge Cox, and which he evidently does not understand, is:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury. (Const. U. S. Amend. Art 5.)

Where no statutory provision intervenes we may well concede that terms made use of in the Constitution of the United States find their truest interpretation in the usages of the Common Law. In Pennsylvania there is a Constitutional provision which prohibits information where an indictment lies. In New Hampshire and Vermont no information is allowed where the punishment is death or confinement at hard labor. In Connecticut the limitation is to crimes punishable by death or imprisonment for life. In New York and Virginia the distinction is only as to infamous crimes. The same rule has long been adopted as the governing principle in proceedings in the United States Courts. This brings us to the question presented to Judge Cox—Whether conspiring to defraud the government is an "infamous" crime? Not infamous as the word is generally used, but in the meaning of the Constitutional limitation.

We had supposed this question well settled by the various unreversed rulings of 1 Gall. C. C. 3, where illegal exportation of goods was held not

infamous: In *U. S. v. Maxwell*, 21 Int. Rev. Rec. 148, where violation of Revenue laws was held not infamous. In 1 Mass., C. C. 482, where smuggling was held not an infamous offence. In the Rev. Stat. U. S. 1022, where offences against the elective franchise are declared punishable upon information by the District Attorney. If more than this were needed to open the eyes of Judge Cox, as to the law of infamous crimes, he might have found enlightenment in the following:

U. S. v. Isham, 17 Wall. 496.

U. S. v. Bozzo, 18 Wall. 125.

U. S. v. Waller, 1 Sawyer, C. C. 701.

U. S. v. Ebert, 1 Cent. L. J. 205.

Stockwell v. U. S., 13 Wall. 531.

U. S. v. Maxwell, 3 Dill. 275, and

U. S. v. Block, 15 Bank, Reg. 325,

in all of which, the distinction is made that crimes are not infamous under the Constitutional limitation relating to proceeding by information unless the person accused is *precluded from appearing as a witness in his own behalf*. It has been further held that great severity of punishment, by imprisonment for a long term, does not render a crime "infamous."

R. v. Hickman, 1 Mood., C. C. 34.

People v. Whipple, 9 Cow. 707.

Com. v. Shaver, 3 W. & S. 338.

The offence charged against the Star Route Thieves, viz: "Conspiracy to defraud the government," not having been by statute declared to disqualify the party charged, as a witness in his own behalf, it is very plain that it is not an offence held as infamous by the Constitution. This leads inevitably to the conclusion that the offence charged against the quartette of scoundrelly Star Routers is *not* an infamous one, under the law, but that the ruling of the Judge is emphatically so.

NEW BOOKS.

ODDITIES OF THE LAW. BY FRANKLIN FISKE HEARD, Esq. 12 mo; Cloth, \$1.50. Boston: Soule & Bugbee, 1881. Mr. Heard has a largely developed sense of the humors of the laws and lawyers. He has published one or two volumes something similar to the one before us, and like this one, entertaining and scholarly. He delights in picking up quaint and funny things said and done by lawyers, clients and judges, and preserving them for the entertainment of whom it may concern. The minds of some men become so thoroughly soaked in law

that it becomes a painful thing to bring any thing to mind, except it be in or of the law. To these this book will be golden. To those who love fun for its own sake, the book will be welcome, for there are many excellent jokes therein; and the enemies of the profession will take delight in knowing what asses lawyers and judges sometimes make of themselves.

AMERICAN DECISIONS. VOL. XXIX. This volume contains one hundred and fifty cases in full, selected, because of their value to the present practice, and in consonance with and governing the rulings of courts upon important questions of law, from the various State Reports of 1835 and 1836. To nearly all of these cases is appended notes, and collections of cases wherein the rulings of the principal case have been followed since that time. In nearly all cases these notes and collections amount in fact to a brief of the authorities upon the question in hand. We notice among other valuable papers the following:

Right of Stoppage in Transitu,	384-396
Trespass by one Co-Tenant against Another,	483-6
Overvaluation of Injured Property,	616-22
Cruelty as Ground for Divorce,	674-80

The **AMERICAN DECISIONS** have become indispensable in the practice of all great lawyers, and the constant companion of judges, in dealing with all questions of great importance. *Bancroft & Co., San Francisco, Cal.*

A PROMINENT law firm in Cincinnati continues to address communications to "Arnold Green, Clerk of the Supreme Court." No longer ago than Tuesday of this week, did Mr. Crowell, the present Clerk, receive a communication so addressed. It is needless to say that this firm is the only prominent law firm in Cincinnati not on the **LAW JOURNAL** subscription list. Did the members of this firm receive and read weekly the **LAW JOURNAL**, they would long since have known that Mr. Richard J. Fanning succeeded Mr. Arnold Green, as Clerk of the Supreme Court, and that Mr. Dwight Crowell succeeded Mr. Fanning, and is now the accommodating and efficient Clerk.

THE Supreme Court of the United States, Monday last, decided that the capital of a bank invested in foreign countries, can be taxed in the United States.

THE Supreme Court is now considering cases on the General Docket up to and including number 182. This week's report shows a long list of cases disposed of, which gives evidence of hard work on the part of the Judges. The Court will adjourn for the term shortly before the holidays. The Clerk of the Court, Mr. Crowell, and his Deputy, Mr. Frazier, will require at least three weeks in which to prepare their new dockets, make up a new calendar, and get everything in readiness to open the new term January 3d, 1882. The Judges will not adjourn this term until they find they are crowding the time absolutely needed by the Clerk.

SUPREME COURT OF OHIO.

THE CLEVELAND & MAHONING RAILROAD CO.
v.
THE HIMROD FURNACE COMPANY.

November 15, 1881.

The board of directors of a railroad company, who are authorized by the act of incorporation to construct, maintain and operate a railroad, and, for that purpose, are empowered to make contracts and "to do all acts needful to carry into effect the objects for which it was created," including the right to demand and receive for the transportation of passengers and property a compensation not exceeding a maximum rate, may, within that limit, make contracts for transportation for a fixed future period. Such a contract, if otherwise valid, is not *ultra vires* and void, for the reason that it binds the corporation for a fixed period of time.

Error—Reserved in the District Court of Cuyahoga County.

The action below was brought by Himrod Furnace Co., to recover damages for the breach, by the Cleveland & Mahoning Railroad Co., of an alleged contract, to receive and dock at Cleveland, and to transport from thence over its road, to plaintiff's furnaces at Youngstown, all the Lake Superior iron ore, which the plaintiff should require in the manufacture of pig iron at its furnaces.

As alleged in the petition, and as proved to the satisfaction of the jury, on issue joined, which required such proof, the railroad was bound for ten years from February 15, 1860, to receive, dock and transport said ore, at the rate not exceeding \$1.00 per ton for five years, and for a further term of five years at a rate not exceeding \$1.20 per ton, and not exceeding the lowest freight charged to others during the whole period of ten years.

The breach alleged was, that although the Railroad Company had fully performed said contract, by carrying plaintiff's ores at the agreed rate down to 1864, yet on the 1st of November of that year, it refused longer to recognize or be bound by said contract, and thereafter refused to carry unless at a much greater rate, which the plaintiff was compelled to pay and did pay

under protest, there being no other mode of supplying said furnaces.

The action was commenced April 11, 1868. The existence, as well as the validity of said contract was put in issue. The trial resulted in a verdict in favor of plaintiff, including, by way of damages, all overcharges, exacted and paid the railroad company for receiving, docking, handling and transporting ores, from the time when the company refused longer to observe the contract, to the commencement of the action, and also including expenses paid to others than the railroad company for docks at Cleveland, and for handling the ore at that point.

On a motion for a new trial, as well as in the petition in error, numerous reasons are assigned, why this judgment should be reversed. None of these have been sustained, except as to the amount paid other parties at Cleveland for dockage, &c. As to that item a remittitur has been entered, and the judgment less that amount has been affirmed. Only one of these questions, has been reserved for report, and the facts specially relating to it, will be stated in the opinion.

JOHNSON, J.

A former judgment in favor of the plaintiff in error, was reversed and reported in Himrod Furnace Co. v. The C. & M. R. R. Co. 22 O. State 451. For a full statement of the pleadings and of the points then decided we refer to that report. It is sufficient for our present purpose, to say, that it was there held, that certain evidence was admissible to prove the alleged contract, and that said contract if proved, was not void for want of mutuality of obligation between the parties, nor for want of a sufficient consideration.

On the last trial, this contract was proved as alleged, and a verdict and judgment resulted, which it is sought to reverse.

This judgment as to all overcharges paid by the plaintiff below to the plaintiff here, has, after a careful consideration of all the points made, been affirmed. Among the errors assigned is one we have reserved for report.

It is now claimed, that this contract for transportation, though not void for want of mutuality, nor for want of a sufficient consideration to support it, is so for want of a capacity of the corporation to make it. It is insisted with earnestness and marked ability, that the laws of Ohio, do not confer upon the directors of a railway corporation the power to make such a contract for a term of years, which will bind that, or any future board of directors. The claim is that, "The franchise conferred upon railway corporations as the agents of the state, for the operation of a public highway, to transport persons and property and to receive a reasonable compensation for it, was given to be used for the equal benefit of those to whom it equally belonged, and not to be abused; to be preserved in all its integrity, for use from time to time, as the exigencies of the corporation and the public good might require, and not to be frittered away by alienation or contract in favor of individuals or classes,

or to build up monopolies or other interests * *
 * * To hold that this judgment and discretion of the directors in performing their duties, under the authority of this franchise might be suspended for periods of ten years in succession, would certainly be attended with strange if not disastrous consequences." (Judge Ranney's Brief.)

The substance of this claim is, that a board of directors of a railway corporation have no authority to bind the corporation for a term of years, or for any future time, however short, which in any manner abridges or suspends the discretion of the same or any future board to fix rates such as the exigencies of the corporation and the public good might require," in short, that such a contract is *ultra vires*, notwithstanding the contract, when made is based upon a sufficient and valuable consideration received by the corporation and was in all respects fair and reasonable.

In the discussion of this proposition, it is of the first importance, that it should be carefully distinguished from other questions of somewhat kindred nature, which the learned counsel have blended with it in the argument.

1st. It is distinguishable from that class of contracts sometimes made by common carriers, which are held to be void because they unjustly discriminate in favor of one shipper over another. The invalidity of such contracts arises from the fact that it is against public policy to allow any common carrier, whether an individual or a corporation to give an illegal preference to one shipper over another, for the same kind and amount of service.

When such is the nature of the contract for transportation, its validity or invalidity does not depend upon the individual or corporate character of the carrier but upon the provisions of the contract itself, unless the terms of the charter of the corporation limits its power to contract in this respect.

These contracts are not enforceable because they are against public policy, and not because they are *ultra vires*. An act of a corporation is *ultra vires*, when it is beyond the chartered powers of the corporation, and is therefore said to be void. It may also be void because it is against public policy as declared by statute, or the fundamental law, or for any reason that would make a like contract of an individual, void. In the case before us, the court charged the jury as to what constituted an invalid contract on account of discrimination. That charge was not prejudicial to the plaintiff in error. The jury found as a fact that this contract was not obnoxious to this objection. A careful review of the evidence satisfies us that the jury were warranted in so finding. This eliminates from the problem the question of the invalidity of this contract on the ground of discrimination.

2nd. That such a contract is not void for want of a sufficient consideration to support the promise of the railroad company, nor for want of mutuality of obligation between the parties, was settled in this case when it was here before.

The Himrod Furnace Co. v. The C. & M. R. R. Co. 22 O. St. 451. We see no reason to disturb that decision.

3d. This is not a question of the *abuse*, by the board of directors of the judgment and discretion vested in them by law, to contract for transportation. Neither the stockholders nor the public authorities are here complaining.

It is not even insisted that the rates fixed by the contract are not reasonable and advantageous to the railroad company, nor that the board of directors did not act in perfect good faith.

In view of the evidence and the verdict, we have the right to assume, that the contract was to the mutual advantage of both parties, that it was made in good faith, and that its performance for the whole term would not have been injurious to the interest of the stockholders, or in any way suspend or abridge the powers conferred to discharge the duties the corporation owed to the public as a common carrier, to carry for all on equal terms.

4th. Neither does the *length of time* the contract has to run, affect the question of power. A contract for a less time than ten years, or indeed for any time, is invalid if there is no corporate power to make time contracts for transportation.

If the power exists, to make a time contract for transportation, the discretion thus vested may be abused to the prejudice of the corporation and its stockholders. For such abuse of vested powers, the law furnishes a remedy in proper cases, as in other cases of a breach of trust by boards of directors of corporations. So it might, by such a contract, grant a monopoly to one shipper, and thus render it incapable of carrying for others. It is not claimed that the existence of this contract, impairs the capacity of the company to carry for others, as its public duty requires. We are thus brought to the question, whether the board of directors had the power or capacity to make a contract to transport property for a fixed time. This depends upon its chartered powers.

The Cleveland & Mahoning Railroad Company was chartered February 22, 1848, with authority to construct a railroad from Cleveland to Warren, Trumbull county, with the right to extend it east to the state line. The company was to have, "all the powers and be subject to all the restrictions and provisions of the 'Act regulating railroad companies,' passed February 11th, 1848." 1 Ohio Railway Rep. 545.

By the Act of Feb. 11, 1848, this corporation was endowed with a corporate capacity, "to sue and be sued, plead and be impleaded, defend and be defended, contract and be contracted with, acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation; * * * and do all needful acts to carry into effect the object for which it was created; and such company shall possess all the powers and be subject to all the rules and restrictions provided by this act, except so far as

modified by the special act incorporating the same."

By Sec. 7, the directors are vested with the exercise of these corporate powers, and are to "transact all business of the corporation."

By Sec. 12; "such corporation may demand and receive for the transportation of passengers on said road, not exceeding three and one half cents per mile, and for the transportation of property not exceeding five cents per ton per mile when the same is to be transported a distance of thirty miles or more, and in case the same is transported for a less distance than thirty miles such reasonable rate as may be from time to time fixed by said company." 1 Ohio Railway Report 14-17.

In this act the power, "to contract and be contracted with, * * * and to do all needful acts to carry into effect the objects for which it was created;" clearly embraces the power to transport persons and property, as a common carrier for hire.

This obviously includes the right to charge and collect compensation, at a rate not exceeding the maximum fixed by Sec. 12 of the statute.

Substantially the same provisions are found in the general act of 1852, relating to railroads. The object for which the charter was granted, was to construct maintain and operate a railroad for the individual benefit of the stockholders, as well as for the public benefit. Here, then is an express power to make contracts for transportation, and to agree with the shipper upon rates. The only limitation which the statute imposes is that the rates shall not exceed the maximum fixed by Sec. 12 of the act.

Every undertaking to carry persons or property rests upon contract express or implied. It may be the result of an express contract, agreed upon by the parties, or it may arise by implication of law. In either case it is a contract, which gives the company the right to demand and receive compensation.

The power that exists to make a contract for a single shipment, will authorize a contract for a series of shipments, or for a period of time.

Whether the rates be fixed by a schedule and posted up, or by separate contract in each case, is not material. In either way it is a lawful exercise of the power to contract with the shipper for a compensation.

We fully agree that this corporation is the creature of the law, and that being such, "it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence;" *Dartmouth College v. Woodward*, 4 Wheat. 518, 636; and that grants of power to individuals to construct, maintain and operate a railroad, as a body corporate, which are primarily designed for the profit of its stockholders, should receive a strict construction. "The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation." *Beatty v. Knowles*, 4 Peters 162. This does not exclude

the right to use any appropriate means to carry into effect the powers expressly granted, or necessarily implied. There is a clear line of distinction, between cases involving the *mode* of exercising granted powers, and those where the power to do the act is wanting. If the power to do an act is clearly conferred, either by express grant or by necessary implication, the corporation may adopt any appropriate means, not expressly forbidden. The *mode* or *manner* in which the act shall be done, is, in the absence of limitations imposed by the charter, left to the sound discretion of the corporate authority.

In this case the power to make contracts for transportation cannot be questioned.

Whether such contracts shall be made by a published tariff of rates, or, as expressed in the bill of lading which accompanies each shipment, or by a general contract with each shipper for a longer or shorter term rests, we think, in the sound discretion of the board of directors. If either method is resorted to it is but the exercise of a power expressly granted, which is necessary and essential to carry out one of the leading objects of the corporation, namely, to earn money for the proprietors. If this were not so railroad corporations would possess immunities that no individual has.

A contract made to-day might be repudiated to-morrow, or even while goods are in transit under agreed rates, under the plea that the exigencies of the corporation requires it. If such a principle be sound, no reason exists, why it should not apply to all executory contracts which the corporation is authorized to make, as well as to contracts for transportation.

In this holding, we do not controvert the principle, that the company cannot alienate its franchise or property, which are essential to the performance of any duty it owes to the public.

This corporation is clothed with powers and franchises of both a public and private nature. It could not, without express authority divest itself of its power to perform all obligations it owed to the public or to the State. It could not do this either by misuser, nonuser, or by contract without liability to the State, or to those having the right to demand their performance. As a private corporation it also possessed powers and franchises, such as the power to contract and be contracted with, and generally to do all acts needful to carry out the objects of the incorporation. Included in this class of powers, is that of demanding and receiving compensation for transportation. Its power to contract in this respect is limited by the maximum rate fixed by statute, also by the rule above stated, that it cannot impair its ability to perform its public duties. To make a contract for transportation binding for a greater time than a single shipment, is within the scope of its authority, if it is otherwise valid, and if the power to perform all the duties it owes to the public are not impaired or abridged.

Thus, in *Thomas v. West Jersey R. Co.*, 101, W. S. 71, it was held that a lease by a railroad

company of all its road, rolling stock and franchises, for which no authority is given in the charter, is *ultra vires* and void, that the general power to contract with other companies for the mutual transfer of goods and passengers did not include the power to lease. It was further held that any contract, by which the company renders itself incapable of performing its duties to the public, or which attempts to absolve itself from its obligation, without the consent of the State, violates its charter and is forbidden by public policy.

In this we concur, but cannot see its application to the case at bar. It is not even pretended that this railroad, has, by this contract, rendered itself incapable of performing its duties to the public, or that it has attempted to absolve itself from any obligation to the State, or to the public as a public carrier, under the act of incorporation.

The State *v.* Consolidation Coal Co., 46 Md. 1, was decided on the same principle, where it was held, that the power to sell and convey all its property and franchises, and thus escape its obligations to the public, could only be conferred by express legislation.

To the same effect are: *Beach v. The Delaware & Raritan Canal Co.*, 24 N. J. 455, S. C. 22 N. J. Eq. R. 130; *Middlesex R. R. Co. v. Boston & Chelsea R. R. Co.*, 115 Mass. 347; *Richardson v. Sibley*, 11 Allen 65.

These, and other cases that might be cited, rest upon the principle that the corporation owes duties to the public, that the franchises granted to it, impose a trust, and that without express authority, it cannot disable itself from the performance of these duties, or the faithful execution of the trust.

For aught that appears, or is even suggested, the plaintiff in error has performed all its corporate duties to the public, and has faithfully discharged the trust reposed in it by the grant of its franchises, to the satisfaction of the State and of the public. The existence of this ten year contract has not, so far as we are advised, incapacitated the corporation from the performance of all such duties and trusts.

Neither the State, nor the public who are benefitted by this public highway, nor the stockholders are complaining. Why should the corporation be allowed to absolve itself from a contract, fairly made, of mutual obligation and advantages when made, supported by a valuable consideration received in great part, and free from any discrimination, simply because it may prove less profitable than was anticipated.

What effect such a contract would have on the rights of other shippers, we have not considered, as they are not here complaining.

We hold that the making of this contract was in the exercise of the sound discretion of the board of directors, granted to them in the charter of the company, and is not *ultra vires* and void.

Judgment affirmed.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

PENNSYLVANIA COMPANY

v.

JOHN WENTZ.

1. The power of a railroad company to make and enforce a regulation that one or more designated passenger trains on its road shall not stop at specified stations or places, is subject to legislative control; and by the act of 1852, § 26, as amended in 1867 (S. & S. 114; Rev. Stats. § 3320), such power is taken away as to municipal corporations containing three thousand inhabitants.

2. Where one travelling on a passenger train of a railroad company, presents to the conductor a ticket issued by such company, authorizing him to ride from one to another designated station, "only on such trains as stop regularly at both stations," and is ejected from the cars by such conductor between such stations, it will be no defense to the passenger's action against the company for damages, that by the regulations of the company, the train on which he was travelling did not stop at the latter station, if the ticket was issued since the passage of the act of 1867, and such station was in a municipal corporation which, at the time the ticket was issued, had a population of three thousand inhabitants, and the passenger believed when he took passage on the train that it stopped at both stations.

Error to the District Court of Crawford County.

In 1876, John Wentz commenced an action in the Court of Common Pleas of Crawford County, against the Pennsylvania Company, operating the Pittsburgh, Fort Wayne and Chicago Railroad, to recover damages sustained by being ejected from a train of cars of the Pennsylvania Company in which he was riding as a passenger. The facts are as follows: Wentz has resided since 1859 on his farm one and a half miles from Bucyrus, a municipal corporation containing in 1870, and ever since, more than three thousand inhabitants, and being the county seat of Crawford County. He desired to attend the Centennial Exhibition at Philadelphia, and seeing that the Pennsylvania Company was selling railroad tickets to and from Philadelphia, at reduced rates, he applied at the office of the company, in Bucyrus, for a ticket to Philadelphia. He was informed, however, that he could not obtain such ticket there, but could obtain it at Crestline, twelve miles further east on the company's road. He then bought a ticket from Bucyrus to Crestline and return. That ticket contained these words: "In consideration of the reduced rate at which this ticket is sold, the purchaser agrees to use it only on such trains as stop regularly at both stations named (Bucyrus and Crestline), and for a continuous trip each way only." He went to Crestline on August 11, 1876, presenting his ticket, which was a sufficient voucher for his fare to that place, and retaining such ticket as a voucher that his fare was paid for his return from Crestline to Bucyrus. At Crestline he purchased of the company a ticket to Philadelphia. He remained at Philadelphia until August 21, 1876, when he purchased of the company a ticket from Philadelphia to Crestline, and took passage for the latter place. At Pittsburgh he and the other passengers were required to change cars, and were placed in what was called the limited mail, a passenger train of the company running from

New York through Pittsburgh, through Crestline, thence through Bucyrus, and on to Chicago. Arriving at Crestline, where the train was stopped for a few minutes, he retained his seat, and when the cars had reached a point about four miles from Crestline, and within eight miles of Bucyrus, the conductor came to him for his fare. He presented the ticket he had purchased at Bucyrus, but the conductor informed him that the limited mail, on which he was then riding, did not stop at that place, and that he would be carried to Forest, which is twenty-eight and one-half miles west of Bucyrus, on payment of eighty-five cents. He said he was willing to pay eighty-five cents, but not willing to go to Forest, and he insisted on stopping at Bucyrus. The conductor then stopped the train and told him he must get off or be put off, and thereupon he left the train. This was about one o'clock at night. He walked home arriving there at five o'clock in the morning. Soon afterward he brought suit against the company and obtained a verdict and judgment for eighty-seven dollars and fifty cents. That judgment having been affirmed in the District Court, this petition in error was filed to reverse both judgments.

By the printed rules and regulations of the company, the limited mail did not stop at Bucyrus.

By the 26th section of the act relating to incorporated companies, as amended in 1867 (S. & S. 114; Rev. Stats. § 3320), it was provided as follows: "Sec. 26. That every railroad company in this State shall cause all its trains of cars for passengers to entirely stop, upon each arrival at any station, at any town or village having a population of three thousand, and all trains advertised by such company to stop at any station for the receiving of passengers shall stop the same at such station for a time sufficient to receive and let off passengers; and every company, and every person in the employment of such company, that shall violate, or cause, or permit to be violated the provisions of this section, shall forfeit and pay for each offense not more than one hundred, nor less than twenty-five dollars, to be recovered in a civil action, on complaint of any person before any justice of the peace of the county in which the violation shall occur, and in all cases of violation of the provisions of this section the company whose agents shall cause or permit such violation, shall be liable for the amount of such forfeiture, and in all cases the conductor upon such train shall be held *prima facie* to have caused the violation of this section, which may occur by the train in his charge, and said forfeiture to be recovered in the name of the State of Ohio for the use of common schools."

J. T. Brooks, for plaintiff in error.

S. R. Harris, for defendant in error.

OKEY, C. J.

The claim is urged that when Wentz purchased the ticket at Bucyrus, and also when he retained his seat in the limited mail at Crestline, he knew that train did not stop at Bucyrus; and hence, that in making the agreement the parties were

in pari delicto, and that in retaining his seat at Crestline, Wentz was guilty of negligence, either of which facts should defeat a recovery. But we need not determine how far such knowledge should affect a recovery. It is sufficient to say the court charged the jury that such knowledge, if he had it, would defeat Wentz's action, and that the jury found in his favor. This, therefore, was in effect a finding of the jury that he did not have such knowledge; and, after a careful examination of the evidence, we cannot say such finding was clearly wrong.

A further claim is made, that there was a special contract between Wentz and the company. No doubt a special agreement between the parties that Wentz should only use the ticket he purchased at Bucyrus upon a particular train would have been valid, whether made before or after the passage of the act of 1867. But no such agreement was proved. Nobody testified to any thing of the sort. Indeed, there was no evidence whatever that any conversation concerning any special agreement between the parties was ever held. The only facts to show such agreement were the words on the ticket, the printed time table posted in the offices of the company, showing that the limited mail did not stop at Bucyrus, and the residence of Wentz in the neighborhood of Bucyrus for several years. But it is perfectly well settled that these facts do not prove any special agreement. *Railroad Co. v. Campbell*, 36 Ohio St. 647. Indeed, there is no evidence that the attention of Wentz was ever directed to the words on the ticket or the time table, or that he ever saw such table.

Conceding, however, the claim of the company that when Wentz purchased the ticket at Bucyrus, he consented to the conditions appearing thereon, the question remains whether, even then, his right of action is defeated, the jury having found, as already stated, that he did not know, when he presented the ticket, that the limited mail did not stop at Bucyrus. The place at which he was ejected was not at a station, nor at any habitation, but in or near woodland, and the time was one o'clock at night. The sole ground for ejection was that he could not consent to be carried twenty-eight miles beyond the station named on the ticket. Even laying out of view the statute, it would be difficult to maintain the proposition that such ejection was justifiable. *Thompson's Car. of Pas.* 340.

But the right to recover may be placed on broader ground. The stipulation on the ticket was, as we have seen, that the holder would not use it on trains which did not regularly stop at Bucyrus. In the absence of statutory provision to the contrary, a railroad company may adopt a regulation that a certain train or trains of passenger cars running regularly on its road, shall not stop at designated stations or places, and one traveling as passenger on such road is bound to inquire whether the train upon which he takes passage stops at the station or place to which he is going. *Pittsburgh, etc. R. Co. v. Nuzum*, 50 Ind. 141; *Ohio, etc. R. Co. v. Applewhite*, 52 Ind. 540;

Ohio, etc. R. Co. v. Swarthout, 67 Ind. 567; Chicago, etc. R. Co. v. Randolph, 53 Ind. 510. And, in the absence of any statutory provision, where the conductor of a road which has made such regulation, finds, after the train has started, a passenger who holds a ticket for a station at which such train does not stop, he may, in a proper manner, be removed from such train. Thompson's Car. of Pas. 375. But the power of a railroad company to adopt or enforce such regulation, is subject to legislative control. Com. v. Eastern R. Co. 103 Mass. 254; Shields v. The State, 26 Ohio St. 86, S. C. 95 U. S. 319; The State v. New Haven, etc. Co., 43 Conn. 351; New Haven, etc. Co. v. The State, 44 Conn. 376; Pierce on Rail. (ed. of 1881) 450.

The act of 1867, set forth in the statement of this case, is such legislative control. While it is clear that this actoin was not prosecuted under this section, it is equally clear that the alleged contract, whereby Wentz purchased a ticket from Bucyrus to Crestline and return, must be construed with reference to such section. Lindemann v. Ingham, 36 Ohio St. 1, 10. This is an action for the alleged wrong done to Wentz, and it is not material whether it should be regarded as in tort or on contract, for in either case the question is whether he had a right to retain his seat on production of his ticket. Sometimes it is difficult to determine whether a matter is so far illegal that it cannot be the subject of an agreement. But in this case the provision is express, that all passenger trains shall stop on arrival at a municipal corporation having a population of three thousand; this is a statutory regulation for the benefit of the public; and moreover, a penalty is provided for a failure to comply with the requirement. An agreement—assuming that one was made—recognizing the validity of a regulation to disregard such statutory provision, is, according to the authorities, clearly illegal. Spurgeon v. McElwain, 6 Ohio, 442; The State v. Findley, 10 Ohio, 51; Bloom v. Richards, 2 Ohio St. 287; Huber v. Ger. Con. 16 Ohio St. 371; Delaware Co. v. Andrews, 18 Ohio St. 49; Hooker v. De Palos, 28 Ohio St. 251; Leake on Con. 723.

The purchase of the ticket, authorizing Wentz to travel on passenger trains of the company from Bucyrus to Crestline and return, was manifestly lawful, and that purchase was fully executed when Wentz paid the money and received the ticket as his voucher that such fare was paid. It is true that the ticket contained a stipulation that the purchaser thereof "agrees to use it only on such trains as regularly stop at both stations named," that is, Bucyrus and Crestline. But as the law required all passenger trains to stop at Bucyrus, and as the train upon which he was riding was a passenger train, he might well and properly assume that the law would be obeyed. Such limitation on the use of the ticket, being in violation of the statute, should be disregarded, while the payment of fare for a passage from Bucyrus to Crestline and return, should be held to create an obligation on the part of the company to perform such service for Wentz on any pas-

senger train of the company. This is in accordance with Pigot's case, 11 Coke, 27 b, in which it was resolved, "that if some of the covenants of an indenture, or of the conditions indorsed upon a bond, are against law, and some good and lawful; that in this case the covenants or conditions which are against law are void *ab initio*, and the others stand good." This principle has been reasserted in many cases. The whole subject is ably considered in Wald's Pollock on Con. ch. VI.

If there was any error in the rulings in the court of common pleas, it was not to the prejudice of the plaintiff in error. In any view that can be taken of the case, the judgment below is right.

Judgment affirmed.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

JACOB TAYLOR
v.
JOSHUA BINFORD.

November 15, 1881.

C., being the owner of land, conveyed it, for a valuable consideration, to a Township Board of Education, its successors and assigns, for the use of school purposes only. Afterward the board, wishing to change the school-house site, sold the land at public outcry to T.

C. having conveyed to B., entered—under his permission—as upon condition broken. In an action of trespass by T. against C—

Held, that the entry of C. was unlawful, the sale to T. not being in violation of the terms of the grant to the Board of Education by which the estate was expressly made assignable.

Error to the Court of Common Pleas of Mahoning County. Reserved in the District Court.

The facts are sufficiently stated in the opinion of the court.

LONGWORTH, J.

The original action was brought by Jacob Taylor against Joshua Binford and Emmor Cobbs, to recover damages for a trespass upon lands which the plaintiff claimed to own. Binford answered, traversing all the allegations of the petition. Cobbs admitted his entry upon the land but justified under a permit from Binford who was, he averred, at the time the owner of the land. The ownership of the land was the sole question at issue.

Upon the trial the court rendered judgment for the defendants.

The pleadings, together with the separate findings of fact and law by the court, constitute the record.

From this record it appears that in 1854 Cobbs, who was then the owner of the land, conveyed it to the Board of Education of Smith township, by deed as follows:

"This indenture, made the fourth day of April, one thousand eight hundred and fifty-four, between Robert Cobbs and Mary Cobbs, his wife, of the county of Mahoning, in the State of Ohio, parties of the first part, and John Shaffer, Mor-

decai D. Tanneyhill, Stephen Miller, John Allerton, Enoch Shreeve, Nathan Ball, Jesse Stanley, J. W. Satterthwait, James Hoiles, and Seth Pennock, Chairman, and Samuel Cobbs, Clerk, as the township Board of Education of the township of Smith, county and State aforesaid, party of the second part, witnesseth:

That the said parties of the first part, in consideration of fifty dollars to them duly paid before the delivery hereof, have bargained and sold, and by these, presents do grant and convey to the said party of the second part, its successors and assigns forever, the following lot of land, in range five, township eighteen, section thirty-six: beginning at the south-west corner of the north-west quarter of said section, and running north ten rods, thence east eight rods, thence south ten rods, thence west eight rods, to the place of beginning, with the appurtenances, and all the estate, title and interest of the said parties of the first part therein, *for the use of school purposes only*; and the said parties of the first part doth hereby covenant and agree with the said party of the second part, that at the time of the delivery hereof the said parties of the first part were the lawful owners of the premises above granted, and seized thereof in fee simple absolute; and that they will warrant and defend the above granted premises in the quiet, peaceful possession of the said party of the second part, and its successors and assigns forever, for the above named purposes.

In witness whereof the said parties of the first part have hereunto set their hands and seals, the day and year above written.

ROBERT COBBS, [SEAL.]
MARY COBBS, [SEAL.]

Signed and delivered in the presence of }
JOSEPH L. HANNA and JOSEPH COBBS. }

The grantees took possession of the land and used it until the year 1874 as a school house site. In the fall of that year the board determined to change the location of the school house and to sell the house and lot. In pursuance of this resolution, after proper advertisement, the premises were sold to Taylor for \$200, he being the highest bidder. Taylor, thereupon, entered into possession under a written agreement for a deed which was afterwards delivered to him in April, 1875. In February, 1875, Cobbs conveyed to Binford, claiming that the title had reverted to him by reason of a breach of the condition that the premises should be used for "school purposes only."

On the one hand it is claimed that the limitation of the use is a condition of the grant, the breach of which works a forfeiture of the estate, while on the other hand it is claimed that a grant declared to be for a special purpose without other words cannot be held to be upon condition, but at most, creates only a trust. See *Packard v. Ames*, 16 Gray 327; *Ayer v. Emery*, 14 Allen 69; *Sohier v. Trinity Church*, 109 Mass. 1; *Stanley v. Cobb*, 5 Wallace 119, 146, 164.

We will assume, without however so deciding, that the grant is upon condition, the breach of which would work a forfeiture.

Has the condition been broken? Surely not by the sale to plaintiff. The estate conveyed was a fee, and of this estate the right to assign is an essential incident. Indeed by the terms of the instrument the estate is expressly made assignable, the grant being to the board "its successors and assigns forever." The mere fact of a sale therefore would be no breach of the condition in the absence of a showing that the grantee diverted the land to other than school purposes only; and this fact nowhere appears. Judgment reversed.

[This case will appear in 37 O. S.]

CUYAHOGA COMMON PLEAS.

SECOND NATIONAL BANK OF CLEVELAND, OHIO,

v.

DAVID MORRISON ET AL.

Accommodation endorsement—Anomalous endorsement—Doctrine of election—Doctrine of subrogation.—1. The taking by an endorsee of an accommodation negotiable promissory note, with full notice that the note was a mere gift, does not prevent the endorsee for value before maturity from taking a good title.

2. The endorser of accommodation paper lends his credit without any constraint as to the manner of its use.

3. The endorser of a note before utterance is a joint maker thereof in the absence of an agreement with the endorsee limiting his liability.

4. The doctrine of election only applies to cases where the plaintiff seeks to enforce the same right that the plaintiff is attempting to put in execution in another action which is then pending.

5. The plaintiff cannot be compelled to first exhaust the security which it holds from the principal, but it has a right to proceed against both at the same time, and to make the best it can of both. The remedy of the surety is to pay the debt, and he will then be subrogated to and may enforce all collateral security held by the bank for the payment of the debt.

This case was heard by the Court upon a demurrer to Morrison's answer to plaintiff's petition. The opinion states the case.

McMath, Weed & Dellenbaugh for the Second National Bank.

Willson & Sykora for David Morrison.

HAMILTON, J.

This case was brought by the bank as endorsee of a negotiable promissory note made by Martin Krejci and endorsed in blank by David Morrison and J. W. Sykora. Morrison alone answers, averring that he endorsed the note as an accommodation endorser and surety for Krejci and Sykora, without consideration, and that the plaintiff was well aware of and knew that there was no consideration for his signing the note at the time Sykora endorsed and delivered it to the plaintiff. To this answer the plaintiff demurs, upon the ground that it does not state facts sufficient to constitute a defense.

What is the form of the exact contract in suit in the case at bar? In form, it is a negotiable promissory note. Its legal effect is an unqualified agreement on the part of the maker to pay

to the payee or any endorsee of the instrument a sum certain on a day certain; while it is also a conditional promise on the part of the endorser to the endorsee to pay the full face of the note upon default of the maker and due notice to themselves. The contract, therefore, is one which may lawfully exist between these parties. It is the exact contract which exists between the parties as to every note discounted by a bank in the usual and ordinary course of business. No claim is made that the bank did not pay a valuable consideration for it, or that any fraud was practised upon any party, or that it has been paid, or that under the form of a legitimate contract was hidden any usurious artifice or scheme, so that the contract itself has no stain of excessive interest, of fraud or illegality. Clearly, it is a well settled principle of law that Morrison, by endorsing said note before its delivery to the bank, for the accommodation of his co-defendants, loaned them his credit without any constraint as to the manner of its use. The want of consideration, and the further fact that Morrison was an accommodation endorser or surety, does not affect the rights of the bank as an endorsee, though taking it with notice. *Thatcher v. West River National Bank*, 19 Mich., 196; *Fulweiler v. Hughes*, 17 Pa. St., 448.

In the case at bar, Morrison endorsed said note at the time of the execution thereof, and the law presumes it to have been made for the same consideration as the note itself, and a part of the contract thereby expressed. *Good v. Martin*, 95 U. S., 90.

It is a well settled principal of law in Ohio that an endorser before the utterance of the note is a joint maker. In this case it is distinctly averred in plaintiff's petition (and not denied in Morrison's answer) that he endorsed said note at the time of its inception, and that subsequently it was transferred to the bank in the usual and ordinary course of doing business.

Morrison also avers in his answer to plaintiff's petition that "said plaintiff, at the time of the reception of said note by it, had and held and still has and holds, a note of \$7,000 secured by mortgage upon the property of said Martin Krejci as collateral security to the note described in plaintiff's petition." He also avers the insolvency of his two co-defendants, and prays that the plaintiff may be required first to exhaust its remedy against Krejci in an action now pending to foreclose said mortgage for \$7,000 before obtaining judgment in the case at bar. True or false, the pendency of an action to enforce the payment of said mortgage will not prevent this plaintiff from obtaining the fullest measure of justice. The plaintiff cannot be compelled to elect as to which remedy it will pursue, for the reason that the doctrine of election only applies to cases where the plaintiff seeks to enforce against the defendant, the same right that the plaintiff is attempting to put in execution in an action which is then pending; as, where an action for an account is pending, and the plaintiff files a bill for an account. It is put upon this

ground: As the parties are the same, and the relief is the same, the second suit is merely for vexation and annoyance, and consequently will not be entertained by the court.

In *Lord v. The Ocean Bank* (20 Pa. St., 384), the opinion of the Court was delivered by the famous Chief-Justice Jeremiah S. Black, who said: "The fact that the holder had other collateral security for the same debt, more than sufficient to cover it, from which, however, the debt had not been realized, is not a ground of defense on the part of the maker."

In the case at bar the plaintiff is not seeking to put in execution the same remedy to recover its claim, and there is no reason why it may not, in good conscience, have recourse to all the means of reparation at its command which the courts of this country will give, and after ascertaining the extent of the relief which will be granted, then make its election and enforce the judgment or decree of this Court, which it may be advised metes out to it the fullest measure of justice. Notwithstanding the fact that a mortgagee has a double security, he has a right to proceed against both at the same time, and to make the best he can of both. It would be a strange anomaly not to allow the bank to pursue all of its remedies till it has obtained satisfaction of its debt. If Morrison is compelled to pay this plaintiff's claim, he will be subrogated to all of the legal and equitable rights of the bank. The auxiliary equity, known as the doctrine of subrogation, will enable Morrison to reap the benefit of any securities which the bank holds against Krejci, and by the use of which he may thus be made whole. Equity will not interfere with the rights of the bank to enforce payment out of any of its securities, and therefore equity will substitute Morrison to the rights of the bank against other securities which it now holds. *Bispham's Principles of Equity*, Sections 335 to 342, both inclusive.

It is settled by a long continued and unvarying current of authorities that the bank cannot be compelled, before proceeding to enforce the payment of the note sued upon in this case, to first exhaust the security which it holds from the principal for the payment of the debt. Clearly, it is equally well settled that Morrison's remedy is to pay the debt, and he will then be subrogated to, and may enforce all collateral security held by the bank to secure the payment of the note upon which this action is predicated.

The demurrer, therefore, must be sustained.

THE OHIO LAW JOURNAL will henceforth print in full, every opinion written by the Judges of the Supreme Court, as fast as they are handed down. Our subscribers will get these opinions from two to six months earlier than advanced sheets could reach them, if issued.

SUPREME COURT OF PENNSYLVANIA.

JOHN W. SEAMAN, Defendant Below,
v.
THE COMMONWEALTH OF PENNSYLVANIA.

October 17, 1881.

The owner of a store who permits his clerk to sell for him on the Lord's day, commonly called Sunday, as well as the clerk, is liable to the penalty imposed by the Act of Assembly of April 22, 1794, and its supplements.

Certiorari to the Court of Common Pleas, No. 2, of Allegheny county.

This was a summary conviction had before Alderman John Allen, of the Nineteenth ward, Pittsburgh, under the Act of Assembly of April 22, 1794, and its supplement of April 26, 1855.

The evidence showed that the place of business was open and a clerk was selling. The defendant, Seaman, was present part of the time.

The alderman adjudged the defendant guilty and imposed the penalty provided, thereupon defendant issued a *certiorari* out of the Court of Common Pleas, No. 2. After argument in that court, Judge White, on March 5, 1881, affirmed the judgment of the alderman, filing the following opinion:

"We reversed the judgment in No. 260 because there was no evidence that Seaman authorized his clerk to open his store on the Sabbath referred to, in that case, or knew that the store was open. But in this case the evidence was, that he was present in the store on this Sabbath. It is incredible that the clerk was selling on this day without his knowledge and authority; he was there present, when the store was open to the public, thus carrying on his worldly business, besides he had been prosecuted only a few days before that (in No. 260) for selling on Sunday. It is very clear he was there carrying on his business, knowing he was violating the law. The evidence was amply sufficient to prove that he was carrying on a worldly business, prohibited by the law."

On the 23d of March, 1881, Seaman appealed to the supreme court and obtained a writ of *certiorari*.

On the argument the following cases were cited by appellant's attorneys: Commonwealth v. Nesbit, 10 Casey 403; Johnston v. Commonwealth, 10 Harris, 106; Commonwealth v. Jeandell, 2 Grant 510; Commonwealth ex rel. Barr v. Naylor, 10 Casey 86; Commonwealth v. Cane, 2 Pars. It was argued that Seaman could not be convicted for an act done by his agent, even though done by his knowledge and consent.

The appellee did not furnish a paper-book, but filed a motion to quash the appeal, assigning as a reason therefor that appellant's remedy was by writ of error and not by appeal. In support of this view it was argued that after the proceedings were removed from before the alderman, they were then "according to the course of common law," and the remedy was error: Commonwealth v. Betts, 26 P. F. S., 471, and Same v. Burkhart, 12 Harris 133, and other authorities

were cited in support of this motion and also as bearing upon the case on its merits. No disposition was made of the motion to quash.

PER CURIAM.

The offense is sufficiently charged in the information. The finding of facts by the alderman is clear, full and specific, and brings the case within the statute. The evidence showed the place of business was kept open on Sunday and an employee was selling cigars. The plaintiff in error was present a part of the day and the conclusion is fully justified that the business was carried on with his knowledge and by his authority. The principal, as well as the clerk, was liable under the statute.

Judgment affirmed.

Digest of Decisions.

NEW YORK.

(Court of Appeals.)

BURKITT v. TAYLOR ET AL. October 4, 1881.

Brokers—Sale—Evidence.—In an action against brokers for a wrongful sale of stocks, where the answer simply sets up a former agreement by which defendant was authorized, in case plaintiff failed to keep his margins good, to sell his stock without notice or demand, and also an instruction by plaintiff to sell when the margin was exhausted, and that it was exhausted at the time of the sale, evidence of unsuccessful efforts to notify plaintiff is inadmissible.

Evidence showing that the lowest price for which this stock sold in the market on the day it was claimed this sale was made was greater than that for which plaintiff's stock was sold would bear on the question of a *bona fide* sale, and is not so irrelevant as to render its admission error.

The agreement set forth in the answer was made in 1870, and the transaction in relation to the stock in suit was entered upon in 1873. All prior transactions had been closed. The question whether this transaction was made under that agreement was submitted to the jury, who found for plaintiff. *Held*, That the verdict established that the agreement of 1870 did not apply to this transaction.

RICH v. HERR. October 11, 1881.

Practice.—In an action to cancel a satisfaction of a mortgage, where the answer alleged that a new mortgage was given for it and that the original mortgage was void for usury, the evidence was conflicting, but defendant's evidence was sufficient, if believed, to sustain the defense. *Held*, That this court was concluded by the findings of the trial judge in favor of defendant, based upon such evidence.

In re ACCOUNTING OF DEAN, ASSIGNEE. October 11, 1881.

Assignment for Creditors.—An assignee for the benefit of creditors has no right to carry on the business of his assignor, and the trust estate cannot be charged with a loss incurred by him therein.

The assignee is bound to exercise the diligence required of a paid agent or of a provident owner, and is liable for ordinary negligence or the want of that degree of diligence which persons of ordinary prudence are accustomed to use about their own business and affairs.

An assignee is entitled only to commissions on the amount received by him on the sale of the property.

SCHRAUTH *v.* THE DRY DOCK SAVINGS BANK. October 11, 1881.

Payment.—Supplementary proceedings were instituted on a judgment against plaintiff's husband and an order procured for the examination of defendant's president or treasurer. Orders were also procured for the examination of plaintiff and her husband. No attempt was made to show that plaintiff had in her possession any of her husband's property. On the report of the referee, an order was made requiring defendant to pay to the judgment creditor the amount of a deposit made with it by plaintiff, and such payment was made. In an action to recover the amount of such deposit it did not appear that plaintiff had notice of the application for the order, was heard, or was in any way a party thereto. *Held*, That defendant was not protected in its payment by the order; that it should have resisted payment or in some way have had plaintiff made a party to the proceeding; that plaintiff had had no day in court, and was not bound by the proceedings, although she had made an unsuccessful motion to set them aside.

SHAW *v.* JEWETT, REC'R. October 4, 1881.

Negligence—Practice.—In disposing of a motion for non-suit on the ground that the evidence of the plaintiff's freedom from contributory negligence was insufficient to go to the jury, it is not necessary for the court to consider the lack of an issue as to such fact in the pleadings, where there is testimony that makes it incumbent on the court to leave the case to the jury on the question of negligence.

In an action for negligence, plaintiff cannot recover unless he establishes that he was using due care, did no act contributing to the injury, and omitted no precaution that would have prevented it.

Where the evidence as to whether a bell was rung is conflicting, and the witnesses had equal means of knowing what was the fact it is for the jury to decide which are creditable.

Although a person about to cross a railroad

track has a right to assume that the company will do its duty and ring a bell, he is not thereby relieved from vigilantly using his senses to avoid danger. The court left to the jury the question whether or not the instinct of self-preservation will prevent a man from attempting to cross a railroad if he sees that an engine is bound to reach the crossing before he can pass. *Held*, No error.

HOLSAPPLE *v.* THE ROME, W. & O. R. R. Co. October 11, 1881.

Common Carrier—Stock Release.—A stock release which provides for the release of the carrier from liability originating in the viciousness or weakness of the animals, or from delays, or in consequence of heat, suffocation or being crowded, or on account of being injured, whether such injury shall be caused by burning of hay, straw or any other material used for feeding said animals or otherwise, and for any damage occasioned thereby, does not release the carrier from the consequences of his own negligence.

SHIPPLY *v.* THE PEOPLE. October 11, 1881.

Larceny—Sale.—One S. agreed to buy certain goods of one H. and directed them to be sent to him C. O. D., saying he would send an expressman. One R. called and said he was an expressman, and H. delivered the goods to him with a bill and instructions to collect the money. R. returned with a check which proved to be worthless, and S. refused either to pay or return the goods. It appeared that R. was in the employ of S. *Held*, That there was no sale and that S. was guilty of larceny.

In a prosecution for larceny, evidence of a similar transaction by the accused with other parties at about the same time is admissible upon the question of intent.

POTTS *v.* MAYER, IMPL'D. October 11, 1881.

Evidence.—On the trial of an action on a note made by the firm of H. & M., defendant had read in his behalf the testimony of his deceased partner, M., given on a former trial, in which he stated that the endorser paid nothing for the note, and added that he (H.) paid for it to defendant. Plaintiff then read the cross-examination of H., in which he stated that defendant was indebted to him on a private account, for which the note was given and received. *Held*, That plaintiff having, in his own behalf, put in evidence important declarations of the deceased, defendant, having asked no question which involved his personal dealings with H., had a right to give evidence contradicting such declarations.

BECKER *v.* HALLGARTEN ET AL. October 4, 1881.

Stoppage in Transitu.—A firm in Berlin sold certain goods to another firm and, by direction of the vendees, shipped them to the plaintiff at Bremen. The vendees there

after procured a loan from one G., on security of these goods, and gave him an order on plaintiff therefor. By direction of G. plaintiff shipped these goods to defendants, and took bills of lading in his own name as shipper, one of which he sent to defendants, and the other to the vendees, who sent it to G. The vendors afterwards assigned their claim against the vendees to plaintiff, who demanded the goods of defendants. In an action for conversion it was claimed it was found that plaintiff had, in behalf of the vendors, stopped the goods in transit. *Held*, Error: that plaintiff was at no time the agent of the vendors; that the transit was over when the goods arrived at Bremen, and that the transaction between the vendees and G. was effectual to pass the property to him, and defeated the vendors' right of stoppage if it otherwise existed.

The German law, which provides that a transfer of the legal title to the goods covered by a bill of lading can only be made by the written endorsement of the consignee, applies only when the bill of lading is taken in the name of the vendee, or of some person through whom the party claiming its benefit must make title.

READ v. THE PEOPLE. October 11, 1881.

Lotteries—Indictment.—An indictment under the lottery law which charges that the accused "did unlawfully and knowingly offer to vend and to sell and to barter and to furnish and supply, and to procure and to cause to be furnished and procured to and for" the complainant a lottery ticket, does not charge a sale but an offer to procure and sell, and does not charge two offenses. Such offer is a single act, although it embraces several things, each of which were illegal.

ILLINOIS.

(Supreme Court.)

WILLIAM B. HODGE, JR., v. JOHN LINN.—Opinion by SHELDON, J., reversing and remanding. Filed Sept. 1881.

1. *Election—Irregularities in conducting are not fatal.*—Mere irregularities in conducting an election and counting the votes not proceeding from any wrongful intent, which deprives no legal voter of his vote, and does not change the result, will not vitiate the election, so as to justify the rejection of the entire poll of the town or precinct.

2. The failure to number the ballots cast at an election, and to count the votes as required by the statute, and to string the ballots on a thread or twine in the order of their reading, and the allowance of persons not judges or clerks of the election to assist in counting the votes, and the presence of persons in the room during the count, not challengers or officers, when nothing appears to show any injurious effect, or that the votes were not truly counted, will not justify the court on a contest of the election to exclude the entire poll and vote of a town as fraudulent and void.

MORRIS KALLENBACH, JR., v. ELIADA DICKINSON.—Opinion by SCHOLFIELD, J., affirming. Filed Sept. 30, 1881.

1. *Limitation—Payment by one joint debtor does not remove the bar as to other not assenting.*—Payments by the

principal on a promissory note upon the same, within sixteen years before suit brought, not expressly authorized by the surety before being made, nor assented to by him afterwards, do not afford sufficient evidence of a new promise by the surety to remove the bar of the Statute of Limitations as to him.

2. *Same—Effect of new promise.*—A parol promise reviving a debt barred by the statute, has the same effect as payment under the statute. It revives or renews the debt, so that the period of limitations commences anew, to run from the date of the promise. In the case of a promissory note it operates as a new delivery of it.

3. *Same—What necessary to make new promise available.*—To bind a party in this State to a new promise, there must exist the elements essential to a new contract, express or implied. There must be such circumstances as reasonably authorize an inference of an intention to waive the bar of the statute. A party, to be bound to a new promise by the fact of payment, must have an affirmative intention in making the payment to revive the debt.

4. One joint debtor cannot bind his co-debtor by a payment before the bar of the Statute is complete, so as to remove the bar, any more than by a payment after the debt is barred.

5. *Agency—Power of joint debtor to bind all by his admissions.*—One joint debtor may affect his co-debtor by making admissions that the debt has not been paid or discharged, but he has no power growing out of his relation to bind the other to a new contract, although it may be in regard to the old debt.

ELI P. WILLIAMS v. ISAAC M. JONES ET UX.—Opinion by DICKEY, J., reversing and remanding. Filed Sept. 1881.

1. *Homestead—When debt is for purchase money.*—Where the assignee of notes given for a part of the purchase price of land by an arrangement with the principal maker, who was the purchaser of the land, surrenders the notes and takes from him in lieu thereof the note of the purchaser alone, with a trust deed on the land to secure the note, the debt will be unchanged, and will remain a debt incurred for the purchase money.

2. *Same—Exception in statute is not confined to vendor's lien.*—The object of the limitation of the homestead exemption to debts not incurred for the purchase money is not merely to protect the vendor's lien, and a waiver of the lien will lose the protection of the statute of a liability for the purchase money.

SUPREME COURT OF OHIO.

JANUARY TERM, 1881.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

TUESDAY, November 22, 1881.

GENERAL DOCKET.

No. 144. Frederick Bacon v. Titus Daniels. Error to the District Court of Erie County.

LONGWORTH, J.

1. Where a contract, not required by the Statute of Frauds to be in writing, has been reduced to writing and signed by one contracting party only, it is error to treat such contract as of no validity for the reason that it is not signed by the party to be charged.

2. An agreement between the parties to a contract and a third person, whereby one party is released from the obligations of the contract and the third person substituted in his stead, is a novation, and requires no further consideration than such release and substitution.

Judgment reversed and cause remanded.

164. David Wert v. T. H. B. Clutter. Error to the District Court of Crawford County.

McILVAINE, J. *Held*:

1. Under the Act of May 5, 1838 (65 Ohio L. 146), to

protect the citizens of Ohio from empiricism, it is not unlawful for a person of good moral character to practice medicine and surgery for reward or compensation, who has been engaged in the continuous practice for ten years or more.

2. Such ten years of continuous practice may embrace time since, as well as before, the taking effect of said act.

3. It is immaterial whether the services rendered during such period of practice were gratuitous or for compensation.

Judgment affirmed.

Okey, C. J. and White, J., dissented.

137. *Mary Fanning v. The Hibernia Insurance Co.* Error to the District Court of Cuyahoga County.

JOHNSON, J. *Held*:

1. To entitle a person to become a member of a corporation, which is being organized under "An act to regulate insurance companies" (S. & S. 205), his contract to take shares therein, must be in writing, and be mutually binding on both parties.

2. A verbal promise to take shares, while the stock is being subscribed which is necessary to authorize an organization, does not constitute the promisor a stockholder or member of such corporation, and a promise to pay for such shares is without a sufficient consideration to support it. A recovery on such promise to pay cannot be had, in the absence of facts showing that the promisor is estopped from setting up such want of consideration.

Judgment reversed.

385. *Mary Fanning v. The Hibernia Insurance Co.* Error to the District Court of Cuyahoga County.

JOHNSON, J. *Held*:

1. The plaintiff may, in reply to new matter set up in the answer by way of defense, allege any new matter, not inconsistent with the petition, which in law constitutes an answer to the new matter relied on by the defendant.

2. If the plaintiff relies on a record of a former adjudication of the same matter set up in an answer, as an estoppel, he should plead such former judgment. It is not admissible in evidence under a general or special denial of the new matter contained in the answer.

Judgment reversed.

156. *Lucinda Francis Platt v. David Sinton et al.* Error to the Superior Court of Cincinnati.

WHITE, J. *Held*:

1. A devise by a testator of all of his property of every description, whether real, personal or mixed, after paying all his just debts, is a devise of the fee, without the aid of a statute declaring such to be the effect of the devise.

2. Where there is a devise in fee, with a provision in the will that in case the devisee should die without leaving any legitimate heirs of her body, then the estate should go over to persons named, the fee taken by the first devisee is determinable only on the contingency of her dying without leaving such heirs living at the time of her death. *Niles v. Gray* (12 Ohio S. 320), followed.

Judgment affirmed.

163. *George W. Hamet v. Orlando T. Letcher and others.* Error to the District Court of Williams County.

OKEY, C. J.

H., the owner of chattels, relying on the representations of R. that he was the agent of L., agreed to sell the same to L. on credit, and H., in the belief that R. was such agent, delivered the chattels to him, when in fact he was not such agent, nor had he authority to purchase for L., as he well knew: *Held*, That the property in the chattels did not pass from H., and that L., who bought the chattels of R. and converted them to his own use, without knowledge of the fraud, was liable to H. for their value; and the fact that R., at the time the chattels were delivered to him, paid H. part of the price agreed on, will make no difference, except as to the amount of recovery against L.

Judgment reversed, and judgment in favor of Hamet for \$137.28, with interest from June 11. 1877, and costs.

148. *M. T. Hornbuckle and others v. The State of Ohio* for the use of Lewis Smith. Error to the District Court of Lawrence County.

BY THE COURT.

A justice of the peace has no jurisdiction of an action on the bond of a constable.

Judgment reversed and cause dismissed.

147. *Lyman E. Scovill v. Samuel W. Stage et al.* Error to the District Court of Pickaway County. Judgment reversed for error in dismissing the appeal, and cause remanded to the District Court for further proceedings. There will be no further report.

149. *John G. Smith v. Steamer, "Young Reindeer."* Error to the District Court of Sandusky County. Passed under rule 4 for proof of service of brief and printed record.

152. *William Brown v. F. A. Kinery.* Error to the District Court of Lawrence County. Cause dismissed for want of preparation.

153. *William B. Millikin, administrator &c. v. A. J. B. Welliver, administrator &c.* Error to the District Court of Butler County. Dismissed for want of preparation.

155. *English, Miller & Co. v. First National Bank of Athens.* Error to the District Court of Athens County. Dismissed for want of preparation.

159. *George W. Castlen v. Thomas Roberts et al.* Error to the District Court of Clermont County. Dismissed for want of preparation.

160. *Jonathan Hamilton v. Merrill & Shepherd, administrators et al.* Error to the District Court of Gallia County. Passed for proof of service of printed record and plaintiff's printed brief on defendants, according to rule 4.

MOTION DOCKET.

No. 200. *David H. Bailey v. George D. H. Glass, administrator.* Motion to dismiss No. 957 on the General Docket for want of printed record. Motion overruled and leave granted to file printed record within 60 days.

201. *W. W. Moore Jr. v. John B. Moors.* Motion to dismiss No. 1061, on the General Docket, for want of printing &c. Motion granted and counter motion for leave to file printed record overruled.

202. *James C. Elliott et al. v. S. B. Berry, Auditor &c.* Motion to take cause No. 1220, on the General Docket, out of order. Motion granted.

203. *Emanuel O. Craighead v. Elizabeth Huston et al.* Motion for rehearing of cause No. 115, on the General Docket, in which judgment below was affirmed. Motion overruled. The judgment below was affirmed on the ground that errors committed in the court below were not prejudicial to plaintiff in error.

204. *The State ex rel. The State Treasurer v. Luke A. Staley, Treasurer of Hamilton County.* Motion for an alternative writ of mandamus. Motion allowed.

205. *J. K. White et al. v. John T. Deweese et al.* Motion to dismiss No. 998, on the General Docket, for want of compliance with former order to print. Motion granted.

206. *Henry Tilden, executor et al. v. James F. Barker.* Motion to take cause No. 993, on the General Docket, out of its order. Motion overruled.

207. *Sophia P. Ford et al. v. Jesse Hildebrant.* Motion in cause No. 1223, on the General Docket, to dispense with printing record. Motion granted, and the case to be heard with the case of *Ford et al. v. Johnson*, No. 1222 on the General Docket.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Nov. 22, 1881.]

No. 1221. *James Mairs v. Jerusha Mairs.* Error to the District Court of Harrison County. J. F. Daton for plaintiff.

1222. *Sophia P. Ford et al. v. Alfred Johnson et al.* Error to the District Court of Clinton County. A. Harris and Slone & Walker for plaintiffs; LeRoy Pope for defendants.

1223. *Sophia P. Ford et al. v. Jesse Hildebrant.* Error to the District Court of Clinton County. A. Harris and Slone & Walker for plaintiffs; A. D. Dibal for defendant.

1224. *Ohio ex rel. Joseph Turney Treasurer &c. v. Luke A. Staley Treasurer &c.* Mandamus. Hon. George K. Nash for the State.

Ohio Law Journal.

COLUMBUS, OHIO, : : : DEC. 1, 1881.

EX-JUDGE BOYNTON of the Supreme Court, we are informed will resume the practice of the law at Cleveland, where he now resides.

A LAWYER by the name of Clendenning has just been arrested at Celina, Ohio, on a charge of blackmail. We trust the accused may be able fully to vindicate himself of such a charge, if not, his name should be forthwith wiped off the roll of attorneys, which it would disgrace.

THE Supreme Court made no report this week. The cases examined into and disposed of last week, will be embodied in the report of next Tuesday. The regular motion day was dispensed with last week, owing to the fact of it coming on Thanksgiving day. Judges White, Johnson, McIlvaine and Longworth, spent that day at their respective homes, leaving Chief Justice Okey, the only representative of the court in the city.

IMPORTANT DIVORCE DECISION.

The Court of Appeals, in the case of Van Voorhis et al., executors, against Brintnell, have just rendered a decision setting at rest the question adversely to the rulings of the General Terms of the Supreme Court in the First and Second Districts, and of the Superior Court in this city, whether a defendant, in a suit for absolute divorce, against whom a judgment has been rendered dissolving the marriage and prohibiting him or her from marrying again during the lifetime of the plaintiff, may, notwithstanding the prohibition, contract a valid marriage while the plaintiff is living, by going into another State for the purpose of entering into a marriage contract. The wife of Barker Van Voorhis obtained a judgment of divorce against him in April, 1872, the decree adjudging that it should not be lawful for him to marry again until the said Elizabeth Van Voorhis shall be actually dead. Subsequently, Elizabeth Van Voorhis still living, Barker Van Voorhis left New York, and in New Haven Conn., was married to Ida Schroeder. A daughter was the issue of this marriage. She was born in the State of New York. On February 27, 1880, Barker Van Voorhis died. The executors of his father's will declined to admit the child of Barker Van Voorhis, whose name was Rose, to a share in the trust allotted to her father, questioning her legitimacy. Judge Barnard, upon the trial, in the Second District, in April, 1880, found that Barker Van Voorhis and Ida Schroeder went to New Haven for the purpose of

evading the New York law; and it was held that the second marriage of Barker Van Voorhis was null and void, and that the child was, consequently, illegitimate and not entitled to any share in the property disposed of in the will of Elias W. Van Voorhis.

The General Term affirmed the judgment, but the Court of Appeals have directed a reversal and granted a new trial.—*The Daily (N. Y.) Register*.

SUPREME COURT OF OHIO.

CINCINNATI, SANDUSKY AND CLEVELAND RAILROAD COMPANY

v.

ELIZA COOK.

November 15, 1881.

1. The act of April 20, 1874 (71 Ohio L. 146), giving a penalty of \$150.00, to the party aggrieved by a railroad corporation for overcharging for the transportation of passengers or property, is not in contravention of the constitution.

2. A petition under said act against a corporation for demanding and receiving excessive fare in the sale of a passenger ticket to a person desirous of travelling on its road between the points named on the ticket, is not bad, on demurrer, for want of an averment that the purchaser of the ticket was, in fact, transported on the ticket for which excessive fare was exacted.

3. A petition under said act is not bad for want of an averment that the excessive fare was paid by the plaintiff in the due course of business, although judgment was not rendered thereon until after said act was repealed by the act of March 30, 1875 (72 Ohio L. 143), saving only pending actions and causes of action under the repealed statute, where the excessive fare was paid in the due course of business and not for the purpose of obtaining the penalty.

4. Several causes of action for penalties under said act may be united in the same petition.

5. Where such action stands for judgment on the petition, it is not error to refuse to empanel a jury to assess damages.

Error to the District Court of Logan County.

The original action was brought on the 15th of August, 1874, in the Court of Common Pleas of Logan County, by the defendant in error, against the plaintiff in error, for overcharging passenger fare in violation of the Act of April 20, 1874, (71 Ohio Laws 146.)

The petition contained two causes of action. The first count charged that the defendant, on June 10, 1874, had demanded and received from the plaintiff, the sum of thirty-five cents for a passenger ticket on its railroad, from Bellefontaine to New Richland, a distance of 9 9-10 miles, over which portion of the defendant's road the plaintiff desired to be transported. The second count charged that the defendant, on the same day, had collected from plaintiff who was then a passenger on its cars, the sum of thirty-five cents for fare from New Richland to Bellefontaine, a distance of 9 9-10 miles. Prayer for judgment on each count for \$150.00.

Defendant demurred to this petition on the ground, among others, that several causes of action were improperly joined, and to each count, that it did not state facts sufficient to constitute a cause of action. These demurrers

were overruled, and the defendant, being in default for want of answer, demanded a jury for the assessment of damages, but the court refused to empanel a jury and rendered judgment in favor of the plaintiff for \$300.00 and costs.

This judgment was afterward affirmed by the district court.

McILVAINE, J.

The statute of April 20, 1874 (71 Ohio L. 146), after enacting, among other things, that a corporation "operating a railroad in whole or in part in this State, may demand and receive for the transportation of passengers on said road, not exceeding three cents per mile for a distance of more than eight miles; provided, the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance;" further provides that "every such corporation, its officers, employees or agents who shall violate, or permit to be violated, the provisions of this act, or any other corporation, its officers, employees or agents, who shall demand or receive a greater sum of money for the transportation of passengers or property on or over their railroad than the sum allowed by law, shall pay to the party aggrieved for every such overcharge a sum equal to double the amount of such overcharge; but in no case shall the amount to be paid be less than one hundred and fifty dollars."

The first question raised on the demurrer, and chiefly urged in the argument of the case, relates to the constitutionality of the statute upon which the action is based. Numerous objections to the validity of statute are urged. It is contended, that if the right of action given to the party aggrieved is for compensation for an injury, the province of a jury is invaded by fixing the minimum recovery at \$150.00. We need not stop to consider the soundness of this proposition, as it is conceded by counsel for plaintiff in error, in which concession we entirely concur, that the minimum sum to be paid for overcharging fare, where the actual damage of the party aggrieved is less than one hundred and fifty dollars, is in the nature of a penalty—is punishment rather than compensation.

In this view of the statute, however, it is contended, that a violation of its provisions is an offense against a public law. And prosecutions therefor must be carried on in the name and by the authority of the State of Ohio." Sec. 20, Art. 4, Constitution. And further, that if, for a violation of the statute, the guilty party can not be prosecuted in a civil action. The rule of the code of civil procedure which declares that allegations in a petition not denied by answer, shall be taken as true, violates the principle guaranteed by the constitution. Sec. 10, Act 1, that no person in any criminal case shall be compelled to be a witness against himself. The summing up of the argument by counsel, I quote:

"These conclusions are thus reached: If the forfeiture of the statute be deemed compensatory, it violates the great civil right of trial by jury;

and right of the citizen to have the compensation for injuries done, measured by the judgment of the tribunal. For if it be competent for the legislature to prescribe the minimum of compensation in any case, it may in all cases, and, as in the present instance, may fix such minimum greatly in excess of any probable or even possible injury, thus reducing the right of jury trial to a mockery.

"If the forfeiture of the statute be deemed punitive, it violates the constitutional guarantees of liberty in the several respects above stated, by making the punishment of crime against the sovereignty of public law, an instrument in the hands of private malice, fraud and conspiracy, to be secured without jury or witnesses, through the virtual, involuntary confession of the accused."

The principles of the constitution above referred to, are wholly misapplied by counsel in argument. These provisions were not intended to inhibit private actions for damages resulting from the violation of a public statute, nor for a penalty where the right of action therefor is given to the party aggrieved, nor even prosecutions in the nature of *qui tam* actions. All prosecutions for the violation of criminal laws, on behalf of the State, or general public, must be in the name of the State and by its authority, and in such prosecutions the person charged cannot be compelled to be a witness against himself; but where a right of private action is given by statute for a penalty, a civil action in the name of the party under the civil code, with all its incidents, is the proper remedy unless otherwise provided specially.

Before the trial in the court below, the Act of 1874 was repealed by the Act of March 30, 1875 (72 Ohio L. 143), as follows: "Sec. 2. That the said Act of April 20, 1874, be and the same is hereby repealed, and the repeal of said act shall affect and annul penalties accruing or accrued under said act or the Act of April 25, 1873, repealed thereby; provided, that no railroad company or corporation shall be released from its liability in actions now pending and causes of action heretofore accrued to any person from whom such railroad company or corporation, by its officers or agents, shall have demanded and received fare or freight at a rate above that allowed by law; Provided, such person paid out overcharges while using such railroad in the due course of his or her business, and not for the purpose or with the view of obtaining the penalty provided by law for such overcharge, &c. Wherefore, it is claimed, that the petition was not sufficient to support the judgment for the reason that it did not show that the plaintiff was within the saving clause.

Whether an action could have been maintained under the Act of 1874, where the overcharge was not paid in the due course of business, but was paid for the purpose of obtaining the penalty, to say the least, is doubtful; but it is clear, that since its repeal in 1875, a cause of action arising under it was lost by the repeal

unless the party was within the terms of the saving clause; yet if an action was pending at the time of the repeal and the petition stated a cause of action under the statute, its subsequent repeal, the case being in fact within the saving clause, did not render the petition insufficient. And we think the petition was sufficient under the Act of 1874. If the plaintiff's case was obnoxious to the charge of bad faith, the petition, however, stating a cause of action in the terms of the statute, the bad faith was, under the Act of 1874, a matter of defense—assuming that the payment of the excessive fare was not in the due course of business, but was for the purpose of obtaining the penalty—would have defeated the action. In the case before us, the testimony not being in the record, we must assume that it was shown that the plaintiff was within the saving clause of the repealing statute.

It is also claimed, that the first count in the petition is bad for want of an averment that the plaintiff was a passenger on the defendant's cars from Bellefontaine to New Richland, or that the ticket purchased was in fact used by a passenger. This objection is answered by the principle above stated. The allegation of the petition is as broad as the terms of the statute, namely: that the defendant demanded and received excessive fare from the plaintiff for the transportation of a passenger. If the passenger was not transported, or in other words, if the payment of the fare was not in the due course of business, but was made for the purpose of obtaining the penalty, the plaintiff, under the Act of 1874, was not bound to aver to the contrary, until such fact was set up by way of defense.

A question of some difficulty is raised as to the joinder of causes of action. Our statute provides for the joinder of actions as follows: "The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they are included in either one of the following classes: * * * 3. Injuries, with or without force, to person or property, or either," Sec. 80 of the code of 1853. The joinder in this case, if justified at all, is under this clause.

There is no doubt that this section should be construed liberally for the purpose of preventing multiplicity of actions; and we are inclined under this rule of construction to hold that the causes of action in the petition are for injuries to property; and if this be so, the joinder was proper.

The wrongful taking of another's property is an injury to the property. Wrongfully demanding and receiving the plaintiff's money for fare in excess of the amount authorized by law, was an injury to her in her property. Although it was taken without protest, the company acquired no right to retain it. It being unlawful to demand or receive it, the railroad company unlawfully exacted and converted it; and for this wrong and injury, the statute gave the plaintiff a right of action; and our best judg-

ment is, that several causes of action for such injuries may be united in the same petition.

There was no error in the court refusing a demand by the defendant for a jury to assess damages. There was no issue of fact for a jury to try. The statute, upon the facts admitted by the pleadings, fixed the amount of the recovery. If an issue had been joined for the trial of which either party might, of right, have demanded a jury, upon the finding of the jury upon the issue for the plaintiff below, the amount of their verdict would have been controlled by the statute.

Judgment affirmed.

OKEY, C. J.

In my opinion the judgment should be reversed in part and affirmed in part. The second cause of action is sufficiently stated, and the judgment as to that should be affirmed. The first cause of action is as follows: "On the 10th day of June, 1874, the plaintiff was at Bellefontaine, in Logan county, and desired to go from there to the town of New Richland, in said county, the distance of nine and nine-tenths miles. At the office of said company, in Bellefontaine, the plaintiff purchased from the defendant's agent a ticket from Bellefontaine to New Richland, which ticket represented that the plaintiff had paid her fare or toll from Bellefontaine to New Richland, and was entitled to ride on defendant's cars on said road (of the defendant) from Bellefontaine to New Richland. For said ticket and fare as aforesaid, defendant, by its agent, charged, demanded and received of the plaintiff the sum and price of thirty-five cents, and the plaintiff paid said sum of thirty-five cents for said ticket and fare, which was more than defendant was entitled by law to charge and receive for riding on said railroad said distance of nine and nine-tenths miles, whereby an action has accrued to the plaintiff for the same, and the plaintiff is entitled to have and receive from the defendant, by reason of the premises, the sum of one hundred and fifty dollars."

The statement of this cause of action is not aided by any other matter in the record. I deny that such statement is as broad as the statute. It is not stated in terms, nor even in substance, that the plaintiff below was transported to New Richland. The statute, quoted in the opinion of the court, limited the sum which the company might "demand and receive, for the transportation of passengers on said road," to a sum "not exceeding three cents per mile," and made highly penal a violation of its provisions. Indeed, for receiving *five cents*—the amount alleged in this cause of action—in excess of the prescribed fare, the penalty must be at least one hundred and fifty dollars; and knowledge, on the part of the agent, that the sum is in excess of the lawful fare, is not made by the statute a material element in maintaining the action. Such a statute, according to well settled principles, must be construed strictly. So construed, the first cause of

action, above set forth, is insufficient, in failing to state that the defendant in error was transported on the road. The inhibition is not against the sale of tickets to a *purchaser* thereof, but receiving an unlawful rate of fare "for the transportation of passengers on said road." According to the construction of the majority, a right of action accrued to the defendant in error the moment she bought the ticket of an agent, and there was not left to the company even *locus penitentiae*. But in my opinion no penalty is incurred under the statute, unless for the act of transportation actually performed by the company, a sum in excess of that prescribed in the statute has been exacted. Nothing of the sort is stated in the first cause of action, and hence it is insufficient. If one from whom illegal fare is exacted is not actually carried, he may recover the money so paid, but not the penalty prescribed in the statute. The section, of course, is susceptible of the meaning ascribed to it by the majority of the court; but where a statute highly penal in its provisions, admits of two probable but conflicting constructions, that is to be preferred which is most favorable to him against whom the penalty is asserted.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

THE STATE EX REL.

v.

THE TRUSTEES OF THE OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME.

November 15, 1881.

1. A statute declaratory of a former one has the same effect upon such former Act, in the absence of intervening rights, as if the declaratory Act had been embodied in the original Act at the time of its passage.

2. The legislative approval in the Act of April 19, 1881 (78 O. L. 309), of the construction given by the defendants, to the Act of April 13, 1880 (77 O. L. 187), requires the Ten Thousand dollars appropriated by the last named Act, to be distributed according to such construction, where no contracts had been previously entered into by the defendants for a different distribution of the fund.

Mandamus.

M. P. Nolan, for plaintiff.

C. H. Grosvenor, for defendant.

WHITE, J.

This proceeding was instituted on the relation of the Trustees of the Montgomery County Childrens' Home against the defendants, The Trustees of the Ohio Soldiers' and Sailors' Orphans' Home, to compel them to contract with the relators under the act of May 13th, 1880, (77 O. L. 187), for the support of certain orphans and destitute children of Ohio soldiers and sailors. The alternative writ was issued October 18th, 1881. The case was submitted on an agreed statement of facts in writing. From this statement it appears that the relators presented forty-seven such children in their charge, to the defendants for admission to Ohio Soldiers' and Sailors' Orphans' Home, in accord-

ance with the rules and regulations established by the defendants, for the admission of children to such home, and asked the defendants to direct the superintendent of said Home to contract at a per capita with the relators for the support of said children, and to pay the relators therefor out of the \$10,000, appropriated by the second section of said act. That the defendants admitted that said children thus presented were proper persons to be received into the Home under their charge, if there was room therein. That the defendants would not contract for the support of said children for the year ending February 15th, 1881, for want of room in the institution. The time of presenting these children for admission is said in the agreed statement to have been at a meeting of the defendants held "on the — day of — 1881." It appears that during the year 1880, and thus far in 1881, Montgomery County has had three more orphan children in the last named home, than her quota under section 677 of the Revised Statutes.

The eleventh annual report of the defendants, as Trustees, for the year 1880, was also given in evidence. The following extract shows their action under, and construction of the Act of April 13th, 1880, above referred to:

"SUPPORT OF ORPHANS OUTSIDE THE HOME."

"Preliminary steps have been taken to carry into operation the provisions of the act of April 13, 1880, (Laws, p. 187), but no contracts have as yet been made in that behalf. The statute is obscure, and the board have been in a state of uncertainty as to their powers and duties under it. It reads as follows, omitting formal parts and the second section, which appropriates \$10,000 for the purposes of the act: "

"That the Trustees of the Soldiers' and Sailors' Orphans' Home, and under their direction the Superintendent is hereby authorized and directed to contract at a per capita not to exceed the current expense cost of keeping the children at the Xenia Home, with the proper officers of the different Children's Asylums or Homes in the State, for the support of such children as have been or may hereafter be transferred to said Homes, who are children of soldiers or sailors who served in the late war from the State of Ohio."

"A number of questions have arisen in our minds in considering the act difficult of settlement. Who are to receive the benefit of its provisions? Are there other restrictions upon those who may, than that they are to be 'children of soldiers or sailors who served in the late war from Ohio?' or must they fall within some of the classes who may be admitted to the Home? Who shall make the 'transfers' contemplated? Whence shall they be made and how? Are children first to be admitted to the Home, or their applications for admissions accepted before they can be 'transferred;' or is it intended to 'transfer' those not inmates or applicants to become such? Are the board to have any supervision over them when 'transferred?' What if those 'transferred' are not properly cared for? Are the ben-

efits of the act to be apportioned among the counties of the State as contemplated by section 677 of the Revised Statutes? These are some of the questions that have arisen, the consideration of which has caused delay in taking action under the law.

"On full reflection and consultation with the Attorney General (who is in accord with the view taken as to its construction), we have concluded to treat the act as *in pari materia* with the general law governing the Home, and as a provision for the support and care of such classes of children named in section 676, Revised Statutes, as it, for want of room, cannot accommodate. All the counties of the State, as far as possible, are to have their proportional benefits of the law. We suppose the trustees of the Home are to make the 'transfers.' They cannot make transfers of children not under their authority. Such authority can be obtained only by acceptance into the Home, or, at least, by the acceptance and approval of applications for admission. But the board can only admit children agreeably to said section 677, which provides, that 'every county shall be entitled to its proportion, according to population, of the whole number that the Home will accommodate.' Any other construction in this particular would work unequally and unfairly. The counties wherein these homes or asylums are situated might be enabled to support their orphans from the State treasury, thus compelling other counties having no such homes to contribute to such support, and to maintain their own indigent orphans in addition. Such could not have been the intention of the Legislature. To effect such a result the terms of the statute should be explicit and imperative.

"While the act remains as it is, then it will be our purpose so to administer it in connection with the general law referred to, as that no county shall have more than its due share of their benefits. And we think the board should so far retain supervision over the children 'transferred' as to see that they are properly cared for and supported. Provision for this should be made in the contracts for support.

"We have stated our views and purposes thus fully upon this very important, but obscure statute, in order that legislative correction may be made, if wrong."

"The Appropriation Act which was passed and took effect April 19, 1881, contains the following clause:

"For the care and support of orphans outside the home, under the act of April 13, 1880, (O. L. p. 187), and in accordance with the interpretation thereof, as set forth in the recent report of the trustees of said home, the sum of ten thousand dollars (\$10,000); provided, the appropriation of ten thousand dollars (\$10,000) made in said act, or so much thereof as remains unexpended, may be used likewise in substantial accordance with the spirit of said act, as thus interpreted, in payment

for the support of orphans thereunder in the year ending February 15, 1881."

On the 20th of April, 1881, (78 O. L. 201) another act was passed on the subject. The first section is as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Ohio*, That the trustees of the soldiers' and sailors' orphans' home are hereby authorized to contract, at a per capita not to exceed the current expense cost of supporting the children at the Xenia home, with the proper officers of any of the children's homes authorized by the laws of Ohio in the State, for the support of such children as are by existing law entitled to admission to the Xenia home, provided, that the total expenditure under this statute shall not exceed the sum of ten thousand dollars for any one year, from February 15th to February 15th of the succeeding year."

The following is the third section:

"Sec. 3. That the act entitled 'an act to provide for the support of the soldiers' and sailors' orphans outside of the soldiers' and sailors' orphans' home in Xenia,' passed April 13, 1880, (vol. 77, Ohio laws, 187), be and the same is hereby repealed; provided that nothing in this section shall operate to impair any rights to the appropriations made in said repealed act which have accrued heretofore; and this act shall take effect and be in force from and after its passage."

The question for decision is, whether the relators are entitled to a peremptory writ.

In the determination of this question the first inquiry is as to the effect of the clause above quoted of the Appropriation Act, upon the act of April 13, 1880.

Whatever may have been the original meaning of the act, the effect of the adoption of this clause was to incorporate it into the original act; and, in the absence of any intervening rights, to give to the act the same meaning and effect as if the clause had been embodied in it at the time of its passage.

The ten thousand dollars appropriated by the act of April 13, 1880, was a charitable provision made by the legislature for the objects named in the act. The provision was to be carried into effect by the defendants. The means prescribed for the distribution of the fund, were through contracts to be made by defendants, or under their direction, "with the proper officers of the different children's asylums or homes in the State." No such contracts having been made, it was competent for the General Assembly to repeal the provision, or to construe it according to its discretion; and, as already stated, such construction was given to the act by the clause in the Appropriation Act above quoted.

The proviso in Section 3 of the act of April 20, 1881, does not affect the case. The saving in the proviso of rights which had accrued under the act of April 13, 1880, embraced the legislative construction of the act as declared in the clause approving the construction given to it by defendants in their report. No contracts having

been previously entered into by the defendants for a different distribution, of the fund.

Peremptory writ refused.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

MARY FANNING

v.

HIBERNIA INSURANCE CO.

November 22, 1881.

1. To entitle a person to become a member of a corporation, which is being organized under "An act to regulate insurance companies" (S. & S. 205), his contract to take shares therein, must be in writing, and be mutually binding on both parties.

2. A verbal promise to take shares, while the stock is being subscribed which is necessary to authorize an organization, does not constitute the promisor a stockholder, or member of such corporation, and a promise to pay for such shares is without a sufficient consideration to support it. A recovery on such promise to pay cannot be had, in the absence of facts showing that the promisor is estopped from setting up such want of consideration.

Error—Reserved in the District Court of Cuyahoga County.

Such facts only are stated as relate to the points reserved for report.

The Hibernia Insurance Company for a cause of action in the court below, in which it was plaintiff and said Mary Fanning was defendant, alleged that it was a corporation under the laws of Ohio, that on November 1, 1870, the defendant executed and delivered her promissory note for \$3,000, payable to plaintiff on demand, with interest at six per cent., together with a mortgage on certain real estate, to secure the same, and that said note is due and the condition of said mortgage is broken; wherefore judgment is asked for the amount due and for the sale of the mortgaged premises.

The defendant alleges that plaintiff was never lawfully organized as a corporation and has no legal capacity to sue, and that said note and mortgage are without consideration and void, by reason of certain fraudulent representations set out, and for the reason that she was not a subscriber for the stock in said company, for which said note and mortgage were given, nor was she ever a stockholder in said company.

The reply put the allegations of the answer in issue. The trial resulted in a verdict for plaintiff and a judgment for the amount of said note and mortgage. There was a motion for a new trial for error in admitting evidence and in charging the jury, as well as for other causes, which was overruled, a bill of exceptions was taken, and on error to the district court the case was reserved for decision in this court.

On the trial, the plaintiff offered in evidence the certificate of incorporation of the company, dated March 2, 1870; proved that this note and mortgage were given November 1, 1870, for a subscription to the capital stock thereof, which was then being made up preparatory to an or-

ganization, and that it commenced business January 1, 1871, as a fire insurance company.

The defendant then offered evidence tending to show that after obtaining the charter, the incorporators did not open books for subscriptions to stock, but placed the stock through the agency of canvassers, who took in payment notes and mortgages, as well as cash, approved by an executive committee or temporary board of directors, selected by a meeting of those engaged in forming the company as stockholders. In the case of defendant, it was shown that she verbally agreed with one of these canvassers to take \$3,000 in stock, and gave this note and mortgage in payment, but that she never subscribed for stock, in a subscription book for that purpose or by any contract in writing, and never received any certificates of stock from the company.

In rebuttal, for the purpose of creating an estoppel, plaintiff produced and offered in evidence, without first proving its execution, a proxy, purporting to be signed by defendant, authorizing one Lavan to vote her stock in 1875, on which he voted said stock. This paper was put in evidence over the defendant's objection.

Among other things the court charged the jury that, "if she (the defendant) subscribed for, or agreed to take capital stock, and she could agree verbally; it is not necessary she should sign any book or anything of that kind; if she agreed to take capital stock, she owed so much money."

The bill of exceptions and charge of the court contain other matters for review, but only so much is stated as raise the points passed upon.

JOHNSON, J.

1st. It was clearly erroneous to allow the paper, purporting to be the proxy of Mrs. Fanning to vote her stock, to be read in evidence over her objection without first proving its execution. If its execution had been proven to the satisfaction of the court, it might have been competent as tending to show that she was estopped from taking advantage of any irregularity in the organization or informality in her obligation to take stock, but until such preliminary proof was made, it was error to allow it to go to the jury.

2d. Did the court err in its charge that a verbal agreement to take stock created an indebtedness to the corporation?

It appeared that the certificate of incorporation was dated March 2, 1870. This charter was obtained under the Act of April 15, 1867, (S. & S. 205). Under this statute, any number of persons, as required by the act entitled, "An act to provide for the creation and regulation of incorporated companies in the State of Ohio," passed May 1, 1852, may form an insurance company, other than life insurance, by giving notice of their intention so to do four weeks in a public newspaper in the county, and by making a certificate specifying the name of the company, its object, the amount of capital, and

place of business, which on being properly executed shall be filed with the Secretary of State. If approved as required by the second section of the act, it shall be recorded and copied as provided by the 2d section of the act of 1852; "and said persons, when incorporated and having in all respects complied with the provisions of this act, are hereby authorized to carry on the business of insurance as named in said certificate of incorporation," &c. By section 4: The persons named in the certificate, or a majority of them, shall be commissioners to open books for the subscription of stock, * * and shall keep the same open until the full amount specified in the certificate is subscribed. Section 5 provides for an election of a board of directors after the stock is all taken.

It is a fact in this case that this note and mortgage were taken before the corporation was authorized to elect directors and other officers. It also appears that the note and mortgage were received and counted as part of the amount of stock necessary to make the amount to be obtained before holding such an election.

Waiving all questions arising out of alleged irregularities in obtaining the requisite amount of capital stock to authorize the company to organize, or make loans, let us inquire what validity there was in the promise of Mrs. Fanning to pay for capital stock, based upon a verbal agreement, made with an agent of the company to take that amount of stock.

In the manner in which the charge was given on this point, the jury might, and probably did find in favor of the plaintiff below, independent of any question of ratification or estoppel. There was evidence tending to show that Mrs. Fanning had by her acts, estopped herself from taking advantage of any defects in the organization, or any informality in the agreement, but this charge, that a verbal agreement to take stock was sufficient to create an indebtedness, left the jury free to find for the plaintiff, without passing upon the question of estoppel.

The note was a promise to pay for stock which the maker had verbally agreed to take. Had Mrs. Fanning been a subscriber to the stock, she should have been entitled to be treated as a stockholder. This would have been a sufficient consideration to have supported a promise either *express* or *implied*, to pay for the stock. The agreement must be mutual, and binding upon both parties. If the corporation are not bound to treat her as a stockholder, her promise to pay, is a *nudum pactum*, for want of a mutual promise by the corporation to award her the stock. In the absence of proof that she had received the stock, or of any other consideration to support her promise, or of any acts by her, creating an estoppel, her promise to pay for stock for which she has not subscribed, and which the corporation is not bound to deliver at the proper time, is without sufficient consideration to support it.

The constitution of the State provides for the individual liability of stockholders, and the statute prescribes the mode by which those, who

constitute themselves such, preliminary to an organization of the corporation, shall become stockholders and entitled to rights as such. The law contemplates such proceedings as will constitute the members of the proposed corporation stockholders, by requiring them to be subscribers to the stock. By the act of thus becoming a stockholder, they acquire an interest in the franchises and business of the company, and are subject to all the liabilities of stockholders, including the obligation to pay for the stock subscribed. If this obligation is not mutual, and equally binding upon the corporation, the promise to pay is not supported by a sufficient consideration. The criterion of liability is whether any act has been done by which the corporation is compelled to recognize the promiser as a stockholder. If the corporation was not bound by what took place, to recognize Mrs. Fanning as a stockholder neither is she bound to pay for stock. *Angel & Ames on Corporations*, chap. XV, *et seq*; *Thompson on Liability of Stockholders* Secs. 105-110; *Valk v. Crandall*, 1 Sandf. ch. 179; *Tonica v. Petersburg R. R. Co.*, 21 Ill. 96; *The Chelsea Glass Co. v. Dewey*, 16 Mass. 94; *Spear v. Crawford*, 14 Wendell, 20; *Selma & Tenn. R. R. v. Tipton*, 5 Ala. 787; *Phillips Limerich Academy v. Davis*, 11 Mass. 113; *New Bedford v. Adams*, 4 Mass. 138; *The Essex Turnpike Co. v. Collins*, 4 Mass. 292; *Lake Ontario, A. & N. Y. R. R. Co. v. Mason*, 16 N. Y. 451; *Vreeland v. The N. J. Stone Co.*, 29 N. J. eq. 188; *The P. & S. R. R. Co. v. Guzzam*, 32 Pa. State, 340; *The Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341.

A careful consideration of the the statutes authorizing the formation of such corporation, as well as of the authorities cited requires us to hold, that a mere verbal agreement to take stock in a company, whose promoters are engaged in securing the amount of stock required before it can organize, does not constitute the promiser a member of such corporation, and is without a sufficient consideration to support it.

Judgment reversed.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

BACON v. DANIELS.

November 22, 1881.

1. Where a contract, not required by the Statute of Frauds to be in writing, has been reduced to writing and signed by one contracting party only, it is error to treat such contract as of no validity for the reason that it is not signed by the party to be charged.

2. An agreement between the parties to a contract and a third person, whereby one party is released from the obligations of the contract and the third person substituted in his stead, is a *novation*, and requires no further consideration than such release and substitution.

Error to the District Court of Erie County.

The action was originally brought by the defendant in error against the plaintiff in error Bacon, L. U. Hazen, Wm. A. Braman, Edward F. Webster, Chas. W. Horr and Sidney S. Warner. Of these Bacon and Hazen were the only defendants served with summons.

The plaintiff alleged in his petition that in

March, 1875, the defendants entered into a contract with him by which they agreed to purchase all the milk which plaintiff should deliver from his farm during the season of 1875, at one cent per pound. That in pursuance of said agreement he had delivered to defendants prior to September, 1875, 56715 lbs. of milk, for which he had received on account \$239.19, and that defendants then refused to receive any more milk and to be further bound by their contract. He asked to recover the balance due under the contract.

The defendant Bacon answered, denying that he ever made the alleged contract with plaintiff, or any other contract for the purchase of milk. Hazen was in default for answer.

At the trial evidence was introduced tending to show that in the latter part of March, 1875, Bacon and Hazen came to plaintiff and proposed to purchase his milk on the terms stated in his petition, and that shortly thereafter plaintiff called on Hazen and notified him of his acceptance of the proposition. It was further proved, and not disputed, that prior to the middle of May, Hazen told plaintiff that Bacon had sold out all his interest in this and other contracts to defendants, Braman, Horr & Warner, and that plaintiff, at the request of Hazen, then signed a written contract thereby agreeing to deliver all his milk during the season of 1875 to Hazen, Braman, Horr & Warner, and delivered the paper to Hazen. It was not pretended by any one that Bacon was a party named in this agreement.

The defendant Bacon asked the court to charge the jury that if they found that such a contract was made between plaintiff and Hazen, Braman, Horr & Warner, their verdict must be for the defendant. This the court refused to do for the reason, among other things, that the contract in evidence was signed by one party only; and did charge the jury that if Bacon did make the original agreement it could not be rescinded without a consideration. The jury thereupon found for the plaintiff; a motion for a new trial was overruled and judgment was rendered upon the verdict. This judgment was afterwards affirmed in the District Court.

H. & L. H. Goodwin for plaintiff in error.
Taylor & Phinney for defendants in error.
LONGWORTH, J.

It might perhaps be enough to say of this case that a recovery has been had for breach of a different contract from that sued upon. It is a well established principle, however, that where parties choose to try their case upon a supposed issue not in reality raised by the pleadings, and the case is fairly tried, submitted and decided upon such supposed issue, it is too late to urge in a court of errors that the issue tried was not made by the pleadings. See *Larimore v. Well's Adm'r*, 29th Ohio St. 13, 17.

If we treat the issue to have been as announced by the court below, we can see no valid reason for refusing to charge as requested by the defendant. The substituted contract was not

one of that class which must by law be in writing, and the fact that the paper given to Hazen was signed by one party only, or not signed at all, would in no way affect the validity of the contract. That such an agreement was made is undisputed. That Hazen was authorized to contract for Braman, Horr & Warner does not appear from the evidence, but is alleged by plaintiff in his petition, which declares upon the contract to which Braman, Horr & Warner were parties. It cannot be presumed in his favor that his own allegations are untrue.

Like other contracts the one in question requires a consideration to support its validity, but that consideration appears in the release of one party and the substitution of another. The existence of the contract being established the consideration is self-evident. As a statement of an abstract proposition the charge of the court was correct, but as applied to the case its effect was to instruct the jury that the substitution of the latter for the former contract was of no validity unless accompanied by a consideration *outside* of the release and substitution itself.

It is contended that the exceptions to the refusal to give the charges asked, and to the charge as given being general, this court cannot examine the errors complained of. We regard this proposition as untenable. The whole case is before us, and it is apparent that the jury were misled by erroneous instructions. See *Baker v. Pendigraat*, 32 Ohio St. 495.

Judgment reversed and cause remanded.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

HORNBUCKLE v. THE STATE.

November 22, 1881.

BY THE COURT.

A justice of the peace has no jurisdiction of an action on the bond of a constable.

Error to the District Court of Lawrence County.

On September 17, 1875, a suit was brought before W. O. Woods, a justice of the peace of Perry Township, Lawrence County, upon the official bond of M. T. Hornbuckle. The bond, dated April 9, 1875, is in the penal sum of one thousand dollars, payable to the State of Ohio, recites the election of Hornbuckle as constable of Upper Township, Lawrence County, is conditioned as required by statute (1 S. & C. 802, § 184; Rev. Stats. § 1516), and is signed by Hornbuckle as principal and James M. Kelley and Thomas Golden as sureties. The action was in the name of the State of Ohio for the use of Lewis Smith, and against Hornbuckle, Kelly and Golden, and the ground of recovery alleged in the bill of particulars was, that Hornbuckle, having in his hands, as such constable of Upper Township, an execution in favor of said Smith against Peter Schlosser, did, on September 9, 1875, make a false re-

turn thereof. The return and its falsity, as well as the bond, are set forth in the bill of particulars. Judgment was rendered in favor of the plaintiff and against the defendants, for \$47.63, and costs, and that judgment was affirmed in the district court. This petition in error was filed in this court, on leave, by Hornbuckle, Kelly and Golden, and the question is whether the justice of the peace had jurisdiction of the action.

W. S. Forgey, for plaintiff in error.

O. S. Collier, for defendant in error.

By THE COURT.

Justices of the peace have exclusive original jurisdiction of any sum not exceeding one hundred dollars, and concurrent jurisdiction with the court of common pleas in any sum over one hundred dollars and not exceeding three hundred dollars, except as otherwise provided by statute. 1 S. & C. 770; Rev. Stats. 585. They are vested with jurisdiction, "to proceed against constables failing to make return, making false return, or failing to pay over money collected on execution issued by such justice." 70 Ohio L. 180, Rev. Stats. § 583. On the judgment so rendered, there is no stay. 68 Ohio L. 75; Rev. Stats. § 6652. But the statute further provides, that "justices of the peace shall not have cognizance * * * in actions against justices of the peace or other officers for misconduct in office, except in the cases provided for in this act" (1 S. & C. 772, § 10, Rev. Stats. § 591), the exception, as applied to this case, being that above stated. In view of these statutory provisions, a justice of the peace has no jurisdiction of an action upon the bonds of a constable.

Judgment reversed.

[This case will appear in 37 O. S.]

Digest of Decisions.

MARYLAND.

(Court of Appeals.)

BROWN v. RENSHAW. April Term, 1881.

1. *Uses—Use upon Estate of Bargainee—Equity.*—A use cannot be limited to arise out of the estate of a bargainee to a third person. If A. bargains and sells in fee to B. to the use of A., or to the use of any other person, for life or in fee, the limitation by way of use is void under the statute of uses; it will, however, be supported as a trust in chancery.

2. *Ibid.—Limitation to Bargainee—"To his and their own Proper Use and Behoof."*—The words "to his and their proper use and behoof," following the words of "limitation to the bargainee and his heirs," in a deed of bargain and sale, have no particular meaning or effect in determining either the extent of the interest conveyed or the nature or quality of the estate to be vested.

3. *Ibid.—Feoffment to A. and his heirs, to his own*

Use—A. to stand seised to Use—Equity.—A feoffment to A. and his heirs, to the use of him and his heirs, gives him the legal estate, under the statute of uses. An expressed declaration that he should stand seised to the use of another would only have an equitable operation.

4. *Ibid.—Rule in Shelly's Case—Equitable Estate—Power of Appointment.*—The rule in *Shelly's case* applies to equitable as well as to legal estates. Where an estate (a second use) is limited to A. for life, with power of appointment, and, in default of appointment, to his right heirs, the limitation being an equitable one, the remainder limited to the right heirs will become an executed fee in the taker for life, subject to be divested by the exercise of the power.

5. *Ibid.—Equitable, Executed Fee, with power of Appointment—Extinguishment of Power.*—Where the owner of an equitable, executed fee, with power of appointment, conveys the property in fee simple, with covenants of general warranty, the power is thereby extinguished.

MAINE.

(Supreme Judicial Court.)

ABBOTT v. HOLWAY, ADM'R. June 8, 1881.

1. *Deed—Feoffment in Futuro.*—Where a deed contains a provision that it is not to take effect and operate as a conveyance until the grantor's decease, and not then if the grantee does not survive him, but if the grantee do survive, it is to convey the premises in fee simple,—it will be upheld as creating a feoffment to commence in futuro, and will give the estate in fee simple to the grantee on the happening of the contingency named; the execution and record of the deed operate in the same manner as a livery seisin at the grantor's decease.

2. *Ibid.—Devise.*—Such a deed is something more than a devise in a will; it conveys to the grantee a contingent right, which, unlike the interest of a devise in the lifetime of a testator, cannot be taken from him.

3. *Ibid.—Estate in Remainder—Waste.*—Such a deed negatives the idea of an estate in remainder for the benefit of the grantee, and a reservation of a life estate to the grantor. And the grantee takes no such an interest in the premises during the lifetime of the grantor as will enable him to maintain an action on the case in the nature of waste against the administrator of the grantor for acts done by him in his lifetime after giving the deed.

CARLTON v. CARLTON. March 5, 1881.

Contract—Divorce—Action against Husband on Contract made before Marriage.—Can a woman who is divorced maintain an action against her former husband for personal services performed for him before their marriage? We think she can. "A woman, having property, is not deprived of any part of it by her marriage." Such is the

statute law of this State. R. S. c. '61, § 2. The word "property" includes choses in action as well as choses in possession. It includes money due as well as money possessed. It includes money due for personal services as well as money due for anything else. In its broadest sense it includes everything which goes to make one's wealth or estate. We cannot doubt that this is the sense in which it is used in this statute. It follows, therefore, that a woman, by her marriage, can no more be deprived of money due to her than she can be of money actually possessed by her; of money due from the man she marries, no more than of money due from any one else. It may be that while the marriage relation subsists no action of any kind can be maintained by her against her husband. But when this relation ceases, this impediment is removed, and no reason is perceived why she cannot then sue him as well as any one else. We think she can.

JEWELL v. HARDING. March 7, 1881.

Trust—Deed not under Seal—Ejectment, by Equitable Grantor—Mesne Profits—Demand.—1. An instrument purporting to be a deed, not under seal, will not operate as a declaration of a dry, naked, or passive trust, such as will prevent a recovery for possession in an action at law by the trustee against the *cestui que trust*. Such an instrument is an equitable, but not a legal deed. In equity the seller can be made to reform the deed unless sufficient cause is shown to excuse it.

2. In a real action by the equitable grantor against his grantee, mesne profits are not recoverable, the grantee being in possession by permission of the grantor, without any agreement or expectation to pay rent.

3. The action for possession is maintainable without a demand for possession. Commencing the suit is demand enough.

NEW YORK.

(Court of Appeals.)

OLMSTED v. KEYES ET AL. ADM'RS. October 4, 1881.

Life Insurance—Married Women.—A valid policy of life insurance is assignable like an ordinary chose in action. It is not necessary that the assignee shall have an insurable interest in the life of the insured in order to recover the amount of the insurance.

Where one honestly and *bona fide* takes out a policy on his life, payable to a person who has no interest in the life or the policy is assigned to such person, the beneficiary or assignee may hold and enforce it if it was valid in its inception and not procured or the assignment made as a contrivance to avoid the statute against wagering policies.

One K. in 1846 procured a policy on his life to be issued to plaintiff as trustee for H., the wife of K. H. afterwards died leaving children. K.

re-married, and at his request plaintiff assigned the policy to the second wife. *Held*, That upon the death of H., Chap. 80, Laws of 1840 ceased to operate on the policy and her interest therein went to her husband who reduced it to possession by causing its assignment, and that the insurance not being made payable to the children in any event they could claim no interest in it.

PIER v. HANMORE. October 4, 1881.

Corporations—Trustees.—A false statement in the annual report of a manufacturing &c. corporation, renders liable only the trustees who signed the report knowing it to be false.

To charge the officer with the penalty imposed for such offense, some facts or circumstances must be shown indicating that he signed the report in bad faith, wilfully or for some fraudulent purpose, and not ignorantly or inadvertently.

A statement in a report that a certain amount of capital has been paid in, must be regarded as a representation that such capital has been paid in, in cash, unless it is specified that such payment consists of the issue of stock for property purchased.

LAWRENCE v. MILLER. October 4, 1881.

Contract—Tender.—Where there is a willingness and ability to perform there need be no actual tender to do so if performance has been waived or prevented; it may be dispensed with by some positive act or declaration.

A contract for the sale of land provided for the payment of \$2,000 on the day it was made, but specified no time for performance of any other part of the agreement. The payment was made. The parties met and the vendor produced and laid on the table a deed, and told the vendee he was ready, but at the vendee's request gave him further time. They again met and the vendor again produced the deed, but the vendee was not ready. *Held*, That the vendor did all that could be required of him to put the vendee in default; that the oral agreement to meet as they did, and the extension of time, could be regarded as an essential part of the contract, and that the vendor, having come rightfully by the money paid on the contract, committed no breach and failed in no duty to the vendee, was entitled to retain it.

HAVEMEYER v. HAVEMEYER ET AL. October 4, 1881.

Contract—Agency.—Plaintiff, through her agent, H., made an agreement with defendants in relation to selling certain shares of stock which they all held, and which constituted a majority of such stock; the agreement providing that the stock should all be sold together, and no separate sale should be made by any of the parties. H. had previously negotiated with one P., to whom on the same day, but before the agreement was made, he wrote, offering to sell his stock and assist P. in getting more, and stating that he de-

sired to act in the interest of P. and not in the interest of defendants. This was unknown to defendants when the agreement was made. In an action for a breach of the agreement, *Held*, that plaintiff was responsible for the acts of H., and chargeable with his bad faith, and that such acts furnished a defense to the action.

BYRNES v. BAER ET AL. October 4, 1881.

Wills.—A will passes all the real estate the testator was entitled to devise at the time of his death.

A testator directed the residue of his estate to be invested and the income paid to his wife and daughter during their lives. The daughter, claiming that he died intestate as to real estate acquired by him after making the will, sold the same, which was purchased from her grantees by plaintiff. In an action for breach of contract of sale of such lands, *Held*, That plaintiff could not convey a valid title.

UNITED STATES COURTS.

ROBINSON, McLEOD & Co. v. MEMPHIS & CHARLESTON R. Co. (Circuit Court, W. D. Tennessee, E. D. October 24, 1881.)

1. *Fraudulent Bill of Lading—Common Carrier—Negotiable Instruments—Collateral Security—Factor's Advances—Innocent Holder—Estoppel—Principal and Agent.*—The freight agent of a railroad company, by the procurement of a cotton buyer, signed a bill of lading for 32 bales of cotton which were not on hand, and were never delivered to the railroad company or any agent for it. The plaintiffs paid a draft for the price of the cotton on the faith of the bill of lading attached to it and indorsed to them, and never having received the cotton sued the railroad company for its non-delivery. *Held*, that the carrier was not estopped to show that no cotton was in fact delivered for transportation; that the agent had no authority, real or apparent, to sign a receipt or bill of lading until actual delivery of the cotton, and the company was not liable.

2. *Same Subject—Custom—Commercial Usage.*—Neither a general nor local custom to use bills of lading as collateral security for drafts drawn against the merchandise, can alter the rules of law governing the contract of the parties. This use of bills of lading is one in which the carrier has no interest, and he cannot be charged with an extraordinary liability *dehors* the contract for which he receives no compensation or indemnity, merely to assure other parties against loss by the fraudulent dealings of those who so use them. It is not in the interest of commerce to impose this liability upon the common carriers of the country.

3. *Same Subject—Pleading—Actions—Who may Sue—Indorsee—Tennessee Code § 1967.*—The indorsee of a bill of lading for value may not only sue for the goods, but he may, in his own name,

sue the carrier for non-delivery. Bills of lading are *quasi* negotiable to that extent, and particularly so under the Tennessee Code, § 1967.

WISCONSIN.

(*Supreme Court.*)

PHOENIX MUTUAL LIFE INS. CO. v. WALRATH.—Filed October 18, 1881.

Conversion of personal property—Evidence.—1. In an action for the conversion of personal property, the defendant, under a general denial, may put in evidence any facts which disprove either plaintiff's title or a conversion by himself.

2. Thus, in this action for the conversion of moneys collected by defendant as plaintiff's agent, defendant was entitled, under a general denial, to show the contract of agency existing at the time of such collection and alleged conversion, for the purpose of showing his right to retain the money.

3. Where competent evidence offered in defence was rejected on the ground, not that it failed to make out a complete defence, but that it was incompetent, this court, on appeal, construes the offer liberally.

4. The circuit court may, in its discretion, permit an amendment of the answer on the trial, setting up a defence not already set up; and where such an amendment has been refused, not in the exercise of discretion, but on the ground of a want of power in the court to allow it, that may be ground of reversal.

5. Under subdivision 3, § 2656, Rev. St., where the plaintiff is a non-resident, the defendant may set up as a counter-claim any cause of action he may have against such non-resident; and where the action was in *tor*, for a conversion of moneys collected by defendant as plaintiff's agent, *held*, that it would not be an abuse of discretion, under the circumstances of the case, for the trial court to permit an amendment of the answer, setting up a counter-claim for plaintiff's breach of the contract of agency.

WHEELER & WILSON MANUF'G CO. v. TEETZLAFF.—Filed October 18, 1881.

Contract of sale—Default in payment—Replevin.—1. A. delivers to B. a sewing machine under a contract for the sale thereof, by which title is not to pass to B. until full payment is made in specified instalments, and on default of any payment A. is to be at liberty to take the machine away at his option. *Held*:

(1) That A., on default in a payment, could not replevy the machine from B.'s possession without demand or notice of his option, and refusal by B. to surrender it, especially when it had been suffered to remain in B.'s possession for several months after the default, plaintiff claiming meanwhile that the payment was due.

(2) That the possession of the machine by B.'s wife, living with him as such, was B.'s possession.

(3) That, in the absence of any proof that B. was keeping out of the way to avoid notice and demand, a demand upon his wife, and her refusal to surrender the machine, and claim that it belonged to B., were not a demand upon and refusal and claim by B., unless she was especially authorized to act for him in that behalf, and the mere fact that she had made all the previous payments is not sufficient to establish such agency.

2. To maintain replevin plaintiff must have had the right of possession at the commencement of the action; and where such action is in justice's court, the filing of the affidavit (which stands for the complaint) and the delivery of a warrant thereon by the justice to an officer or other person, with intent to have it served, is the commencement of the action. Rev. St. §§ 3731, 3733, 3739, 3742.

3. In replevin for a sewing machine it appeared that, at the time of filing his affidavit for a warrant, plaintiff was in possession of the "head" of the machine, i. e., of the whole machine except the stand upon which the apparatus for sewing was placed; though he returned the "head" to defendant's possession before the warrant was served. *Held*, that the action would not lie.

4. A general denial in replevin is not such an asser-

tion of title in the defendant as dispenses with proof of a demand, where that would otherwise be necessary; [and it seems that where the general denial is followed by a special averment of property in the defendant, this does not relieve plaintiff from proving a demand.]

5. A defect in a judgment not prejudicial to the appellant is no ground of reversal.

HINMAN AND OTHERS v. C. & H. HAMILTON PAPER CO.—Filed October 18, 1881.

Judgment by default—Motion to set aside.—Defendant pleaded a good defence, and intended in good faith to go to trial when the cause should be called; and its counsel, with the virtual consent of the court, arranged with the clerk to notify defendant by telephone, at its place of business in the city where the court sat, when the case would be called; and there was only slight unnecessary delay, if any, on the part of defendant in appearing in court after being so notified; and, finding that a jury had been empanelled, and had assessed the plaintiff's damages, and judgment had been rendered therefor, it immediately asked to have the judgment set aside, and for an immediate new trial; and that being denied, afterwards moved for a new trial on affidavits showing the facts. *Held*, that a denial of the motion was error.

KLATT v. CITY OF MILWAUKEE.—Filed October 18, 1881.

Injuries—City, how far liable for defective street.—1. In case of injuries suffered in attempting to pass over streets while they are undergoing repair or improvement, a city is liable only for a want of ordinary care; and where a street, during the process of repair, has been made safe, so far as the public is concerned, by barriers or other proper precautions, but afterwards, suddenly and without warning to or fault of the city, becomes unsafe by the removal of such barriers or other precautions, the city is not liable for damage occasioned thereby, without actual or implied or presumptive notice to it of such removal, and the lapse of a reasonable time for guarding against the consequent danger.

2. Under a charter requiring a city to insert in contracts for street improvements a stipulation that the contractor "shall put up and maintain such barriers and lights as will effectually prevent the happening of any accident," where a sufficient barrier has in fact been put up across the dangerous street, but removed by some unknown person before the accident, the liability of the city is still limited, as defined in the foregoing proposition.

3. Where the special findings show that the accident happened in the night, five hours after the barriers were erected, and that in the interval such barriers had been removed, but do not show where or by whom the removal was made, nor any facts bearing upon the question of implied or presumptive notice, it cannot be held as a matter of law that there was such notice.

BRONSON AND ANOTHER v. MARKEY AND ANOTHER.—Filed October 18, 1881.

Practice—Demurrer.—1. Where one count of a complaint states, in itself, a good and complete cause of action for a personal judgment, a general demurrer thereto will not lie merely because another count attempts and fails to state another cause of action for a lien.

2. The failure of one count in the complaint to state a cause of action against one of two defendants, cannot be reached by a general demurrer thereto of the other defendant; but the objection that there is a misjoinder of parties in such a case must be taken by the defendant not affected by such count, by demurrer or plea in abatement for misjoinder.

MICHIGAN.

(*Supreme Court.*)

BARRIE v. SMITH AND OTHERS.—Filed October 26, 1881.

Conditional Conveyance.—Conditions subsequent, tending as they do to destroy estates, are to be strictly construed.

A party allowing, without objection, property to be

used in violation of a condition subsequent, by which a forfeiture thereof might be claimed, and valuable improvements to be thereafter erected thereon, will be deemed thereby to have waived his right to enforce the condition for such violation.

A condition in a conveyance, which evinces no intention of actual or substantial benefit to the grantor, is one merely nominal, within the meaning of section 4113, Comp. Laws.

A condition in a conveyance by which the land is to revert to the grantor, should it ever be used for the purpose of carrying on the sale of intoxicating liquors, cannot be enforced if the grantor permits such use to be continued and valuable improvements to be thereafter erected thereon without objection, or if no substantial injury is individually sustained by him in consequence of such use.

DAVIDSON v. DAVIDSON.—Filed October 26, 1881.

Support of wife, apart from her husband.—A bill for the support of the wife separate from the husband will only be sustained when the reasons for it are imperative. If from the evidence the court is satisfied the difficulties between the parties are not serious, the bill will be dismissed, especially where there are young children for whom they ought to provide a home.

GRAND RAPIDS & IND. RAILROAD CO. v. MONROE.—Filed October 26, 1881.

Railroad—How far liable for damages to cattle on the track.—A railroad company in maintaining fences along the track is only bound to reasonable diligence, and is not liable for injuries occurring to cattle which come upon the track through defects in fences not traceable to want of care.

When conflicting charges are given, one of which is erroneous, it is to be presumed that the jury may have followed that which was erroneous; and the judgment will be reversed.

HYDE AND ANOTHER v. POWELL AND ANOTHER.—Filed October 26, 1881.

Husband and wife—Mutual acquisitions of property.—Where by mutual understanding between husband and wife their mutual acquisitions were to be equally divided and owned, and a certain amount of property was vested in the wife accordingly, if she afterwards allowed her husband to dispose of this property for his own benefit, she became to that extent his creditor.

A wife does not lose her right as a creditor of her husband by failing to make her claim known, even as against those who trust him in ignorance of it.

The fact that a wife, after receiving a conveyance from her husband in payment of her claim, pays to a third person, from personal and family reasons, a demand against the husband, does not establish the fact that she received the conveyance in trust for him.

LEDUKE v. BARNETT.—Filed October 26, 1881.

Lease.—A condition in a lease of land and building not to assign or release is not broken by allowing another to occupy a room in the building for a short time.

A lease contained a condition that the lessee should not assign or release without the written consent of the lessor, and authorized the lessor to re-enter for violation of the covenant. In an action by the lessor to recover the premises on account of an alleged assignment or re-letting, *held*, that it was incumbent upon him to show that such assignment or re-letting was without his consent.

STEVENSON v. FITZGERALD AND ANOTHER.—Filed October 26, 1881.

Trover.—To enable a party to maintain trover for property converted it is necessary for him to show that at the time of the conversion he was in actual possession or entitled to the immediate possession of the property converted.

WHITE AND ANOTHER v. ROSS.—Filed October 26, 1881.

Action against parents for enticing daughter from her husband.—A father and mother were sued for enticing

their daughter away from her husband and alienating her affections from him. The evidence showed the marriage to have been clandestine; that the antecedents of the husband had been bad; that at the time of the marriage it was agreed it should be kept secret and the wife remain with her parents for a year, but the husband soon disclosed it; that the parents were greatly agitated and excited when they were made acquainted with the facts, and the father threatened violence if the daughter was taken away at once, but said that after a week's delay if she saw fit to go no obstacle should be interposed; that before the week was up she expressed a dislike and repugnance to the husband and determined to stay with her father; and there was no evidence of compulsion or solicitation, or of language which the husband's conduct did not merit. *It seems* that the court might well instruct the jury that there was no case for their consideration.

In such an action, if the husband does not make the wife a witness, it is not competent for him to prove her statements, either written or oral, made before or after marriage, but not in the presence of the defendants, to show her affection for him.

McMANN v. WESTCOTT AND ANOTHER.—Filed October 26, 1881.

Correction of mistake in mortgage.—Complainant, as assignee, filed a bill for the correction of a mistake in the description of a mortgage, and for its foreclosure as corrected, alleging that one defendant had purchased the land intended to be described after the execution of and subject to the mortgage, and had agreed to pay it. This defendant answered, admitting execution and delivery of mortgage, assignment to complainant, agreement to pay it, and conveyance of land to him, but neither admitted nor denied that the mortgagor intended to create a lien on the property so conveyed, or the mistake; he also averred full payment. Complainant then filed an amended bill setting up that afterwards the mortgagor gave a new note and mortgage correcting the old one, which was duly recorded, and that the defendant purchased subject thereto, and asked a foreclosure of this mortgage. On motion to strike amended bill from the files, it was explained by affidavit that the original mortgage was, through inadvertence and mistake, handed to complainant's solicitor, and proceeded upon. *Held*, that the filing the amended bill was proper, and it was improperly stricken from the files.

SOVEREIGN AND ANOTHER v. ORTMAN AND OTHERS.—Filed October 26, 1881.

Parol agreement.—A parol agreement, void because not in writing, is valid so far as it may have been executed, and cannot be revoked so as to undo what has been earned under it.

Where a written agreement as to the right to cut logs from certain land was to be executed between parties, and pending the preparation and execution of such written agreement parties of one part went on and did work in making roads, preparing camps, and getting out lumber under a verbal agreement that they might do so, *Acq.*, that the verbal agreement so made was not dependent for its validity upon the original contract, and that it was valid so far as carried out and rights acquired thereunder.

Ross v. Ross.—Filed October 26, 1881.

Divorce.—Courts will not compel a husband, in a divorce proceeding to make an allowance to the wife for maintenance and counsel fees unless it is made to appear that she has no property of her own. There is no presumption of law that she has no property. An order for such an allowance, where no such showing is made, will not sustain proceedings for the punishment of the husband as for contempt in disobeying the same.

KENTUCKY.

(Court of Appeals.)

Bugs v. THE LEX. & BIG SANDY R. R. Co. Filed Oct. 1, 1881.

1. **Limitation against action to correct a mistake.**—An action for compensation for a material deficit in lands sold,

under a mistake as to quantity, must be brought within five years from the discovery of the mistake, if payment has been made before such discovery.

Payment and discovery must concur before a recovery can be had.

2. **Injunction did not prevent statute from running.**—The granting of an injunction, in this case, did not stay the appellee's action; it only prescribed when and how he should institute it; and appellee will not be allowed to deduct any time by reason of the granting of the injunction, and thus reduce the period below the requisite statutory bar.

PARROT v. KELLY. Filed Oct. 4, 1881.

Wife may will her estate to her husband, when, &c.—A conveyance by husband and wife, of the real estate of the wife, to a third person, who re-conveys it to the separate use of the wife, with power to dispose of it by will, confers upon the *feme covert* the power to devise the real estate to her husband, if the conveyance and the execution of the will are made without fraud or undue influence.

PHILLIPS v. BRECK'S EX'S. Filed Sept. 23, 1881.

A party seeking to enforce a vendor's lien for unpaid purchase money for land, must allege and prove, if denied, the terms of the contract, the character of the title to be made, and his ability and willingness to convey according to the terms of the contract.

When the title is in the vendor's devisees or heirs, and the action is brought by a personal representative he must allege their ability and willingness to convey, &c.

HUMPHREY v. HUGHES' G'DN, &c. Filed Oct. 4, 1881.

1. **Withdrawal of Pleadings.**—A party to an action can withdraw any pleading, or at least it is within the discretion of the court to permit any pleading to be withdrawn, unless it works an injury to his adversary.

2. In an action on an assignment it is necessary to allege the consideration for the assignment, and the recovery is limited to the amount actually paid therefor. Section 7, chapter 22, General Statutes.

3. A party improperly uniting two causes of action should be compelled to elect which he will prosecute.

TURNBULL v. COMMONWEALTH. Filed Oct. 6, 1881.

1. Husband is an incompetent witness against his wife.

2. **Judgment, in a criminal case, reversed for an error not specified in the grounds for new trial.**—It is not necessary that the error of the court in admitting incompetent evidence be relied upon in a motion for a new trial in order to enable the accused to avail himself of that error upon appeal.

ANDERSON, TRUSTEE, &c., v. STERRITT. Filed Oct. 8, 1881.

1. An action for dower is an action for the recovery of real estate, and not a mere personal right or chose in action.

2. **Limitation as to action for dower.**—The widow's right of action accrues upon the death of her husband, and where the husband's vendee claims and holds the land as his own, her right of action will be barred by the statute of limitations, in fifteen years.

RUDD v. MATTHEWS. Filed Oct. 13, 1881.

1. **Estoppel by admissions or representations.**—Admissions or representations made with the intention, or reasonably calculated, to influence the conduct of another, estop the person making them, from denying their truth when they have been acted upon.

It is not necessary to create the estoppel that the admissions or representations were made with a fraudulent intent.

2. Having admitted that his signature was genuine, and that he was bound thereby as surety, the party making such admissions, in this case, will not be permitted to deny his liability, although the jury found that he neither signed the note or authorized any one to sign it for him.

Ohio Law Journal.

COLUMBUS, OHIO, : : : DEC. 8, 1881.

THE first shipment of 36th Ohio State Reports was insufficient to fill all our orders for the same; hence we have been compelled to tax the patience of some of our subscribers by the delay in getting books to supply their demands. We trust to be able to fill all orders within a very few days.

It does not seem to be fully understood that we intend to publish in full, all the opinions of the Supreme Court of this state, as fast as they are prepared by the Judges. Through the courtesy and assistance of Mr. E. L. De Witt, the State Reporter, and the kindness of the judges in examining the proof sheets, we are enabled to give the opinions as complete and accurate as they will appear in the reports.

A FULL and complete index to the first volume of the LAW JOURNAL, from August 19th, 1880, to August 11th, 1881, inclusive, has just been prepared, and ready for delivery to our subscribers who may desire it. A great many of our present subscribers never received the whole of the first volume and would not desire the index for the purpose of binding the volume, but to those desiring it we will gladly forward the same upon application.

THE Supreme Court will probably adjourn next week. It is absolutely necessary that the Clerk should have the intervening time, from December 15th to January 3d, to prepare the new docket for the next term. The Judges will each take up cases, which they will consider during the interim. Over 240 cases have thus far been disposed of this term, the Judges having cases up to and including 220, on the regular calendar, in their hands for consideration. Last year at the close of the term, cause number 141, on the General Docket, was the highest reached in regular order. Thus far this term the court has disposed of 215 motions, besides the great number of cases taken out of their regular order, which makes up the total number of cases on the General Docket disposed of as above stated. Having passed number 200 on the General Docket, the court has reached the cases that have come up to the Supreme Court without leave, since the year

1878. This leaves the court a little over three years behind, on the docket at this time, but it is thought that a large number of cases will be found of easy disposition, as doubtless many will be found without much merit, as regards right of appeal, &c., not having been examined into before being brought to the Supreme Court.

BANK FAILURE.

The failure of the Mechanics' Bank, [at Newark, New Jersey], produced the usual controversies as to who should bear the loss upon commercial paper payable there. The failure of the bank is the last thing in the contemplation of the parties, and the questions must be settled by rules of law. It is a case where strict law may be applied and no one can complain of injustice. The party who wins considers himself in luck, and the one who loses bears his loss with the rest of the victims of the disaster.

In one case an auctioneer had given a check for the proceeds of a sale. The person who received the check went to the bank and instead of getting the money had the check certified and took it to New York, where he put it in his own bank for collection. This was on Saturday, and on Monday the bank closed. The holder called upon the maker to pay the check, but he replied that the other might have got the money on Saturday if he had asked for it, and that having taken the bank's certificate instead for his own convenience, he took the risk of the failure of the bank. Upon this the holder sought legal advice and was told that the maker was right, and that having taken the bank's certificate he had made the bank the only debtor and discharged the drawer; and his counsel referred to the case of the Essex County National Bank v. Bank of Montreal, 7 Biss. 193; Daniel on Neg. Inst. §§ 1601-2, 3, 4; Ball on Nat. Banks 90.

There were some cases in which checks had been taken uncertified, had not been presented for collection immediately, and in the meantime the bank had failed; and the question was presented whether the makers were liable or not. There can be no doubt in a case in which the check was deposited for collection on the following day and sent through the banks in the usual course of business, even though it might have been several days in coming. But if the holder fails to deposit on the following day, does that of itself discharge the maker in case of loss? It is well settled that unreasonable delay will have that effect, and the rule seems to be that the deposit must be made on the day following the receipt of the check. Ball on National Banks 74; Morse on Banking 262.

A more complicated case was this: A Chicago man drew upon a man in Newark and put the draft in his bank for collection. It was sent to a bank in Newark, and by that bank presented to the drawee, who accepted it "payable at the Mechanics' National Bank." The collecting

bank then presented it at the Mechanics' Bank and had it certified by the teller on Saturday, October 29th. The amount of the draft was then of course charged to the account of the drawee in the Mechanics' Bank. On Monday the Mechanics' Bank was closed. The collecting bank then, instead of crediting the Mechanics' Bank with the certified draft and holding the draft against that bank, returned it as uncollected to its correspondent in Chicago, who notified the drawer that it was unpaid. He took it up and charged the amount to the acceptor, and sent the draft back to him. The acceptor now insists that he had paid the draft on Saturday and that the collecting bank is responsible for the loss. The argument is that the collecting bank might have obtained the money on Saturday, and having accepted the certificate of the Mechanics' Bank instead for its own convenience, it assumed the risk of the solvency of the bank. The certification was a transaction entirely between the two banks, and was equivalent to a payment by the acceptor. The amount of it was charged to his account and the draft became the check of the Mechanics' Bank upon itself, which was accepted as money by the collecting bank. On the other hand the collecting bank insists that it was acting merely as an agent, and is responsible only for neglect; that taking the certificate of the bank was in accordance with a well known and necessary usage, and that there were no remissness to be charged against it. It seems to us that the argument of the acceptor must prevail. The bank could have obtained actual payment on Saturday, and was bound to do so unless it would accept something else upon its own risk. It took the certification of the other bank in lieu of payment, and must now look to the other bank alone. It may well be that the state of the accounts between them was such that there will be no loss upon the draft. It may have gone to reduce the debt due from the collecting bank to the bank that has failed. If the case were that of a check, it would be governed by the authorities cited above—Essex County National Bank v. Bank of Montreal, 7 Biss. 193; Dan. on Neg. Inst. § 1601, etc.; Morse on Banking 280—and there is no sound distinction in this respect between a check and an accepted draft payable at a certain bank. Ames Cases on Bills and Notes 739 n. 1, 802, Meads v. Merchants Bank, 25 N. Y. 143.—*The New Jersey Law Journal*.

IN *Muse v. Muse*, 84 N. C. 35, it was held that "a husband is not excused from the maintenance of his wife because he lacks an estate. He must labor, if need be, for her support." "The court adopted the very minimum that an able-bodied man can earn, ten cents a day."

THE Supreme Court of the United States has just this week decided that a sheriff is not personally liable for damages in having obeyed the mandate of a court.

SUPREME COURT OF OHIO.

THE WESTERN UNION TELEGRAPH COMPANY

v.

GRISWOLD & DUNHAM.

November 1, 1881.

1. While a telegraph company may, by special agreement, or by reasonable rules and regulations, limit its liability to damages for errors or mistakes in the transmission and delivery of messages, it cannot stipulate, or provide, for immunity from liability, where the error, or mistake, results from its own negligence. Such a stipulation, or regulation, being contrary to public policy, is void.

2. Where in an action against the company for damages resulting from an inaccurate transmission of a message, such inaccuracy is made to appear, the burden of proof is on the company to show that the mistake was not attributable to its fault or negligence.

3. The plaintiff's agent sent to them from Woodstock Ontario, a message in these words:—"Will you give one fifty for twenty-five hundred at London. Answer at once, as I have only till night." The court instructed the jury that the message was not in cipher or obscure, within the meaning of a stipulation in the agreement under which the message was sent, that the company "assumed no liability for errors in cipher or obscure messages."

Held,—That the instruction was correct.

Error to the Court of Common Pleas of Cuyahoga County—Reserved in the District Court.

The defendants in error, dealers in flax seed and manufacturers of linseed oil, at Cleveland, brought an action against the plaintiff in error, The Western Union Telegraph Company, in November, 1872, to recover damages for the negligent transmission of a dispatch from Buffalo to Cleveland, sent by the defendants' agent, S. W. Cowpland, from Woodstock, Ontario, upon which the defendants acted, and by reason of which negligence they suffered damages to the alleged amount of \$1,163.70, for which sum, with interest thereon from December 23, 1871, they prayed judgment. The dispatch sent was as follows:

"WOODSTOCK, ONTARIO, December 23d, 1871.

"Messrs. Griswold & Dunham:

"Will you give one fifty for twenty-five hundred at London? Answer at once, as I have only till night.

"S. W. COWPLAND."

The dispatch, as intended by Cowpland and understood by Griswold & Dunham, meant to inquire whether the latter would pay one dollar and fifty cents in gold for twenty-five hundred bushels of flax seed, at London, Ontario, the parties having had a prior correspondence in reference to the purchase of flax seed in Canada. The dispatch was sent from Woodstock to Buffalo over the lines of the Montreal Telegraph Company, and thence to Cleveland over the lines of the plaintiff in error.

The dispatch delivered to Griswold & Dunham, at Cleveland, was as follows:

"WOODSTOCK, ONTARIO, December 23d, 1871.

"To Griswold & Dunham:

"Will you give one five for twenty-five hundred at London. Answer at once, as I have only till night.

"S. M. COWPLAND."

To this dispatch they made the following reply :

"CLEVELAND, OHIO, December 23d, 1871.

"S. M. Cowpland, Woodstock, Ontario :

"Yes, if seed is prime, and we can hold at London until spring. "GRISWOLD & DUNHAM."

Upon the receipt of this message Cowpland purchased for the defendants 2407 bushels of flax seed at \$1.45 per bushel, and on the 22d of January, 1872, shipped the same to Cleveland via Detroit.

The answer of the plaintiff in error denied the allegation of negligence charged and set up the fact that the dispatch was sent from Woodstock under a special agreement with the Montreal Telegraph Company, which was as follows :

"MONTREAL TELEGRAPH COMPANY, FORM NO. 2.

"(Terms and conditions on which this and all other messages are received by this Company.)

"In order to guard against, and correct as much as possible some of the errors arising from atmospheric and other causes appertaining to telegraphy, every important message should be repeated, by being sent back from the station at which the message is received to the station from which it is originally sent. Half the usual price will be charged for repeating the message, and while this company, in good faith will endeavor to send messages correctly and promptly, it will not be responsible for errors or delays, in the transmission or delivery, nor the non-delivery of repeated messages beyond two hundred times the sum paid for sending the messages, unless special agreement for insurance be made in writing, and the amount of risk specified on this agreement and paid at the time of sending the message, nor will the company be responsible for any error or delay in the transmission or delivery, or for the non-delivery of any un-repeated message, beyond the amount paid for sending the same, unless in like manner specially insured, and amount of risk stated therein, and paid for at the time. No liability is assumed for errors in cipher or obscure messages, nor is any liability assumed by this company for any error or neglect by any other company over whose lines this message may be sent to reach its destination, and this company is hereby made the agent of the sender of this message to forward it over the lines extending beyond those of this company. No agent or employe is allowed to vary these terms, or make any other verbal agreement, nor any promise at the time of performance, and no one but a superintendent is authorized to make a special agreement for insurance. These terms apply through the whole course of this message on all lines by which it may be transmitted.

"(Signed,) JAMES DAKERS, Secretary.

"(Signed,) HUGH ALLEN, President.

"Sent the following message without repeating it, subject to the above conditions. Time received, December 23d, 1871 :"

"To Messrs. Griswold & Dunham, Cleveland, O. :

"Will you give one fifty for twenty-five hundred at London. Answer at once, as I have only till night.

(Signed) "S. W. COWPLAND."

It appeared from an answer to an interrogatory annexed to the plaintiff's reply, made by the superintendent of the Telegraph Company, that he had caused inquiry and search to be made for the original message received by the company at Buffalo, and that the same could not be found.

The court, among other things, charged the jury, in substance, as follows :

That if the message delivered to the defendant below by the Montreal Company was the same as the one delivered to it at Woodstock, and the mistake occurred in transmitting the same over the line of the defendant below from Buffalo to Cleveland, and such mistake occurred through the carelessness and negligence of the defendant, the special agreement set up in the answer did not relieve the company from liability otherwise resulting from such negligence.

The court also charged the jury that the delivery of the message to the plaintiffs differing from that received by the company, was evidence of negligence, and left it to them to determine whether such evidence was sufficient to establish the fact of negligence.

The court further charged, that while the clause in the special agreement set up in the answer exonerating the Company from liability "for errors in cipher or obscure messages" was valid the message was not obscure, nor in cipher within the meaning of that stipulation.

To these several points of the charge, and for refusing to give their converse to the jury, the defendant below excepted.

Verdict and judgment for the plaintiffs below for \$1,290.61.

On error to the district court the cause was reserved for decision by this court.

BOYNTON, C. J.

As we have reached the conclusion that the court below did not err in denying the motion for a new trial founded on the alleged insufficiency of the evidence to sustain the verdict, and as a review of the evidence would serve no useful purpose, it only remains to consider whether the court erred in the instructions given to the jury. The first question arises on the exception to that portion of the charge by which the jury were told that the special agreement under which the message was sent did not relieve the company from liability for the damages resulting from the inaccurate transmission of the message, if the mistake or error occurred through the negligence of the Company or its agents. There seems to be a want of harmony in the decided cases on the point of the correctness of this instruction; and this no doubt arises, in some measure, at least, from the different views taken of the nature of the employment in which telegraph companies are engaged, and to some extent from different views taken of their rights and liabilities by courts who

fully agree upon the nature of such employment, but differ as to the extent of the duties and obligations that spring therefrom. In *Parks v. The Alfa California Tel. Co.*, 13 Cal. 422, the obligations of telegraph companies were held to be the same as those of common carriers, and consequently that they were, in effect, insurers of the safe transmission of a message, unless the transmission was interfered with by the act of God or the public enemies. An early case in England held the same doctrine. *McAndrew v. The Electric Tel. Co.*, 33 Eng. L. & Eq. 180. But the weight of authority, both English and American, is clearly the other way. *Ellis v. American Tel. Co.*, 63 Allen 226; *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544; *Breese v. United States Tel. Co.*, 48 N. Y. 132; *New York, etc., Tel. Co. v. Dryburg*, 35 Penn. St. 298; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; *Birney v. New York, etc., Tel. Co.*, 18 Md. 341; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299.

But that telegraph companies exercise a *quasi* public employment with duties and obligations analogous to those of the common carrier, is a proposition clearly settled. The statute confers upon them power of eminent domain, which no one will contend could be conferred upon them, consistently with the Constitution, if they were engaged in a mere private employment or occupation by which the public interests were not affected.

They are required to receive dispatches from individuals or corporations, including other telegraph companies, and to transmit and deliver the same faithfully and impartially in the order received, except in a few specified cases, where from public considerations certain preferences may be made. S. & S. 155. These provisions, as well as the nature of the employment itself, are entirely inconsistent with the theory that the business of conducting a line of telegraph is a mere private employment as distinguished from one carried on for the benefit of the public at large. Granting this, it is, however, contended that because the company is not an insurer of the safe transmission of a message, and is authorized to make or adopt such regulations and by-laws for the management of the business as it may deem proper, (1 S. & S. 298, § 46), it cannot be made liable to the plaintiff below, beyond the amount paid for sending the message, in the face of the stipulation against liability for any error in an unrepeatable message, notwithstanding such error resulted from the negligence of the company's agents by whom the message was sent over the wires. To this proposition we do not agree. It has long been the settled law of this State that a common carrier cannot, either by special agreement with, or notice brought home to the shipper, relieve himself from liability for the consequences of his negligence. *Davidson v. Graham*, 2 Ohio St. 181; *Railroad Company v. Curran*, 19 Ohio St. 1. In *Graham v. Davis*, 4 Ohio St. 377, a case involving the liability of a common carrier who

claimed exemption therefrom by reason of a special contract with the shipper, it was said that "one of the strongest motives for the faithful performance of a public duty, is found in the pecuniary responsibility which the carrier incurs for its failure. It induces him to furnish safe and suitable equipments, and to employ careful and competent agents. A contract, therefore, with one to relieve him from any part of this responsibility reaches beyond the person with whom he contracts, and affects all who place their persons or property in his custody. It is immoral because it diminishes the motive for the performance of a high moral duty; and it is against public policy, because it takes from the public a part of the security they would otherwise have."

These considerations—there referred to common carriers—apply with equal force to those who furnish the means of telegraphic communication to the public. Their employment is not only public in its nature, but it has become a necessity alike to the social and commercial world.

Hence, it is as true of them as of common carriers, that any stipulation or regulation that authorizes or enables them to secure exemption from liability for negligence, in the transmission or delivery of the message, reaches far beyond the person with whom they are dealing and for whom the immediate service is being performed, and affects the entire public. The cases which hold that a common carrier may stipulate for immunity from liability for mere negligence all agree that they are liable for "gross negligence." But just what this term means is not readily ascertained. There is authority for holding it to be equivalent to fraud or intentional wrong; *Jones on Bail's* 8—46 *et seq.*; but a majority of the cases would seem to hold it to be a failure to exercise ordinary care. In *Wilson v. Brett*, 11 Mees' & Wels' 113, it was said by Baron Rolfe, that he could "see no difference between gross negligence and negligence; that it was the same thing with a vituperative epithet." In *Hinton v. Dibbin*, 2 Ad. & EL (N. S.) 644, Lord Denman remarked, that "when we find gross negligence made the criterion to determine the liability of a common carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made; and it may well be doubted whether between gross negligence and negligence merely, any intelligible distinction exists." See also *Beal v. South Devon R'y Co.*, 3 H. & C. 337; *Austin v. The Manchester R'y Co.*, 11 Eng. L. & Eq. 513; and *Comments of Parke B. in Wyld v. Pickford*, 8 M. & W. 443. In *Duff v. Budd*, 3 Brod. & Bing. 177, it was held by Dallas, Ch. J., that "gross negligence is where the defendant or his servants have not taken the same care of the property as a prudent man would take of his own." And by

Best, J., in *Batson v. Denovan*, 4 Barn & Ald., that "they must take as much care of it as a prudent man does of his own property."

In *Grill v. The General Iron Screw Collier Company*, L. R. 1, C. P. 600, gross negligence was held to be a relative term and meant "the absence of the care that was requisite under the circumstances." It was the absence of such care as it was the duty of the defendant to use in the circumstances of the case.

In *Beal v. South Devon R'y Co.*, *supra*, it was held in the case of a carrier that "gross negligence includes the want of that reasonable care, skill, and expedition which may properly be expected of him." Crompton, J., remarking that, "for all practical purposes, the rule may be stated to be that failure to exercise reasonable care, skill and diligence, is gross negligence." To the same effect is *Briggs v. Taylor*, 28 Vt. 181, and *Shear & Red on Neg.*, § 16. All substantially agreeing with Willis, J., in *Lord v. Midland Railway Co.*, L. R. 2, C. P. 344, that "any negligence is gross in one who undertakes a duty and fails to perform it." See, also, *Griffith v. Zipperwich*, 28 Ohio S. 388; and *Pennsylvania Co. v. Miller*, 35 Ohio S. 549.

These authorities show a strong tendency in the adjudications to break down the impracticable distinction between what is termed gross negligence and ordinary negligence, which some of the cases hold to exist. The rule, however, in this State is well settled, that one exercising a public employment is liable for failing to bring to the service he undertakes, that degree of skill and care which a careful and prudent man would, under the circumstances, employ; and that any stipulation or regulation by which he undertakes to relieve himself from the duty to exercise such skill and care in the performance of the service, is contrary to public policy, and consequently, illegal and void. In our opinion telegraph companies fall within the operation of this rule; and that in failing to exercise such care and skill in the transmission and delivery of messages, they become liable for the resulting consequences, notwithstanding their stipulation to the contrary. The right to make rules and regulations to govern the management of their business is expressly conferred by statute. But such rules must be reasonable, and if they fail to accord with the demands of a sound public policy they are void. *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 Wall. 267.

We are also of the opinion that the failure to transmit and deliver the message in the form or language in which it was received, is, *prima facie*, negligence, for which the company is liable; and that to exonerate itself from the liability thus presumptively arising, it must show that the mistake was not attributable to its fault or negligence. This rule not only rests upon sound reason, but is fully sustained by well considered cases. *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; *Rittenhouse v. The Independent Line of Telegraph*, 44 N. Y. 263; *Tyler, etc., v. The W. U. Tel. Co.*, 60 Ill. 421; *Baldwin*

v. U. S. Tel. Co., 45 N. Y. 744; *W. U. Tel. Co. v. Carew*, 15 Mich. 525; *De La Grange v. S. W. Tel. Co.*, 25 La. An. 383; *W. U. Tel. Co. v. Meek*, 49 Ind. 53; *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458.

If the error or mistake is attributable to atmospheric causes or disturbances, or to any cause for which the company is not at fault, it is entirely within its power to show it. To require the sender of the message to establish the particular act of negligence or hunt out the particular locality where the negligent act occurred, after showing the mistake itself, would be to require, in many cases, an impossibility, not infrequently resulting in enabling the company to evade a just liability. We are further of the opinion that the court did not err in holding, and so instructing the jury, that the message received by the company for transmission was not obscure within the meaning of the stipulation in the agreement under which the message was sent. It appeared upon its face that it related to a business transaction, a transaction involving the purchase and sale of property. The company was, therefore, apprised of the fact that a pecuniary loss might result from an incorrect transmission of the message. Where this appears there is no such obscurity as relieves the company from liability for negligently failing to transmit and deliver the message in the language in which it was received. *Western Union Tel. Co. v. Wenger*, 55 Penn. St. 262; *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 265; *Manville v. W. U. Tel. Co.*, 37 Iowa 220.

Judgment affirmed.

OKEY, J.

The view taken of this case in the opinion of the Chief Justice is, in my judgment, wrong. In the argument for the plaintiff in error in this court, a reversal of the judgment in the court below is sought upon three grounds only. First: It was not shown that the defendant below failed to correctly transmit the message received, and therefore a new trial should have been granted. Second: The verdict is not supported by sufficient evidence, in that the damages are excessive. Third: The court erred in the charge with respect to the special contract.

I will briefly consider these alleged grounds of error, but not in the order they are discussed by counsel.

1. As to the special contract with respect to the message, set forth in the statement of the case. The contract, though made in Canada, with the Montreal Telegraph Company, applies in terms "through the whole course of this message on all the lines by which it may be transmitted." The statutes of this State (S. & S. 155, § 137, 1 S. & C. 298, Rev. Stats. § 3462), conferring power on telegraph companies to make rules and regulations, are the same as in Massachusetts and other states, and, according to the construction placed thereon in several states, the stipulations in the special contract in this case are, with a single exception, such as

telegraph companies may lawfully make. *Grinnell v. Telegraph Co.*, 113 Mass. 299; 30 Ohio St. 557.

I am entirely satisfied with Grinnell's case; and in asserting a principle inconsistent with it, this court is opposed by the clear weight of authority. 2 Thompson on Neg. 841. But by the contract relied on in this case a special agreement could only be made with the superintendent of the company. To require that one desiring to make such special agreement shall hunt up the superintendent, is unreasonable, and renders the regulation wholly void. *Tyler v. Telegraph Co.*, 60 Ill. 421—438, affirmed, 74 Ill. 168.

2. Did the plaintiff in error fail to correctly transmit and deliver the message? The answer amounts to a general denial; at least, it was so regarded by both parties during the trial; and although, during the charge, the plaintiffs below suggested that certain allegations in the petition were not denied, the court said to the jury that this was a mistake, and that the jury must regard all allegations in the petition as denied. Whether this was strictly accurate or not, we should under the circumstances, on hearing of this petition in error, regard the answer in the same way.

The court charged the jury that the burden was on Griswold & Dunham to show negligence. If that charge was correct, the verdict was wrong, for negligence was not proved. The destruction of the original message by the telegraph companies and two or three other facts relied on to show such negligence, are wholly insufficient to show any negligence whatever. But the charge was not correct. Where suit is brought for a loss of goods against the last of several connecting common carriers, the burden is on such last carrier, on proof that the goods were lost or injured in transit, to show that the loss did not occur on his part of the line. *Laughlin v. Railroad*, 28 Wis. 204; *Dixon v. Railroad*, 74 N. C. 538; *Smith v. Railroad*, 43 Barb. 225, affirmed, 41 N. Y. 620; 2 Daly, 463; *Brintnall v. Railroad*, 32 Vt. 665. The same principle has been applied, and I think properly applied, in the case of connecting telegraph companies. *De La Grange v. Telegraph Co.*, 25 La. Ann 383. The burden to show by evidence that the mistake in this case was not the result of negligence on the part of the agents of the plaintiff in error—the proof showing that the message received by the defendants in error was not the same as when delivered to the Montreal Telegraph Company—rested, therefore, upon the plaintiff in error; but it offered no such proof.

3. Were the damages excessive? Cowpland was the agent of Griswold & Dunham to purchase and pay for the seed in Canada, and he was to be paid for his services by them. This is so stated in the petition and shown by the evidence. Cowpland testifies that he did not know any mistake in the message had been made until January 30, 1872, which was after Griswold

& Dunham had sustained all the injury of which they complain. But if there is a fact clearer than all others in the case, it is that Cowpland ascertained the mistake January 5, 1872. About this there can be no sort of doubt. Now, on January 5th, Cowpland had not received or paid for a bushel of the seed, and besides the seed was then worth at London, Canada, one dollar and forty-five cents per bushel. He had it in his power, therefore, to prevent the larger part, if not all the loss sustained by his principals, which loss they are now shifting upon the telegraph company. This can be justified neither in morals nor law. Notice to Cowpland on January 5, 1872, was notice to Griswold & Dunham. Wade on notice, § 672 *et seq.* And see 2 Thompson on Neg. 858. I am of opinion, therefore, that a new trial should have been granted upon the ground that the damages were excessive.

SUPREME COURT OF OHIO.

DAVID WERT

v.

T. H. B. CLUTTER.

November 22, 1881.

1. Under the Act of May 5, 1868 (65 Ohio L. 146), to protect the citizens of Ohio from empiricism, it is not unlawful for a person of good moral character to practice medicine and surgery for reward or compensation, who has been engaged in the continuous practice for ten years or more.

2. Such ten years of continuous practice may embrace time since, as well as before, the taking effect of said act.

3. It is immaterial whether the services rendered during such period of practice were gratuitous or for compensation.

Error to the District Court of Crawford County.

The original action was brought by defendant in error against plaintiff in error, to recover for services rendered by plaintiff as a physician and surgeon, at the request of the defendant. The plaintiff alleged that at the time of rendering the services, to wit: on and after the 17th day of March, 1874, he was a person of good moral character and had been continuously engaged in the practice of medicine for a period of ten years and more, &c. These allegations were denied by the defendant.

On the trial in the court of common pleas, the plaintiff offered testimony tending to prove the rendition of services as alleged in his petition, and that previous to such services he had been continuously engaged in the practice of medicine for more than ten years, but it was not claimed that he had been so engaged for a period of ten years before the 1st day of October, 1868; and it was also admitted on the trial, that at the time the alleged services were performed by the plaintiff, for the defendant, on the said 17th day March, 1874, he the said plaintiff had not attended two full courses of instructions and graduated at some school of medicine, either of the United States or some foreign country, that he did not have and could not now produce a certifi-

cate of qualification from any State or county medical society; and that he then was and now is a person of good moral character.

Whereupon the defendant, by his counsel, asked the court to charge the jury: "That in order to recover in this case the plaintiff must satisfy the jury by a preponderance of evidence, that prior to the time the alleged services were performed by plaintiff, as alleged in his petition, that the said plaintiff had attended two full courses of instruction and graduated at some school of medicine either of the United States or some foreign country; or can produce a certificate of qualification from some State or county medical society; or, that prior to October 1st, 1868, he had been continuously engaged in the practice of medicine, for a period of ten years." Which instructions the court refused to give to the jury, but did charge the jury that, "If the plaintiff had been continuously engaged in the practice of medicine, for a period of ten years prior to rendering the services alleged in his petition, and if the services were performed at the request of the defendant, under a promise of the defendant to pay him therefor, he will be entitled to recover what the testimony shows the services were reasonably worth, with interest." To which refusal to charge as requested, and charge as given, the said defendant excepted.

A verdict and judgment were rendered for the plaintiff, which judgment was afterwards affirmed by the district court.

This proceeding is prosecuted to reverse the judgment below.

Finley & Swigart and S. R. Harris, for plaintiff in error.

Nathan Jones, for defendant in error.

McILVAINE, J.

The only questions for decision in this case arise on the statute of May 5, 1868, (65 Ohio L. 146), which is as follows: "An act to protect the citizens of Ohio from Empiricism, and elevate the standing of the medical profession."

"SECTION I. That it shall be unlawful for any person within the limits of said State, who has not attended two full courses of instruction and graduated at some school of medicine, either of the United States or some foreign country, or who cannot produce a certificate of qualification from some State or county medical society, and is not a person of good moral character, to practice medicine in any of its departments for reward or compensation, or attempt to practice medicine, or prescribe medicine or medicines, for reward or compensation, for any sick person in the said State of Ohio; *provided*, that in all cases when any person has been continuously engaged in the practice of medicine for a period of ten years or more, he shall be considered to have complied with the provisions of this act, and that where persons have been in continuous practice of medicine for five years or more, they shall be allowed two years in which to comply with such provisions."

"SEC. II. Any person living in the State of

Ohio, or any person coming into said State, who shall practice medicine or attempt to practice medicine in any of its departments, or perform or attempt to perform any surgical operation upon any person within the limits of said State, in violation of Section one of this act, shall, upon conviction thereof, be fined not less than fifty nor more than one hundred dollars for such offense, and upon conviction of a second violation of this act, shall, in addition to the above fine, be imprisoned in the county jail of the county in which said offense shall have been committed, for the term of thirty days, and in no case wherein this act shall have been violated, shall any person so violating receive a compensation for services rendered; *provided*, that nothing herein contained shall in any way be construed to apply to any person practicing dentistry."

"SEC. III. This act shall take effect and be in force on and after the first day of October, 1868."

The defendant in error claims, that the admission of his good moral character excludes him from the operation of the statute. The letter of the statute sustains this claim, but we think the evident intent of the legislature, being "to protect the citizens of Ohio from empiricism," as declared in the title of the act, was to exclude, from the profession of medicine and surgery all persons who do not possess both qualification and character, by making it unlawful for any person who has not the prescribed certificate or a good moral character to practice medicine for reward or compensation. In construing the statute in this respect, we must substitute the disjunctive "or" for the copulative "and."

The principal question in the case, however, is: In order to entitle the medical practitioner to reward or compensation for his services, under the proviso in the first section, must it be shown that the period of ten years of continuous practice elapsed prior to the taking effect of the act, or is it sufficient to show that the period was complete at the time of rendering the service for which compensation is claimed? By the purview of the first section it is made unlawful for any person to practice medicine or surgery in the State of Ohio for reward or compensation without having graduated at a school of medicine, or producing a certificate of qualification from some State or county medical society. The evidence of qualification here prescribed is without limit as to date—it is sufficient that it can be shown to exist at the time when the right to practice is drawn in question. By the proviso, a period of ten years continuous practice is made exactly equivalent, to the evidence of qualification prescribed in the purview; and there is no reason, as far as the protection of the public is concerned, why a different rule should prevail as to the time when a person may qualify himself for the practice of medicine. If the experience of an empiric, (the term empiric is here used as in the statute, to mean a medical practitioner who has not graduated in a medical college, or has a certificate of qualification from a medical society, or

has not been engaged in the continuous practice for the period prescribed in the statute), for ten consecutive years before the passage of the act, was sufficient "to protect the citizens of Ohio" from the evils to be apprehended from unskilled practitioners, the like experience, after that date, should also suffice. That this was the legislative view is evident from the language of the *proviso*. "That in all cases *where* any person has been continuously engaged in the practice of medicine for the period of ten years or more, he shall be considered to have complied with the provisions of this act." In the opinion of the majority of the court, this proviso is a clear declaration, that *whenever* the right of a person of good moral character, to practice medicine or surgery for reward or compensation, is questioned, such right may then be established by showing that previous to that time, he has been continuously engaged in the practice for ten years or more.

The latter clause of the *proviso* "that *where* persons have been in continuous practice of medicine for five years or more, they shall be allowed two years in which to comply with such provisions," does not conflict with this view. We admit that the five years here referred to must ante-date the taking effect of the act. But the case here provided for does not exclude the empiric from practicing for reward or compensation during the two years of probation, while the person seeking to qualify himself by continuous practice subsequent to the taking effect of the act is debarred from reward or compensation until the whole period of ten years is completed.

It must be observed that this statute does not declare the practice of an empiric, *ipso facto*, unlawful, but only such practice for reward or compensation. The provision in the penal section of the act (section two) that "in no case wherein this act shall have been violated, shall any person so violating receive compensation for services rendered" does not extend the inhibitions of the first section. Hence, for this reason the judgment below could not be disturbed, as the record does not show that the plaintiff below practiced for reward or compensation, after the passage of the act, until his period of ten years continuous practice was complete. But a majority of the court do not put their judgment of affirmance on this ground; but on the broader grounds that ten years of continuous practice of medicine, whether before or after the taking effect of this act, and whether for compensation or not, relieves the practitioner from inhibitions imposed upon empirics by its provisions. Unquestionably if such period were devoted to the practice beyond the limits of this State, such practitioner would not be amenable to the provision of the statute. True, it may be said that such probationary practice is not in violation of the act; but that circumstance does not add or detract from the knowledge or skill which the statute assumes is gained from experience, and which is deemed to constitute the necessary qualification of a practitioner.

We fully appreciate the force of the argument

on the other side, that a statute should not be so construed as to create a right in one who acts in violation of its provisions. But this rule of construction does not apply in this case. This statute was not intended to create a right in any one to practice medicine. It was simply intended to prohibit the exercise of the right, (which before was universal), by unqualified persons. The right remains in all persons except those from whom it is taken away by the statute, and it is not taken away from a person who, at any time, has been in the continuous practice for ten years or more. Such we think is the manifest intent and purpose of the act when considered as a whole; and the manifest purpose can not be defeated by any general rule of construction.

Judgment affirmed.

WHITE, J. dissenting:

The first section of the statute makes it unlawful for any person to practice, or attempt to practice medicine for reward or compensation, without having the qualifications therein prescribed. By the proviso two classes of persons are excepted from the operation of the act: 1. Persons who *have been* continuously engaged in the practice of medicine for a period of ten years; 2. Persons who *have been* in the continuous practice of medicine for a period of five years. The last-named class is allowed two years within which to comply with the prescribed provisions. The second section of the act declares the practice or attempt to practice in violation of the first section an offense and prescribes the penalty to be not less than fifty nor more than one hundred dollars. For a second offense imprisonment is added. The act was passed May 5th and took effect October 1st, 1868. Its object is declared to be to protect the citizens of Ohio from empiricism, and it should receive such construction as will promote this object. In the opinion of the majority of the court, this is accomplished by the continuous violation of the statute for a period of ten years, thus during that time exposing the citizens to all the evils of empiricism. The claim is, as I understand it, that ten years of such practice is by the statute made equivalent to having the other qualifications prescribed. This, in effect, makes the statute operate to reward and punish the same acts or conduct. To this reasoning I cannot assent.

The proviso embraces only the two classes named, who had been engaged in practice five and ten years respectively at the time the act took effect, and was intended solely for their benefit.

OKEY, C. J. concurs in the foregoing dissenting opinion.

"Lord Ellenborough showing some impatience at a barrister's speech, the gentleman paused and said, 'Is it the pleasure of the court that I should proceed with my statement?' 'Pleasure, sir, has been out of the question for a long time; but you may proceed.'"—*Oddities*.

SUPREME COURT OF OHIO.

JAMES MORGAN, SUPERINTENDENT OF THE CINCINNATI WORK HOUSE,

v.

WILLIAM NOLTE.

April 19, 1881.

1. The only limitations to the creation of offences by the General Assembly, are the guarantees contained in the Bill of Rights.

2. These guarantees are not infringed by sec. 2108 of the Revised Statutes, which authorizes cities and villages to provide for the punishment of known thieves, pickpockets, watch-stuffers, etc.

3. An ordinance under this statute, providing for the punishment of any known thief found in the municipality, is valid.

Error to the Probate Court of Hamilton County.

William Nolte having been sentenced and committed to the work house, by the Police Court of Cincinnati, sent out a writ of habeas corpus from the Probate Court of Hamilton County against James Morgan, Superintendent of the Work House, to obtain his discharge from custody.

The return showed that Nolte was held in custody under a commitment from the police court issued in pursuance of his conviction and sentence by that court. A certified transcript of the proceedings in the police court was also made part of the return, from which it appears that a prosecution was instituted in said court, by the City of Cincinnati against Nolte upon an affidavit containing the following charge:

"That one William Nolte, on the 21st day of December, A. D. 1880, at the city and county aforesaid, being a known thief, was found in the city, contrary to the ordinance of said city."

The defendant pleaded not guilty to the charge, and on the trial having waived a jury was tried to the court. The court, after hearing the testimony, found him guilty and ordered that he be committed to the work house for the term of thirty days.

On the return to the writ of Habeas Corpus the probate court ordered the discharge of Nolte from the custody of the superintendent of the work house.

The object of the present petition in error is to obtain the reversal of this order. On account of the public interest involved in the question, and owing to the fact that conflicting decisions have been rendered on the question by judges of the court of common pleas, the petition in error has been allowed directly to the probate court.

John S. Murphy, for plaintiff in error.

Walter T. Logan, for defendant in error.

WHITE, J.

The only question submitted in this case is whether the council of the city was authorized to create the offence of which the accused, Nolte, was convicted.

The ordinance is not made part of the record, but it is admitted that the charge is in accord-

ance with the ordinance. If it were not so admitted, it must be presumed in the absence of any showing to the contrary in the record.

For the authority of the city council in the matter, we are referred to section 2108 of the Revised Statutes. That section, among other things, provides, that the council shall have power "to provide for the punishment of any vagrant, common street beggar, common prostitute, habitual disturber of the peace, known pickpocket, gambler, burglar, thief, watch-stuffer, ball-game player, a person who practices any trick, game or device with intent to swindle, a person who abuses his family, and any suspicious person who cannot give a reasonable account of himself."

One of the classes of persons against whom the council was authorized to provide, was known thieves. The account was found to be of this class. The charge on which he was convicted was that of being a *known thief* and found in the city of Cincinnati, contrary to the ordinance of the city. No question arises on the evidence, and the proof must be presumed to have been sufficient. That the creation of the offence was authorized by the statute we entertain no doubt. The statute declares that the council shall have power to provide punishment of *any known thief*. This brings us to the question whether the enactment of the statute is within the power conferred upon the general assembly.

The only limitations to the creation of offences by the legislative power are the guarantees contained in the Bill of Rights, neither of which is infringed by the statute in question. It is a mistake to suppose that offences must be confined to specific acts of commission or omission. A general course of conduct or mode of life which is prejudicial to the public welfare may likewise be prohibited and punished as an offence. Such is the character of the offence in question.

The case of *Byers v. Commonwealth*, (42 Penn. St. 89), cited and relied upon by counsel in this case, has no direct bearing on the question now under consideration. The question there was whether the Act of March 13, 1862, of the State of Pennsylvania, authorizing the summary conviction, without a jury, of professional thieves, &c., was valid under the constitution of that State. The act under consideration in that case is found in *Brightly's Purdon's Dig.*, vol. 1, p. 346, § 158. The act was held constitutional, and the opinion in the case contains a learned summary of the law of England and of Pennsylvania on the subject.

The case of *the People v. McCarthy* (45 How. Pr. 97) involved a similar question arising under a statute of New York. The constitutionality of the statute was also upheld in that case.

In the present case no such question arises. The accused, under our law, was entitled to a trial by jury as the punishment of the offence involved imprisonment. Rev. Stats., §§ 1788, 1819. He, however, waived a jury and consented to be tried by the court.

At common law a common scold was indicted

ble; so, also, a common barrator; and by various English statutes summary proceedings were authorized against idlers, vagabonds, rogues and other classes of disorderly persons. See Stephens' Dig. of Crim. L., Art. 193. In the several states in this country similar offences are created. In some of the states it is made an offence to be a common drunkard, a common gambler, a common thief, each state defining the offences according to its own view of public policy. The case of *The Commonwealth v. Hopkins*, (2 Dana 418), was the prosecution of a person for being a common gambler; of *World v. The State*, (50 Md. 49), for being a common thief.

In such cases the offence does not consist of particular acts, but in the mode of life, the habits and practices of the accused in respect to the character or traits, which it is the object of the statute creating the offence to suppress.

The order of the probate court discharging the defendant in error from custody is reversed. [This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

MARY FANNING

v.

THE HIBERNIA INSURANCE CO.

November 22, 1881.

1. The plaintiff may, in reply to new matter set up in the answer by way of defense, allege any new matter, not inconsistent with the petition, which in law constitutes an answer to the new matter relied on by the defendant.

2. If the plaintiff relies on a record of a former adjudication of the same matter set up in an answer, as an estoppel, he should plead such former judgment. It is not admissible in evidence under a general or special denial of the new matter contained in the answer.

Error to the District Court of Cuyahoga County.

This case was taken out of its order to be heard with *Mary Fanning v. The Hibernia Insurance Co.* just reported. That action was to recover on a note and mortgage given for stock in said company, while its promoters were engaged in placing the amount of stock required by its charter, as preliminary to its organization. This action is to recover upon a note executed by said Mary Fanning to said company to pay an assessment upon said stock, made some two years after the company commenced doing business, on account of losses incurred in the Chicago fire. This note, in addition to an assessment of 33 per cent. on the \$3,000 of capital stock, included one years interest on the note involved in the case just reported, and was for \$1,170. The same defenses were made to the payment of this note, as to the former one of \$3,000.

At the time the case was tried, final judgment had been rendered in the former case, and a petition in error was pending to reverse the same. The record in that case was offered in evidence

in this case without being pleaded, as a bar to the defenses set up in this action. It was admitted against the objection of defendant below. The court charged the jury that the record in that case, was conclusive evidence that there was a consideration for that note, and that if there was no fraud in obtaining the former note, there was none in obtaining the one now sued on. The trial resulted in a verdict for the plaintiff below, followed by the overruling of a motion for a new trial. Some of the errors assigned are, the overruling of the motion for a new trial, the admitting in evidence the record of the former case, and in charging that it was conclusive in this as to the alleged want of consideration and as to fraud in obtaining it. The bill of exceptions sets out all the evidence. This proceeding is to obtain a reversal of the judgment of the courts below.

JOHNSON, J.

The petition was upon a promissory note for the recovery of money only. The answer sets up new matter as defenses, among them, facts showing want of consideration, and fraud in procuring the note. The reply denied each of the allegations contained in the answer.

On the trial, and as a bar to the defenses above stated, the record in the former suit was introduced, and the court charged the jury that it was conclusive upon the defendant, both as to the question of fraud, and want of consideration.

The Code, Sec. 101, provides, that the plaintiff may demur to an answer, or where, as in this case, it contains new matter, "he may reply to such new matter, by denying either generally or specifically each allegation controverted by him, and he may allege * * * any new matter, not inconsistent with his petition constituting an answer in law to such new matter." To this reply the defendant may demur. The answer contained new matter by way of defense.

If the former adjudication was a bar to this new matter of defendant, it was new matter, not inconsistent with the petition, which could have been set up by reply.

The defendant could then have demurred. In this way there would have been presented to the court, a question of law. The code therefore furnishes an opportunity to plead the former adjudication. The object of requiring pleadings in writing is to advise the opposite party of the facts constituting their respective claims and defenses. This object is defeated by allowing the record to be offered in evidence without notice by pleading, that it is relied on, after the defendant had offered in evidence the facts constituting his defense.

The former adjudication is *new matter* which the code practice requires should be pleaded. It is matter *ex post facto*, and should be specially pleaded so that the court may as matter of law, determine as to its effect. This was the settled rule at common law, wherever there was an opportunity to plead such former adjudication. The code having furnished that opportunity to

plead it, we think the record was inadmissible as evidence. *Vooight v. Winch*, 2 B. & Ald. 662. *Brazil v. Isham*, 12 N. Y. 9, 17; *Pomeroy on Rem. & Sec.* 702; *Clink v. Thurston*, 47 Col. 21; *Ransom v. Stanberry*, 22 Iowa, 334; *Phillips v. Van Shaick*, 37 Iowa, 229; 2 *Smiths Lead Cases*, Notes 629, 630, 631; *Gray v. Massie*, 17 Vt. 419; *Lockwood v. Wildman*, 13 Ohio, 430.

Judgment reversed.

[This case will appear in 37 O. S.]

Digest of Decisions.

IOWA.

(Supreme Court.)

GATES v. BALLOU AND OTHERS Oct. 21, 1881.

Mechanic's Lien.—One who has an interest in land, not made a party to a proceeding to foreclose a mechanic's lien thereon, cannot be bound by such proceeding; and if the effect will be to cast a cloud upon his title, he may maintain an action to restrain the sale under the lien and show that as to him it is no lien.

The language, "I hereby agree that you shall have a mechanic's lien until the same is paid," used by an owner in a contract for a lien, will not be construed as a waiver of the statute of limitations as to right to enforce such lien.

LAVERENZ, ADM'R, ETC., v. C., R. I. & P. R. Co. Oct. 21, 1881.

Railroad accident—Negligence.—Where a party voluntarily goes upon a railroad track where there is an unobstructed view, and fails, without excuse, to look or listen for danger, he is, as a matter of law, guilty of negligence, and not entitled to recover for damages he may sustain by reason thereof from a passing train. But where the view is obstructed, so it is difficult to know of the approach of the train, or there are complicating circumstances calculated to deceive or throw him off his guard, the question is one for the jury.

Question as to whether deceased plaintiff's intestate was guilty of contributory negligence, held, to have been properly submitted to the jury.

Certain special findings were requested by defendant, to which the jury returned answers that they "did not know" or "could not tell." Held, that as the answers, had they been in favor of the defendant, would not have been inconsistent with the general verdict rendered, the indecisive answers were no ground for reversal.

FURMAN v. C., R. I. & P. R. Co. Oct. 22, 1881.

Common carrier—Attachment.—Goods belonging to the wife, and consigned to her at Atchison, Kansas, were delivered to a carrier at Chicago

by the husband, who had authority to so deliver the same and contract for their transportation. After their delivery to the carrier, they were attached in an action against the husband and taken possession of by an officer, and upon the husband going to the office of the carrier to direct a change of place of shipment, he was informed of the attachment, and after such notice had ample time to assert plaintiff's right to the goods. Held, that upon such showing a verdict against the carrier for failure to deliver the goods, pursuant to the contract for their carriage, should be set aside as against evidence.

PENNINGTON v. JONES. Oct. 22, 1881.

Growing crops—Mortgage.—A mortgage upon crops to be sown or planted, to be valid as against third persons, should at least specify the year or term during which the crops are to be grown.

A chattel mortgage described the property as "about 50 acres of wheat, 20 acres of oats; also 12 acres of barley and 20 acres of corn; also two acres of buckwheat, to be sown and raised on the land leased of Barber McDowell, and now occupied by said W. A. McDowell, lying and being in section seventeen (17,) in township of Ingham, in said Franklin county. * * *" Held, that the description was too indefinite and uncertain, and was not valid as to third persons.

SOUTH CAROLINA.

(Supreme Court.)

HAMMOND v. PORT ROYAL AND AUGUSTA RAILWAY CO. 1881.

1. **Estate upon condition—Deed—Intention—Court and Jury.**—The intention of the parties to a deed, as to whether an estate upon condition has been created, must be determined by the court from the deed itself, and should not be submitted to a jury.

2. **Condition subsequent—Breach.**—A deed conveyed a strip of land to a railroad company, to them, their successors and assigns forever, "provided always, and this deed is upon the express condition," that a certain system of drainage was to be kept up by the railroad company. Held, that this created a condition subsequent in deed, and voidable by the grantor upon condition broken.

3. **Forfeiture—Entry or Claim.**—But no action for recovery of the land could be brought by the grantor until he had made entry upon the land after condition broken, or made claim, if entry was impossible.

4. **Ibid—Waiver—Intention.**—Whether the grantor had waived his right to enforce a forfeiture, is a question of intention depending upon the facts, and was properly submitted to the jury.

5. **Railroads—Public policy.**—Public policy does not forbid a railroad corporation from accepting land for its road-bed upon such conditions—conditions reasonable and possible to be performed.

VERMONT.

(Supreme Court.)

NEWELL v. WHITCHER. 1881.

1. *Trespass—Illegal entrance into visitor's chamber.*—The private sleeping-room of a visitor is absolutely and exclusively her own possession, and any unjustifiable entrance therein is a trespass.
2. *Assault—Approaching bed of chaste woman and soliciting intercourse.*—The approach to the bed of a chaste woman, and the leaning over her therein with the solicitation for illicit sexual intercourse is an assault.

MINER v. WOOD. 1881.

1. *Mortgages—Foreclosure—Parties—Mortgagor having passed title.*—When a mortgagor has parted with his entire right and title in an equity of redemption, in a proceeding merely to foreclose such equity, and not seeking a personal judgment against him, such mortgagor is neither a necessary nor proper party. Story on Eq. Pl. § 197; 2 Jones on Mort. §§ 1402-1404, 364, 366; 6 Paige, 343; 2 N. J. Eq. 405.
2. *Mortgagor deceased.*—The mortgagor being deceased, it was the duty of the defendant to suggest to the court, by plea or otherwise, such facts that might require the court, in its discretion, to make his representative a party defendant.

CORLIS v. SMITH. 1881.

1. *Notice—Vicious animal—Agency.*—When one employs an agent to control his farm and the property thereon, the agent's knowledge of the vicious habits of a dog owned and kept by the principal on the farm is the knowledge of the principal; and evidence which tends to show that the agent had such knowledge is admissible in an action against the principle for damages caused by the dog.
2. *Other Servants.*—Evidence tending to show that the other servants knew of the dog's evil propensity is admissible to prove such propensity; and being admissible the court will not presume that the jury made an illegitimate use of it.
3. *Ownership of Animal.*—The defendant's agent, without express authority, purchased the dog; and, there being a conflict in the testimony as to whether the defendant ratified the purchase, it was properly submitted to the jury to decide.

KENTUCKY.

(Court of Appeals.)

FITZPATRICK v. TODD, &c. Filed Oct. 15, 1881.

Supersedeas bond, executed by personal representative, binds him "to pay the damages and costs of the appeal and the judgment in case of affirmance out of the assets which have, or may come to his hands in due course of administration."

But such a bond does not bind the personal represent-

tative or his sureties personally, except as against assets which are in or may come to his hands.

SANDERS v. MILLER. Filed Oct. 15, 1881.

Ante-nuptial contract in writing, and settlement upon the wife in pursuance thereof, is sustained, in this case, against the claims of creditors. *Held*, "If a husband voluntarily enters into a contract to make, or does make, a settlement upon his wife in discharge of an obligation arising out of the reception of her property, under an agreement made before its receipt or reduction to possession, such as the chancellor would, on her application, make on her, neither the contract nor the settlement would be regarded as fraudulent against creditors."

GRAVES v. MCGUIRE, HELM & Co. Filed Oct. 20, 1881.

1. The promise of a bankrupt, after filing his petition but before obtaining a discharge in bankruptcy, to pay a note, being without consideration, cannot be made the foundation of an action.
2. A new promise to pay a debt already existing, cannot be made the foundation of an action.

NEW YORK.

(Court of Appeals.)

LASHER ET AL. v. THE ST. JOSEPH F. & M. INS. CO. October 18, 1881.

Fire Insurance.—L. who held personal property under a contract to purchase from S. and L., which provided that the title should not pass until the purchase price was paid, procured a policy thereon, loss payable to S. and L., as "their interest may appear," representing that the property was hers. The policy provided that it should be void if the interest of the assured was not truly stated therein. At the time the property was destroyed the purchase price had not been fully paid. *Held*, That the policy was void, and that the necessity for a true statement of plaintiff's interest was not obviated by making the loss payable to S. and L., as their interest might appear.

RODGERS v. THE PEOPLE, October 11, 1881.

Burglary—Indictment.—In an indictment for an attempt at burglary, where the offense charged consists in an attempt to break into the room of a guest in a hotel, the premises should be described as the dwelling house of the landlord, and not that of the guest.

PIER v. GEORGE. October 4, 1881.

Corporations—Trustees—Evidence.—An action to enforce the personal liability of a trustee of a manufacturing corporation on the ground of a failure to make a report, or for making a false one, may be maintained by an assignee of a debt of such corporation.

SALTER, ADME'X v. THE UTICA & B. R. R. R. Co. October 11, 1881.

Interest—Costs.—In actions for causing death by wrongful act, negligence or default, the rate of interest is governed by the statute regulating interest in force when the damages are ascertained by verdict.

The proviso in § 1, Chap. 538, Laws of 1879, has no application to torts.

In the absence of proof that the sum charged was fraudulently or collusively exaggerated, or more than the usual trade price at the place of plaintiff's residence for such services, it is proper to tax printing disbursements at the amount paid.

STORY, REC'ER v. HAMILTON. October 18, 1881.

Foreclosure.—On sale under foreclosure by advertisement the terms of sale provided that the premises should be sold free and clear of all incumbrance, and that the purchaser should pay off another mortgage. *Held*, that there was nothing in the statute prohibiting such terms, and that they were proper.

Parol evidence is admissible in an action for surplus

moneys to prove the conditions of such sale and the amount bid. The affidavits are but *prima facie* evidence of the facts stated, and may be controverted.

CALIFORNIA.

(Supreme Court.)

JEFFERS, ADMINISTRATOR v. COOK ET AL. Sept. 21, 1881.

Mortgage—Foreclosure—Parties.—A decree of foreclosure of a mortgage does not affect purchasers from the mortgagor, who are not made parties to the action, such purchasers having acquired their rights prior to the commencement of the foreclosure suit.

Supplemental complaint—Statute of limitations.—Persons in whose favor the statute of limitations has run cannot, by supplemental complaint filed in an action commenced against their grantor within time, be deprived of the benefit of the plea of such statute. Grantees of a mortgage have the right, independent of their grantor, to plead the statute of limitations.

Supplemental complaint is a new action as to new parties.—A supplemental complaint is a continuance of the original action as to the original defendant, but is the commencement of a new action as to parties brought in by the supplemental complaint.

Extinguishment of mortgage by time.—The lien of a mortgage is extinguished by the lapse of the period of limitation provided for bringing suit to foreclose it.

Lis pendens (Per McKinstry, J.)—The grantee, after foreclosure brought, of a party whose deed from the mortgagor had been recorded prior to the commencement of foreclosure proceedings, is not affected by the filing of a *lis pendens*, such person (grantor) not having been made a party to the foreclosure suit.

UNITED STATES COURTS.

(Southern District of Ohio—Eastern Division.)

The December term of the District and Circuit Courts opened on Tuesday morning of this week, with Judges Baxter and Swing present.

The Grand Jury was empanelled and entered upon active duty.

Judge Baxter at once proceeded to call the Equity Docket, which contained nineteen cases. A large number were continued.

Judge Swing called the Circuit Court Docket, and empanelled a jury in the case of The Minneapolis & St. Louis Railway Company v. The Columbus Rolling Mill Company. The amount involved is \$32,000. Messrs. Olds & Critchfield represent the plaintiff; Messrs. Harrison, Olds & Marsh the defence. Case still on.

The Courts opened in the new rooms, corner State and Fourth streets. There was no little comment on the question of the stinted quarters into which the United States officers were crowded to transact business. The Judges did not hesitate to convey in plain and emphatic language that it was a humiliating sight to see the Government quarters so far beneath what they should be. About the only virtue apparent was an air of cleanliness, owing to everything being new. The location is out of the way, on a side street so to speak, over a corner grocery, and cramped in every way.

William C. Howard, Clerk; Channing Richards, Esq., District Attorney; Marshal Joseph C. Ullery, with other officers of the Court in Cin-

cinnati, were present to join with the local officers, in attending upon the courts.

SUPREME COURT OF OHIO.

JANUARY TERM, 1881.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

TUESDAY, December 6, 1881.

GENERAL DOCKET.

No. 181. John Weaver v. William E. Carnahan. Error to the District Court of Butler County.

LONGWORTH, J.

1. Where plaintiff sues to recover the value of services rendered, and defendant admits the rendition of the services, but denies the value to be as great as claimed, and avers that it does not exceed a certain specified amount, it is error to render a judgment in plaintiff's favor for such amount, and continue the cause for trial, to determine the further value of such services.

2. Where defendant, in such case, denies the rendition of the services and further alleges that, even if they had been rendered, they would have been worth a specified sum and no more, and the court thereupon, without trial had, erroneously renders judgment against him for such amount; the judgment, if acquiesced in by defendant, is final and a bar to further proceedings.

3. Section 376 of the Code, as amended March 13th, 1872, (69 O. L. 44), applies only to cases where a part of the cause or causes of action is admitted and part denied. (Moore v. Woodside et al, 26 O. S. 537, distinguished.)

Judgment reversed.

171. T. P. Handy et al. v. Etina Insurance Company. Error to the District Court of Cuyahoga County.

McILVAINE, J. Held:

1. A policy of marine insurance, which contained a stipulation that in case of loss or misfortune the insurer would contribute ratably to expenses incurred by the assured or their agents in and about the recovery of the insured cargo, was issued by a corporation of the State of Connecticut, also doing business in the State of Ohio. The cargo was sunk in waters of the State of Michigan, and labor was expended in efforts to recover it. Held, That the breach of such stipulation on the part of the insurer constitutes a cause of action against the company, cognizable by the courts of this State.

2. After the filing of a petition on such cause of action and the issuing of a summons, which was returned served on the defendant by delivering a true and attested copy on an agent of the defendant, the defendant filed a motion to dismiss the action "for the reason that this court has no jurisdiction of the case, it appearing from the petition on file that said defendant is a foreign insurance company, and that no part of the alleged cause of action arose in this State." Held, That the filing of such motion was a voluntary appearance in the action and a waiver of any defect in the service of the summons.

Judgment reversed and cause remanded to the district court for further hearing on the petition in error.

172. George Russell adm'r of W. H. H. Turner v. Charles T. Sunbury, adm'r of John M. Anderson. Error to the District Court of Ashtabula County.

JOHNSON, J. Held:

The right to an action for wrongfully causing death, under "An Act requiring compensation for causing death by wrongful act, neglect or default," passed March 25, 1861, (2 S. & C. 1139), abates by the death of the wrong doer.

Judgments of the district court and court of common pleas reversed and action dismissed at plaintiff's cost.

174. Andrew Nesbit v. George Worts et al. Error to the District Court of Lucas County.

WHITE, J. Held:

1 Where an indemnity mortgage is conditioned to

save the mortgagee harmless, and to pay the note on which the mortgagee is surety, the protection of the mortgage extends to a liability incurred by the mortgagee jointly with the mortgagor for money borrowed to pay the first note, and with which such note was paid.

2. The affidavit on an indemnity mortgage, under Section 2 of the Act relating to chattel mortgages as amended May 7, 1889, (86 O. L. 345), must show that the mortgage was taken in good faith, to make it valid against creditors. A statement that the claim on which the mortgagee is surety is just and unpaid, is not sufficient.

Judgment of the district court reversed and that of the common pleas modified.

178. John D. Williams v. Charlotte Englebrecht and others. Error to the District Court of Scioto County, OKEY, C. J.

In an action by the mortgagee against the mortgagor, under the statute (Civil Code, § 556, Rev. Stats. § 5781), to recover possession of the lands mortgaged, the fact that such mortgage was given to compound a felony is not available as a defense.

Judgment reversed.

187. Manasseh Glick, administrator of Jacob W. Alsapach v. Samuel Crist. Error to the District Court of Fairfield County.

BY THE COURT:

A payment by a principal debtor which will take a case out of the statute of limitations as to him, will have the same effect as to his surety, who is present for the purpose of seeing that the payment is made and credited, and makes no statement that any limitation shall be placed on the effect of such act.

Judgment of the district court reversed and judgment of the court of common pleas affirmed.

169. Alonzo Sinnmerson, Adm'r, v. Emeretta Tennery. Error to the District Court of Sandusky County.

BY THE COURT.

An action by an assignee of the claim of a married woman, against her husband for monies belonging to her and converted by the husband to his own use, is not barred by the limitations of Chap. 3 of the Code of 1853, (2 S. & C. 947), where less than six years have intervened between such assignment and the commencement of the action.

Judgment affirmed.

140. Thomas McGuire v. John and James McGuire et al. Error to the District Court of Summit County. Judgment affirmed. There will be no further report.

165. Diantha Richards et al. v. Simon Kidman et al. Error to the District Court of Sandusky County. Judgment of the district court reversed for error in reversing the judgment of the court of common pleas for refusing to grant a trial by jury, the case being one in which the parties were not, as of right, entitled to a trial by jury; and cause remanded to the district court for hearing as to the other grounds relied on for reversing the judgment of the court of common pleas.

168. The Baldwin Quarry Co. v. Robert J. Clements. Error to the District Court of Cuyahoga County. Passed for want of index to printed record, and for proper references in briefs of counsel to the pages of the printed record.

177. Jacob A. Long v. Wm. H. Palmer. Error to the District Court of Jackson County. Judgment affirmed, following the case of Nesbit v. Worts et al., this day decided.

178. Neil Macneale v. George W. Fackler. Error to the Superior Court of Cincinnati. Dismissed for want of preparation.

179. Hiram Cooper v. Pierson B. Holden et al. Error to the District Court of Hancock County. Judgment reversed on the ground that the case was appealable, and cause remanded to the district court for further proceedings. There will be no further report.

180. George C. Butts v. Charles K. Leonard et al. Error to the District Court of Washington County. Dismissed for want of preparation.

182. George W. Moore v. Charles McKhann. Error to the District Court of Darke County. Judgment affirmed. There will be no further report.

191. Pittsburgh, Cincinnati & St. Louis Railway Co. v.

Daniel Haskell. Error to the Common Pleas Court of Madison County. Passed for want of proof of service of plaintiff's brief, on defendant in error.

196. S. Wyllys Pomeroy v. Buckeye Salt Co. Error to the District Court of Meigs County. Passed for proof of service of plaintiff's brief.

198. Henry T. Brown v. Charles E. M. Jennings. Error to the District Court of Athens County. Dismissed for want of preparation.

199. John Newcomer, Administrator, &c., v. Robert Malony. Error to the District Court of Richland County. Dismissed for want of preparation.

200. Edward W. Nye v. John Newton. Error to the District Court of Washington County. Dismissed for want of preparation.

230. City of Steubenville v. Jacob G. Culp. Error to the District Court of Jefferson County. Motion for leave to print petition in error granted.

Cases on the docket have been called up to and including No. 275.

MOTION DOCKET.

No. 208. Mary McClow et al. v. C. Stump et al. Motion to dispense with printed record in cause No. 1079 on the General Docket. Motion granted.

209. J. H. Devereux et al. v. Hugh J. Jewett et al. Motion to modify order in No. 1210 on the General Docket. Motion overruled.

210. Andrew S. Core, Assignee, &c., v. West Va. Oil and Oil Land Co. Motion to take cause No. 1096, on the General Docket out of its order. Motion overruled.

211. Andrew S. Core v. West Va. Oil and Oil Land Co. Motion to take cause No. 1110, on the General Docket, out of its order. Motion overruled.

212. English, Miller & Co. v. First National Bank of Athens. Motion to reinstate cause No. 155, on the General Docket. Motion granted.

213. Wm. B. Millikin, Administrator, v. P. J. B. Welliver, Administrator, &c. Motion to reinstate No. 153, on the General Docket. Motion granted at costs of plaintiff in error.

214. Enoch D. Cracraft et al. v. Joseph Smith et al. Motion to reinstate cause No. 154, on the General Docket. Motion granted at costs of plaintiffs in error.

215. Ex parte Larney. Motion for leave to file a petition in error to reverse the judgment of the Superior Court of Cincinnati. Motion overruled. There will be no further report.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Dec. 6, 1881.]

No. 1229. Margaret E. Hill v. Benjamin C. Hill. Error to the District Court of Richland County. Diriam & Leyman for plaintiff; Pritchard & Wolfe and Thomas McBride for defendant.

1230. Leander J. M. Baker v. Thomas F. McGrew, adm'r et al. Error to the District Court of Clark County. Keifer, White & Rabbitts for plaintiff; J. F. McGrew, George Arthur, S. A. Bowerman and Summers for defendants.

1231. Mary A. Neil v. Wm. A. Neil. Error to the District Court of Franklin County. O. N. Olds and George L. Converse for plaintiff; Harrison, Olds & Marsh for defendants.

1232. Isaac E. Dresbach et al. assignees, &c. v. David H. Stern et al. Appeal—Reserved in the District Court of Pickaway County. Festus Walters for plaintiffs; Page & Abernethy for defendants.

1233. Isaac E. Dresbach et al. assignees, &c. v. Wilson Dresbach et al. Error to the District Court of Pickaway County. Festus Walters for plaintiffs; Page & Abernethy for defendants.

1234. F. J. L. Blandy v. John L. Taylor et al. Error to the District Court of Muskingum County. M. M. Granger and Trainor for plaintiff; V. J. Taylor and others for defendants.

Ohio Law Journal.

COLUMBUS, OHIO, : : : DEC. 15, 1881.

THAT INFAMOUS STAR ROUTE ROBBERY.

The *Washington Law Reporter* is one of our most highly esteemed exchanges. The Editors are gentlemen, and well informed; and moreover have a frank and pleasant manner of discussion that makes disagreement with them profitable and not unpleasant. Therefore when the *Reporter* takes the OHIO LAW JOURNAL to task for citing authorities showing Mr. Justice Cox to be without warrant of law in discharging the Star Route Thieves, we can only regret that the *Reporter* otherwise so good is within the pernicious atmosphere and influence of the Wicked City.

The zeal displayed by the *Reporter* in defending Judge Cox is worthy of a better cause; and its announcement that all the Washington bar is in arms against us if we assail the integrity or ability of Judge Cox, does not seem to disturb us to any great extent. We simply repeat that Judge Cox decided contrary to law as we have shown and can more clearly show, and we don't care a fig, whether it is placed upon the ground of ignorance, or dishonesty of purpose. We charge neither. That is something outside our province.

The argument used so laboriously by the *Reporter* is successful in showing that the crime of conspiracy involves great moral turpitude; and that it is *infamous* in the sight of honest men; and that it entails punishment by imprisonment at labor in the penitentiary; but that it renders the Star Route thieves obnoxious to Washington society, (we mean high-toned political society) or that it disqualifies persons convicted of conspiracy, to become witnesses, the argument does not show. This is well known to the bench and bar at Washington, and the long drawn argument of counsel for the thieves, and of Judge Cox and the *Washington Reporter* can do no more than to pull wool over the eyes of those who are not lawyers. But these willing defenders of Brady & Co. should bear in mind that no offence is infamous to the extent of disqualification (as juror or witness), unless so declared by statute; that conspiracy in the District of Columbia is not "infamous" by statute; and that a conviction for conspiracy does not disqualify as a witness.

Please apply as a test the latter contingency. Let us imagine that Belknap or Babcock or Brady or any other gentleman of that crowd had been convicted of conspiracy, and at a subsequent time—say now, on the Guiteau Trial, the party who had been thus convicted and had served a term of retirement at labor, were offered as a witness, having seen the assassin fire the fatal shot; would Justice Cox hold that such conviction and degradation disqualified the offered witness from testifying?

Now Brother Jackson you have the floor.

THE Supreme Court will adjourn *sine die*, to-morrow. The next term will begin on the first Tuesday in January, being two weeks from next Tuesday. There will be no change in the court, Judge Longworth will enter upon his regular term for which he was recently elected.

ADMITTED TO PRACTICE.

Below we give the names of the members of a class which was examined last week by the Supreme Court Committee, and by the court admitted to practice law in this State. The examiners were Judge F. W. Wood, O. W. Aldrich, T. A. Powell and Ivor Hughes. Miss Edith Sams, whose name we put at the head of the list is, we believe the fourth lady lawyer admitted to practice in this state. She was a student of Miss Florence Cronise, who has been in the practice of the law for several years, at Tiffin, where she is now enjoying a handsome and lucrative practice. Miss Sams stood among the highest in her class in point of percentage.

Edith Sams, Tiffin.
F. W. Braddock, Wooster.
Louis F. Coleman, Lebanon.
W. W. Eppe, Greenville.
W. F. Harn, Wooster.
James H. Leonard, Elyria.
Wm. F. Nutt Jr., Sandusky.
Dudley Phillips, Manchester.
John P. Stein, Sandusky.
H. T. Shepherd, Quaker City.
A. A. Stearns, Cleveland.
Jerome C. Traak, Austinburg.
A. C. Voorhes, Coshocton.
James T. Close, Nevada.
Thos. S. Brown, Bellefontaine.
John A. Connelly, Mansfield.
Charles A. Craighead, Dayton.
James H. Duvall, Cincinnati.
John G. Dunn Jr., Columbus.
Wakene A. Gates, Toledo.
George A. Hay, Coshocton.
John W. Leahy, Tiffin.
E. W. Porter, Marysville.
John Reese, Bellefontaine.

GENERAL HENRY B. BANNING.

The death of General Banning occurred at Cincinnati Saturday evening last, and was very unexpected, although he had not been feeling well for some time no alarm was felt thereat. His many friends throughout the land will hear of his death with heartfelt sadness. There is scarcely a man in Ohio to-day better known than was General Banning. Personally, he was very popular, and through that popularity and well known ability, was recognized as an eminently successful public man. Early in 1861, he entered the army and served until the close of the war. By gallant service he earned the grade of Brevet Major General. After the war he was elected a member of the Ohio Legislature from the County of Knox—his native county,—and served two terms as a member of the House. He then removed to Cincinnati, where he took an active part in politics, and was three times elected to Congress. During the last few years he has been engaged in the active practice of law, being at the head of the well known firm of Banning & Davidson. He was forty-seven years old at his death.

EXAMINING COMMITTEE FOR 1882.

THE Supreme Court has appointed the following named gentlemen, the Committee to examine applicants for admission to the Bar, during the year 1882:

Milton L. Clark, of Chillicothe, Chairman; M. A. Daugherty, E. L. Taylor, A. W. Krumm, O. W. Aldrich, H. J. Booth, R. C. Huffman, all of Columbus; T. Q. Ashburn, of Batavia; S. V. Horton, of Pomeroy; G. H. Wald, J. B. Brannon, of Cincinnati; W. O. McFarland, of Cleveland; W. M. Koons, of Mt. Vernon; J. K. Mower, of Springfield, and George Metcalf, of Elyria.

SUPREME COURT OF OHIO.

SAMUEL A. VAN FOSSEN

v.

THE STATE.

November 8, 1881.

A decree of divorce under a statute of another State authorizing a divorce between husband and wife, neither of whom is domiciled therein, is of no force or effect in this State where the parties were domiciled.

Error to the Court of Common Pleas of Muskingum County.

BOYNTON, C. J.

The plaintiff in error was tried and convicted of bigamy in the Court of Common Pleas of Muskingum County, at the May term of the present year, and sentenced to the penitentiary. The State gave evidence at the trial, tending to show that in March, 1850, the accused was married to Lydia J. Fowler, who was still living, and that on the 18th day of January, 1881, at said county, he intermarried with one Louisa Williams. The defendant offered in evidence what purported to be a record of a decree of divorce granted by the County Court of Larimer County, Colorado, by which it appeared that, in an action apparently brought by said Lydia J., she was divorced from the defendant at the December term of said county court in 1880, for some marital offence alleged and found to have been committed within that State. He also offered in evidence a copy of the general laws of Colorado, by which a year's residence was required by the party applying for a divorce, unless the marital offence was committed within the State, or while one or both of the parties resided therein.

In reply to this evidence the State offered testimony tending to show that at the time said decree of divorce was granted, as well as at the time the action therefor was commenced, and for many years before, the defendant and his wife Lydia J. were both residents of and domiciled in Ohio; and that neither of them had ever acquired a domicile in Colorado. Whereupon the court charged the jury, that if they found that neither the husband nor wife was domiciled in Colorado, when the action for divorce was instituted or prosecuted, but that both were then domiciled in Ohio, the decree of the Colorado court was void, or inoperative beyond the limits of that State. The question to be decided arises upon an exception to this instruction.

We think the instruction was correct. The courts of one state have no jurisdiction over any marital offence, or of divorce, wherever arising, unless one of the parties has an actual *bona fide* domicile within the State. 2 Bishop on Mar. & Div., § 144; Cox v. Cox, 19 Ohio 8. 502. Nor does it alter the case that the alleged marital offence was committed within the state where the divorce is sought, or that the parties submit to its jurisdiction. What is wanting in such case is jurisdiction over the subject matter.

Marriage is a *status*, exclusively regulated and controlled by the laws of the state where the relation exists. Cheever v. Wilson, 9 Wall. 108. It is upon this *status* that the decree of the court operates. If the courts of one state can dissolve the marriage relation of parties, both of whom are domiciled in another, for an act or offence committed while the parties were temporarily within the former state, they could as well be clothed with jurisdiction to divorce parties for an act or offence, wherever committed, provided the defendant could be found and summoned within their jurisdiction. The doctrine is, however, well settled, and is founded upon the most obvious considerations of public policy, that the law of the place of the actual domicile, where both parties dwell within the same jurisdiction, governs not only as to the causes or grounds of divorce, but as to the tribunals in which the action therefor may be prosecuted. Story on Conf. Laws, § 230 a; Strader v. Graham, 10 How. 82, 93.

It is true that courts may be authorized to take jurisdiction where either of the parties is domiciled within the state; and that a wife may acquire a domicile different from that of her husband whenever it is necessary or proper that she should have such separate domicile, and away from the domicile of marriage, or the place or state where the marital offense was committed. Cheever v. Wilson, *supra*; Bishop on Mar. & Div., § 128, a.

But it is held by numerous cases, and may be regarded as settled law, that a decree of divorce granted by another state in which neither of the parties was domiciled, is, beyond the limits of such state, a nullity. Sewell v. Sewell, 122 Mass. 156; Hoffman v. Hoffman, 46 N. Y. 30; Hood v. The State, 56 Ind. 263; People v. Dowell, 25 Mich. 247; Litowich v. Litowich, 19 Kana. 451.

It is, however, said in argument, that the clause of the Constitution of the United States requiring full faith and credit to be "given in each state to the public acts, records, and judicial proceedings of every other state," saves the Colorado decree from impeachment, and requires full force and effect to be given to it. This result quite likely would follow, if the Colorado court had acquired jurisdiction of both the parties and the subject matter of the action. But where jurisdiction is not acquired—a fact always open to inquiry, although the record recite the facts necessary to give the same—the judgment is void, and the provision of the Constitution has no effect upon it. Thompson v. Whitman, 18 Wall. 457; Knowles v. Gas Light & Coke Co., 19 Wall. 58; Price v. Ward, 25 N. J. (Law) 222; Kerr v. Kerr, 41 N. Y. 272; Carleton v. Bickford, 18 Gray 591; Folger v. Columbian Ins. Co., 99 Mass. 267, 273.

The jurisdiction of the court granting the decree was therefore open to inquiry, and the jury having found neither party to the decree to have been domiciled in the state where the same was

rendered, it was entirely void beyond its territorial limits.

Judgment affirmed.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

GEORGE W. HAMET

v.

ORLANDO T. LETCHER.

November 22, 1881.

H., the owner of chattels, relying on the representations of R. that he was the agent of L., agreed to sell the same to L. on credit, and H., in the belief that R. was such agent, delivered the chattels to him, when in fact he was not such agent, nor had he authority to purchase for L., as he well knew: *Held*, That the property in the chattels did not pass from H., and that L., who bought the chattels of R. and converted them to his own use, without knowledge of the fraud, was liable to H. for their value; and the fact that R., at the time the chattels were delivered to him, paid H. part of the price agreed on, will make no difference, except as to the amount of recovery against L.

Error to the District Court of Williams County.

In 1874, O. T. Letcher & Co. were engaged at Bryan, Williams county, in buying and shipping hogs. George W. Hamet, a farmer residing in that county, had a lot of hogs for sale. On October 16th of that year, Jacob J. Rohner, representing himself to be the agent of O. T. Letcher & Co., bought the hogs of Hamet for \$173.25, which was a fair price for the same, paying to him on the purchase \$55. Hamet knew Letcher & Co. to be responsible, and would not have let Rohner have the hogs on his own account. He believed Rohner's representation that he was such agent, and relied on the representation. In fact, Rohner was not the agent, of Letcher & Co., nor had he any authority to purchase hogs on their account. Rohner, receiving the hogs under such circumstances from Hamet, drove them to Bryan, where he sold them as his own hogs to O. T. Letcher & Co., who were ignorant of the fraud by which they were obtained. Believing that Rohner was the owner, the firm received the hogs, paying him full value for the same. Shortly thereafter Hamet demanded of the firm payment for the hogs, but payment was refused, and thereupon he brought suit against the firm, in the Court of Common Pleas of Williams County, to recover the value of the property. In that court it was held that, on the facts above stated, Hamet was not entitled to recover; the district court affirmed the judgment, and Hamet, on leave, filed in this court a petition in error to reverse the judgment.

Pratt & Bentley and Sheldon & Boothman for plaintiff in error.

J. Pillars and S. E. Blakeslee for defendants in error.

OKEY, C. J.

A remark made in *Cundy v. Lindsay*, 3 App. Cas. 459, is quite applicable here. There it was said, "you have in this case to discharge a duty which is always a disagreeable one for any court,

namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practiced upon both of them must fall." But our duty in this case, as in all others, is simply to declare the law. The only question here is whether, in view of the facts set forth in the statement of the case, the property in the hogs passed from Hamet. If it did, the judgments in the courts below are right; if it did not, they are wrong. In the decision of cases of this sort, difficult questions are sometimes presented; but the principles upon which they should be determined are firmly established.

If Rohner had offered to buy the hogs for himself, and Hamet had agreed to sell them to him, and had made delivery thereof in pursuance of such sale, the property in the hogs would have passed to Rohner, although the sale had been induced solely by fraudulent representations made by Rohner. That would have been a *de facto* contract; and while it might have been avoided by Hamet, by reason of the fraud, while the property remained in the possession of Rohner, yet Rohner having sold the hogs, before the contract was thus avoided, to Letcher & Co., who had no knowledge of the fraud, the latter would have acquired a perfect title. *Rowley v. Bigelow*, 12 Pick. 307; *Hoffman v. Noble*, 6 Met. 68; *Schaeffer v. Macqueen*, 1 Disney 458; *Attenborough v. Dock Co.*, 3 C. P. D. 450; *Babcock v. Lawson*, 4 Q. B. D. 394, affirmed, 5 Q. B. 284. In a case where this principle was enforced (*Moyce v. Newington*, 4 Q. B. D. 32), Cockburn, C. J. said: "The reasoning on which this conclusion is based may not appear altogether consistent with principle, but, agreeing in the result, we should prefer to adopt the view of the American courts, as stated in the case of *Root v. French* (13 Wend. 570), a case decided in the supreme court of judicature of the state of New York, according to which the preference, thus given to the right of the innocent purchaser, is treated as an exception to the general law, and is rested on the principle of equity that where one of two innocent parties must suffer from the fraud of a third, the loss should fall on him who enabled such third party to commit the fraud."

But this was not a sale to Rohner in his own right. He made no proposition to buy in any other way than as agent. Hamet did not agree to sell to any other than Letcher & Co., who never agreed to buy of him, and he was induced to sell solely by reason of Rohner's representation that he was such agent, which representation was wholly false, as Rohner well knew. This, therefore, was not a contract voidable merely, but an agreement wholly void; and, under the circumstances, the property in the hogs never passed from Hamet. Hence, applying the maxim, that no one can transfer a greater right or better title than he himself possesses (*Roland v. Gundy*, 5 Ohio 202), it necessarily follows that Letcher & Co. are liable as for a conversion. *Moody v. Blake*, 117 Mass. 28; *Barker v. Dinmore*, 72 Pa. St. 427; *Saltus v. Everett*, 20 Wend.

267; *Fawcett v. Osborn*, 32 Illinois 411; *Hardman v. Booth*, 1 H. & C. 803; *Higgon's v. Burton*, 26 L. J. Ex. 342; *Kingsford v. Merry*, 1 H. & N. 503; *Hollins v. Fowler*, L. R. 7 Q. B. 616, affirmed, L. R. 7 App. 757; *In re Reed*, 3 Ch. D. 123; *Lickbarrow v. Mason*, 1 Smith's L. C. 2 pt. 1196; *Cundy v. Lindsay*, *supra*.

Perhaps the principle here involved was more fully considered in the latter case (*Cundy v. Lindsay*) than in any other. The facts briefly stated were as follows: *Lindsay & Co.* were manufacturers of linen goods at Belfast, Ireland. *Alfred Blenkarn*, who occupied a room in a house looking into Wood street, Cheapside, wrote to *Lindsay & Co.* proposing to purchase a certain quantity of such goods, and in his letter used this address, "37 Wood street, Cheapside," and signed the letters (without any initial for a christian name) with a name so written that it appeared to be "*Blenkiron & Co.*" There was a respectable firm known to *Lindsay & Co.* of the name, "*W. Blenkiron & Co.*," carrying on business at 123 Wood street. *Lindsay & Co.* sent letters, and afterwards supplied goods, being all addressed to "*Messrs. Blenkiron & Co., 37 Wood street*," which they supposed was the address of the respectable firm above mentioned. The goods were received by *Alfred Blenkarn* at that place, of which goods he sold 250 dozen of cambric handkerchiefs to the *Messrs. Cundy*, who had no knowledge of the fraud, and who resold them in the ordinary course of their trade.

On the hearing of the case before the judges of the Queen's Bench (*Lindsay v. Cundy*, 1 Q. B. D. 348), in 1876, it was held that the property in the goods passed to *Alfred Blenkarn*, and consequently that *Lindsay & Co.* could not maintain an action against the *Messrs. Cundy*, innocent purchasers. But that decision was reversed the next year, in the court of appeals (*Lindsay v. Cundy*, 2 Q. B. D. 96), and the latter decision was affirmed in the House of Lords in 1878. *Cundy v. Lindsay*, *supra*. That was a stronger case for the innocent purchaser than this. Indeed, on the latter hearing, *Mr. Benjamin*, who argued the case for the *Messrs. Cundy*, admitted that under circumstances such as are presented in this case, the property would not pass to the fraudulent vendee.

The circumstance that *Hamet* intended that *Letcher & Co.* should have the hogs is of no importance. He never intended they should acquire title from any other than himself, nor do they make any claim to such property under any purchase they made from him. The case would be in no material respect different if *Rohner* had represented to *Hamet* that he was agent of some firm other than *Letcher & Co.* Nor does the payment by *Rohner* of \$55 on the agreed price have any other effect on the right to recover than to reduce the amount for which judgment should be rendered.

Counsel for defendants in error rely on *Stoddard v. Ham*, 129 Mass. 383, the syllabus of which is as follows: "If A. sells goods to B., who sells them to C., the fact that A. supposed he was selling

the goods to C. through B. as his agent, and would not have sold them to B. on his sole credit, will not entitle A. to maintain an action against C. for a conversion of the goods." But the decision lends no support to the defendants in error. There it appeared that *Stoddard & Co.*, the plaintiffs, had sold bricks to *Leonard*, believing that he was acting as agent for *Ham*, the defendant; but *Leonard* was acting for himself, and subsequently he sold the bricks to *Ham*. It was expressly found as a fact that "*Leonard* was not guilty of any false representations as to agency, and it was a case of error and mistake on the part of the plaintiffs as to the principal with whom they were dealing." Of course, *Stoddard & Co.* failed in the action.

Defendants in error also rely on a remark of *McIlvaine, J.* delivering the opinion in *Dean v. Yates*, 22 Ohio St. 388, as to the effect of delivery of possession to a fraudulent vendee. But nothing was determined in that case inconsistent with the conclusion stated in this case. On the contrary, *Dean v. Yates* is entirely consistent with our decision of this case, and supports it, as it is likewise supported by *Sanders v. Keber*, 28 Ohio St. 630, also cited by defendant in error.

In the finding of facts in the court of common pleas, it was ascertained that if *Hamet* was entitled to recover, the amount then (June 11, 1877,) due to him, deducting the sum paid by *Rohner*, was \$137.28. The judgment of the district court and court of common pleas will be reversed, and judgment will be rendered in favor of *Hamet* and against the defendants in error for that sum, with interest from June 11, 1877, and costs.

Judgment reversed.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

LUCINDA FRANCIS PIATT

v.

DAVID SINTON, ET AL.

November 22, 1881.

1. A devise by a testator of all of his property of every description, whether real, personal or mixed, after paying all his just debts, is a devise of the fee, without the aid of a statute declaring such to be the effect of the devise.

2. Where there is a devise in fee, with a provision in the will that in case the devisee should die without leaving any legitimate heirs of her body, then the estate should go over to persons named, the fee taken by the first devisee is determinable only on the contingency of her dying without leaving such heirs living at the time of her death. *Niles v. Gray* (12 Ohio S. 320), followed.

Error to the Superior Court of Cincinnati.

The plaintiff in error, who was the plaintiff below, is the devisee of *William Piatt*, whose will bears date March 2, 1832, and was admitted to probate in 1834. The testator was the owner in fee simple of the land in controversy.

The dispositive provisions of the will are as follows:

"I will and bequeath to *Lucinda Francis Piatt*, now at the school of *Mrs. Ryland*, in this

place, all of my property of every description, whether real, personal, or mixed, after paying all my just debts; excepting, however, such other bequests as are hereinafter named, viz: To my nephew, Daniel S. Piatt, son of my deceased brother, Daniel Piatt, my fowling piece, which was presented to me by Colonel Riano, of the Spanish Royal Army; then to my nephew, William Piatt, son of my deceased brother, Daniel Piatt, I will and bequeath my sword and pistols, being the same which I used at the siege of New Orleans; these I wish to have retained in the family, if possible; my wearing apparel I will and bequeath to E. Demond Piatt, William Piatt, and Daniel S. Piatt, sons of my deceased brother, Daniel Piatt, to be equally divided between them; and in case the aforesaid Lucinda Francis Piatt should die without leaving any legitimate heirs of her body, then I will and bequeath all my property, of every description, such as would be granted to her by this will, unto Catharine Wheeler, E. Demond Piatt, William Piatt, and Daniel S. Piatt, children and heirs of my deceased brother, Daniel Piatt, to be equally divided."

In July, 1844, the plaintiff uniting with her husband conveyed, for the consideration of thirty-one hundred dollars, a parcel of the real estate devised to her, to John C. Wright by a deed in fee simple, with full covenants of warranty.

In 1866, the widow and heirs of Wright, by like deed, conveyed the same premises to the defendant, David Sinton.

It is charged in the petition, in substance, that the plaintiff only in fact sold an estate for and during her life in the premises; and that the deed in fee simple was executed by mistake and in ignorance of her rights. It is also charged that Sinton purchased with notice of her rights. The plaintiff also claims that she took by the devise only an estate during her natural life.

The court below found, "that Lucinda Francis Piatt took a fee in the real estate described in the petition, under and by the will of her testator, William Piatt, subject to be defeated only by her dying without leaving legitimate heirs of her body."

And the court found the other issues joined for the defendants, and rendered judgment accordingly.

On error, the Superior Court in general term affirmed the judgment, and the present petition in error is prosecuted in this court to reverse these judgments.

WHITE, J.

We find no error in this case. The construction of the will now in controversy is governed by the decision in *Niles v. Gray*, 12 Ohio S. 320. That case was decided in 1861 and has become a rule of property in this State and we are not now disposed to reconsider it.

The will in that case, as well as the will now in question, was made prior to the passage of the

Act of March 3, 1834 (1 Curwin 145), which declared, in effect, that a devise of lands, in a will thereafter made, should be construed to convey a fee simple, and that the devisee should take all the estate which the deviser had in the property, unless it appeared by express words or the manifest intent that a lesser estate was intended. The decision, therefore, in *Niles v. Gray*, was not founded upon that statute nor upon any subsequent one of like effect; but upon the term of the will as construed without the aid of such legislation. The language in that case that was held to operate as a devise of the fee was "the remaining part of my real property." The language of the devise in the present case is "all of my property of every description, whether real, personal or mixed, after paying all of my just debts;" and the devise over to the children and heirs of his deceased brother, is of the same interest and estate that was given by the will to Lucinda, the first devisee.

The claim on behalf of Lucinda is that she took only a life estate. But it seems to us that she took all the estate and interest that was subject to disposition by the testator and that was liable for the payment of his debts, subject to be defeated on the happening of the contingency named in the will, when the estate is to go over to the persons named as the children and heirs of his deceased brother.

The contingency upon which the devise over takes effect, according to *Niles v. Gray*, is the death of the first devisee, Lucinda, without leaving legitimate heirs of her body or lineal descendants then living; and that until such contingency happens the fee is vested in the devisee and her grantees.

Whether the devise over will ever take effect cannot be determined until the plaintiff's death; but if it should never take effect, her grantee, Sinton, will, according to the principles decided in *Niles v. Gray*, hold an indefeasible estate, if the deed to him is valid.

That the deed is valid was found by the court below upon the evidence; and we see nothing in the record to warrant us in disturbing that finding.

Judgment affirmed.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

JOHN D. WILLIAMS

v.

CHARLOTTE ENGLEBRECHT.

December 6, 1881.

In an action by the mortgagee against the mortgagor, under the statute (Civil Code, § 558, Rev. Stat. § 5781), to recover possession of the lands mortgaged, the fact that such mortgage was given to compound a felony is not available as a defense.

Error to the District Court of Scioto County.

On July 14, 1874, John D. Williams commenced an action in the Court of Common Pleas of Scioto County, against Charlotte Englebrecht

and others, under the civil code, § 558; Rev. Stats. § 5781. The object of the suit was to recover possession of certain real estate in that county, the plaintiff alleging in his petition that he had a legal estate in the premises therein described, was entitled to the possession thereof, and that the defendants unlawfully kept him out of possession. There was an answer to the petition and reply to the answer.

The facts are as follows: In 1866, Williams loaned \$2,500 to Ludwig Englebrecht, who gave him a note for the amount, payable one year after date, which note was signed by Ludwig Englebrecht as principal and purported to be signed by Frederick Englebrecht, his father, as surety. When the note became due, December 20, 1867, Ludwig obtained a renewal of the loan for one year. To effect such renewal, he paid the interest on the note, and delivered to Williams a new note for the same amount, also executed by himself as principal and purporting to be executed by his father as surety, and also delivered to Williams an instrument purporting to be a mortgage on the premises sought to be recovered in this case, to secure the payment of the last mentioned note, which instrument, in the form of a mortgage, purported to have been executed and acknowledged in due form by Frederick Englebrecht and his wife Charlotte, one of the defendants, the premises being owned by said Frederick in fee. In fact, however, the name of Frederick Englebrecht was signed to the notes and the pretended mortgage without his knowledge or consent, and the name of Charlotte Englebrecht was signed to the pretended mortgage without her knowledge or consent, and in placing such signatures on the notes and mortgage, Ludwig Englebrecht committed forgeries. He also fraudulently procured the pretended mortgage to be attested by two witnesses, and the acknowledgement to be signed by a notary public of Scioto county. Williams believed the notes and mortgage to be genuine when he so received them, and so believed until March, 1868, when he first learned that the forgeries had been committed. He insisted that a genuine note and a genuine mortgage on the premises should be executed, but Frederick Englebrecht refused to execute such note, and he and his wife refused to execute such mortgage, until Williams assured them that unless that was done he would immediately prosecute their son Ludwig for the forgeries. Thereupon, March 23, 1868, Ludwig and Frederick Englebrecht executed and delivered to Williams a promissory note for \$2,500, dated December 20, 1867, payable four years after date, with interest, and Frederick and Charlotte Englebrecht executed, acknowledged and delivered to Williams, in due form, a mortgage on said premises, in which mortgage they say that we, "in consideration of \$2,500 to us in hand paid by John D. Williams, * * * do hereby grant, bargain, sell and convey to said John D. Williams, his heirs and assigns forever, the following described real estate." Here follows a description of the property in the same form as set

forth in the petition, the usual covenants of seizin, against incumbrances, and of general warranty, a recital of the terms of the last mentioned promissory note, and a condition that "if the said Frederick Englebrecht and L. Englebrecht, or either of them, shall pay said note when the same becomes due, with interest thereon, then these presents shall be void."

Ludwig Englebrecht died before the note became due. Frederick Englebrecht was living on the premises above mentioned at the time he executed such mortgage. He was the owner of the premises in fee simple and continued to reside thereon until he died, intestate, his death also occurring before the note became due, and the defendants, his widow and heirs at law, have resided on the premises ever since his death.

A jury was waived and the cause was submitted to the court of common pleas on the pleadings and the above facts, which court found in favor of the defendants; the district court affirmed the judgment; and this petition in error was filed by Williams to obtain a reversal of the judgments.

W. A. Hutchins and J. W. Bannon for plaintiff in error.

F. C. Searl and Moore & Newman for defendants in error.

OKEY, C. J.

In 1826, Charles Roll and Peter Roll, his father, executed to Henry Raguet two promissory notes, each for the sum of five hundred dollars, and Peter Roll executed to Raguet mortgages on a parcel of real estate in Hamilton County, to secure their payment. The notes and mortgages were given to compromise or compound a larceny said to have been committed by Charles Roll. The reports of the cases prosecuted on those instruments are very instructive on the question here presented. In an action brought on one of the notes against Charles Roll and Peter Roll, it was held that Raguet could not recover, the contract being executory and the parties in *pari delicto*. Roll v. Raguet, 4 Ohio, 400. The same result was arrived at, for the same reason, in a proceeding by *scire facias*, prosecuted by Raguet against Peter Roll on one of the mortgages. Raguet v. Roll, 7 Ohio, 1 pt. 76. The same result would have followed in any suit in chancery for an account of the amount due on the mortgages and a sale of the premises. McQuade v. Rosecrans, 36 Ohio St. 442. And see acc. Spalding v. Bank of Muskingum, 12 Ohio, 544, 548; Goudy v. Gebhart, 1 Ohio St. 262; Hoss v. Layton, 3 Ohio St. 352, 357; Cooper v. Rowley, 29 Ohio St. 547, 549. Raguet then prosecuted an action of ejectment against Peter Roll, basing his right to recover on the mortgages, the conditions in which had been broken, and Roll relied for his defense on the fact that the mortgages had been given to compound a felony. The court, however, while approving the decisions in the above mentioned cases between the parties, held that in the action of ejectment, such defense was not

available to Roll. Grimke, J., in delivering the opinion, said: "A mortgage is in reality a conditional fee, which is as large an estate as a fee simple, though it may not be so durable. And the case comes within the principle, that when a conveyance has actually been executed on an unlawful consideration the court will not merely, not annul it; they will permit it to be enforced." *Raguet v. Roll*, 7 Ohio, 2 pt. 70. But this is not inconsistent with the statement in *Harkrader v. Leiby*, 4 Ohio St. 602, 612, repeated in other cases, that "a mortgage is now treated in both courts (law and equity) as a mere security for the debt, and the mortgagee is permitted to use the legal title only for the purpose of making effectual such security." And see *Hill v. West*, 8 Ohio, 222; *McArthur v. Franklin*, 16 Ohio St. 206. Hence, it is a good defense to ejectment on a mortgage that the debt has been paid. This principle is further illustrated in the fourth suit to which Roll and Raguet were parties. That was a bill in chancery in which the question presented was whether Roll had the right to redeem, and it was held that he had such right, and the court approve the decisions in the three preceding cases between the parties. *Cowles v. Raguet*, 14 Ohio, 38. But it was further held that a court of equity will not set aside or restrain the enforcement of a deed of real estate the consideration of which is wholly founded on an illegal agreement between the parties (*Moore v. Adams*, 8 Ohio, 373; *Thomas v. Cronise*, 16 Ohio, 54); though where by threats of prosecution for a crime of which he was wholly innocent, a person was induced to execute a note and mortgage, it was held that equity will grant relief, and restrain the collection of the note or the enforcement of the mortgage. *James v. Roberts*, 18 Ohio, 548.

An examination of these cases will show very clearly, that under the law as it existed before the adoption of the code of civil procedure of 1853, there was no such defense to an action of ejectment based on a mortgage like this; nor could a bill in chancery, founded on such facts, be entertained to restrain such action or quiet the title of the mortgagor. As against such mortgage the only relief in the courts available to the mortgagor or his heirs, on the facts here stated, was a bill to redeem. It is urged, however, that the rule is now very different, and that by reason of the blending of legal and equitable actions and defenses, under the code of civil procedure, the defense of illegality is equally available to the defendant whether an action is brought upon the note, or upon the mortgage to obtain a sale of the property, or for the recovery of the possession of the land under the mortgage. True, the rights of parties, with respect to a few matters, are changed by the code, as, for instance, the acknowledgment of a debt sufficient to take a case out of the statute of limitations, must now be in writing; and the practical effect of permitting, in a proper case, the determination of the rights of the parties, legal and equitable, in the same suit, enables a person sometimes to secure rights which under the

former practice would have been lost. But, with the exception of the express changes referred to, the rights of parties are unaffected by the code. This view is well expressed in *Dixon v. Caldwell*, 15 Ohio St. 412, 415, where it was said: "The distinction between legal and equitable rights exists in the subjects to which they relate, and is not affected by the form or mode of procedure that may be prescribed for their enforcement. The code abolished the distinction between actions at law and suits in equity, and substituted in their place one form of action; yet, the rights and liabilities of parties, legal and equitable, as distinguished from the mode of procedure, remain the same since, as before, the adoption of the code." *White, J.* As the heirs of the mortgagor could, in a case like this, have maintained a bill, under the former practice, to redeem, they may, of course, obtain the same relief in this case by cross-petition. Rev. Stats. § 5071. This is not a change of the rights of the parties. But, as we have seen, a bill in chancery could not have been entertained to restrain an action of ejectments on a mortgage like this, and hence the heirs of the mortgagor cannot maintain a cross-petition for such relief in this case. To hold otherwise is to affirm that the code has effected most material changes in the rights of parties, without any words to indicate a purpose to make such change.

No claim is made that the question before us is affected by the provision of the statute (R. S. § 5316) requiring a sale to be ordered when a mortgage is foreclosed; nor could such claim be properly made. The object of that provision will sufficiently appear in *Anonymous*, 1 Ohio, 235, *Higgins v. West*, 5 Ohio 554; *Morgan v. Burnet*, 18 Ohio 535.

In rendering a judgment of reversal in this case, we perform a disagreeable duty; but it is a duty, nevertheless. If it will tend to a better administration of justice to permit, in cases of this sort, such defense as was offered by the defendants, the law upon the subject must be changed by the legislature and not by this court.

Judgment reversed.

SUPREME COURT OF OHIO.

JOHN WEAVER

v.

WILLIAM E. CARNAHAN.

December 6, 1881.

1. Where plaintiff sues to recover the value of services rendered, and defendant admits the rendition of the services, but denies the value to be as great as claimed, and avers that it does not exceed a certain specified amount, it is error to render a judgment in plaintiff's favor for such amount, and continue the cause for trial, to determine the further value of such services.

2. Where defendant, in such case, denies the rendition of the services and further alleges that, even if they had been rendered, they would have been worth a specified sum and no more, and the court thereupon, without trial had, erroneously renders judgment against him for such amount; the judgment, if acquiesced in by defendant, is final and a bar to further proceedings.

3. Section 376 of the Code, as amended March 13th,

1872, (69 O. L. 44), applies only to cases where a part of the cause or causes of action is admitted and part denied. (Moore v. Woodside et al, 26 O. S. 537, distinguished.)

Error to the District Court of Butler County.

Carnahan brought his action in the Court of Common Pleas against Weaver to recover \$117.50, with interest, which he claimed to be due him upon an account for medical services, a copy of which account he attached to his petition. The answer of defendant was as follows:

"The defendant for answer denies that there is due to the plaintiff on said account \$117.50, as alleged in the petition. He admits the items in said account:

22 April, 1875.....	\$4 50
27 April, 1875.....	4 50
3 May, 1875.....	4 50
2 July, 1875.....	4 50
15 July, 1875.....	4 50
1 August, 1875.....	4 50
8 October, 1875.....	4 50
13 October, 1875.....	4 50
17 October, 1875.....	4 50

\$40 50

He says plaintiff expressly agreed to make no charges for medicine and medical aid rendered defendant's family, besides his wife. He denies that the value of the residue of said services and medicines and prescriptions were worth as much as stated in the petition. He says said entire amount should not be more than ninety dollars."

The plaintiff replied denying each and every allegation of the answer.

Thereupon, on motion of plaintiff, the court rendered judgment against defendant for the sum of \$90.00 and continued the cause for further disposition. The amount thus found due, the defendant paid.

At the following term the court proceeded to hear the case and found that there was *still* due to the plaintiff upon the account aforesaid \$26.75, for which sum judgment was rendered against defendant. A motion for a new trial was overruled, and the cause coming into the District Court for review, the judgment of the court below was affirmed.

LONGWORTH, J.

The answer of defendant, as a pleading, is exceedingly vague and unsatisfactory. Whether by it the defendant offered to confess judgment for the sum of \$90.00, or to deny the rendition of any services, except those expressly admitted, and to allege, by way of alternative, that such services, if they had been rendered, would not have been worth, all told, more than \$90.00, is not as clear as we could desire. The latter construction, however, is the more reasonable. Treated as an admission of the facts stated in the petition, except as to the value of the services rendered, the judgment upon the pleadings would have been final and the action of the court in rendering a further judgment in plaintiff's

favor would be too plainly erroneous to admit of discussion.

The court below seems to have treated the case as one of that class to which the provisions of § 376 of the Code of Procedure applies, (69 O. L. 44). That section provides that defendant having answered "to a part of the cause or causes of action alleged, the court may, in its discretion, render judgment upon such part or parts as are not put in issue by such answer." Under the discretionary power thus conferred the court might, undoubtedly, have rendered judgment in plaintiff's favor for \$40.50 upon the nine items expressly admitted by the answer to have been correctly charged, and then continued the cause for trial upon the issue or issues raised. But this was not done.

As to the remaining items of account the answer either admitted or denied that the services were rendered. If it admitted their rendition the mere denial that they were of the value alleged would be surplusage and the court might have rendered judgment against defendant as by default, there being no issue of any kind raised by the answer. If, on the other hand, the rendition of services was denied, then it was error to enter up judgment against defendant for \$90.00, without trial, as was done. But of this error the defendant made no complaint—on the contrary he *paid* the judgment and only objected to the court proceeding against him further. Upon either hypothesis the judgment was a finality.

Section 376 of the Code applies only to cases where a part of the cause or causes of action is admitted and part denied, it does not apply where all are admitted or denied.

Moore v. Woodside et al., (26 O. S. 537), in no wise conflicts with this doctrine. True, in that case the plaintiff had but one cause of action, the suit having been brought to recover the agreed value of goods sold. But the answer alleged that the goods had been sold by sample and were inferior to the samples in a specified amount and offered to confess judgment for the agreed price less this amount. Here it is plain that the defendant might have paid the agreed price and would then have had a right of action against plaintiff for the breach of warranty. Instead of so doing he sought to *recoup* in the same action; and it was upon the sole ground that the defense was a counter-claim and not a mere denial of the amount of damages that the decision in that case was based.

The judgments of the district court and court of common pleas will be reversed.

[This case will appear in 37 O. S.]

Adjoining Owners—Surface Water.—In respect to the running off of surface water caused by rain or snow, an owner of land is not prevented from filling up wet and marshy places on his own soil for its improvement and his own advantage because his neighbor's land is so situated as to be incommoded by it, nor because by so doing he prevents the water reaching a natural water-course as it formerly did.—*N. Y. Court of Appeals. BARKLEY v. WILCOX.* October 4, 1881.

Digest of Decisions.

UNITED STATES COURTS.

SHANKS, EX'R, v. KLEIN. (Supreme Court of the United States. October 31, 1881.)

1. *Partnership—Real Estate—Debts—Equities.*—Real estate purchased with partnership funds for partnership purposes, though the title be taken in the individual name of one or both partners, is in equity treated as personal property, as far as is necessary to pay the debts of the partnership and to adjust the equities of the copartners.

2. *Ibid—Conveyance of Equitable Title—Legal Title.*—For this purpose, in case of the death of one of the partners, the survivor can sell real estate so situated, and, though he cannot convey the legal title which passed to the heir or devisee of the deceased partner, his sale invests the purchaser with the equitable ownership of the real estate, and the right to compel a conveyance of the title from the heir or devisee in a court of equity.

HOPPER v. TOWN OF COVINGTON. (United States Circuit Court, Dist. Indiana. October, 1881.)

1. *Municipal Bonds—Recitals—Estoppel.*—Municipal bonds which contain no recitals are impeachable in the hands of a *bona fide* holder for value.

2. *Ibid—Pleading.*—Municipal bonds that contain no recitals which preclude the municipality from impeaching the bonds in the hands of a *bona fide* holder, give no right of action unless the complaint shows that the bonds were issued duly and for a proper purpose.

MASSACHUSETTS.

(*Supreme Judicial Court.*)

MORSE v. STEARNS. Sept. 1881.

Legacy—Ambiguity—Bill of Interpleader.—Two nephews of the testator, viz., J. W. Sprague and J. Sprague Stearns, claimed a legacy given "to my nephew, J. S. Sprague." *Held*, this is a proper case for a bill of interpleader. Extrinsic evidence of the conduct and the declaration of the testator are competent to show his intention as to the proper person.

AMOS v. OAKLEY. Sept., 1881.

Contract—Breach—Evidence.—The defendant had agreed to support the plaintiff for the rest of the plaintiff's life. The action was for a breach of the contract. The breach occurred on June 9, 1879. On September 9, 1879, the day before the writ in this action issued, defendant had leased to B. the premises conveyed to him by the plaintiff as the consideration for the contract

now broken. In this lease the lessee agreed to receive and support the plaintiff if he should return to the house. *Held*, the lease was properly excluded when offered in evidence by the defendant, the true question being whether the contract had been broken on or before June 9, 1879. If the contract was a continuing one for the plaintiff's life, it was entire, and a complete breach would justify the plaintiff in treating it as absolutely at an end.

LITTLE v. LITTLE. Sept., 1881.

Taxation—National Bank Stock—School Tax.—The question was whether national bank stock belonging to the inhabitant of a school district in one town could be lawfully taxed for the purpose of defraying the expense of building a school-house in the district of another town, under Gen. Stats. c. 39 and Stats. 1873, c. 315. *Held*, the shares of the defendant's intestate could be assessed only in Newburyport, where the bank was situated; and could form no part of the valuation of the town of Newbury. As a district school tax must be assessed as other town taxes are assessed, namely, on the valuation made by the assessors of the property of the inhabitants, subject to taxation for state, county, and town taxes, and as these shares cannot be included in that valuation, they cannot be assessed under existing provisions of law for a school district tax.

IOWA.

SWEET, DEMPSTER & CO. v. OLIVER AND OTHERS. Oct. 22, 1881.

Injunction.—An action was commenced against O., attachment issued, and real and personal property attached, and one W. garnished. Afterwards an amended petition was filed, alleging, among other things, that a mortgage of personalty and real estate from O. to W. was fraudulent; that W. had taken possession of the personalty and was proceeding to sell the same, and that O. was insolvent; and asked that W. be made a defendant, and enjoined from applying the property until amount due her was ascertained, and that plaintiff's lien be declared paramount to hers, and she be compelled to first exhaust the personal property before applying the real estate. W.'s insolvency was not alleged, nor her solvency disputed. The answer denied all fraud, and alleged that the mortgages were given for value. *Held*, that motion to dissolve the injunction should have been granted.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Dec. 13, 1881.]

No. 1235. Moses Sternberger v. Martha M. Hanna et al. Error to the District Court of Jackson County. O. F. Moore, and Irvine Dungan for plaintiff; Moore & Atkinson and Hutchins & Davis for defendants.

1236. John McHenry v. Enoch T. Carson. Appeal—

Reserved in the District Court of Hamilton County. McGuffey, Morrell & Strunk for plaintiff; Matthews, Ramsey & Matthews for defendant.

1237. Joseph Counts et al. v. Wilhelm Stock. Error to the District Court of Miami County. McDonald & McKinley for plaintiffs; W. S. Thomas for defendant.

1238. Uriah Cook et al. v. French G. Lockwood. Error to the District Court of Union County. J. C. Cameron for plaintiffs; P. B. Cole & Son for defendant.

SUPREME COURT OF OHIO.

JANUARY TERM, 1881.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

TUESDAY, December 13, 1881.

GENERAL DOCKET.

No. 175. Caroline Loomis v. Second German Building Association et al. Error to the District Court of Scioto County.

LONGWORTH, J.

L. recovered a judgment in the common pleas court against R. for \$247.48, in an action for money only. R. obtained a second trial under the statute. R. then gave a mortgage to a Building Association. Afterward, upon second trial, L. recovered a judgment against R. for \$251.80 damages and \$135.98 costs, and levied execution upon the mortgaged premises. In an action by the Building Association to foreclose the mortgage, marshal liens, and distribute proceeds:

Held: 1. That the lien of L., to the extent of the original judgment, with interest from the first day of the term at which it was rendered, was the first in order of priority.

2. That the mortgage was second in order of priority.

3. That the lien of the second judgment, to the extent that it exceeded in amount the first judgment with interest, was the last in order of priority.

Judgment affirmed in part and reversed in part.

204. William Bell et al. v. Arthur B. McConnell. Error to the District Court of Mahoning County.

McILVAINE, J.

The double agency of a real estate broker, who assumes to act for both parties to an exchange of lands, involves, *prima facie*, inconsistent duties; and he cannot recover compensation from either party, even upon an express promise, until it is clearly shown, that each principal had full knowledge of all the circumstances connected with his employment by the other which would naturally affect his action, and had assented to the double employment. But when such knowledge and consent are shown, he may recover from each party.

Judgment affirmed.

LONGWORTH, J., dissented.

176. William Howard, adm'r &c. v. Alexander H. Brower. Error to the District Court of Clermont County.

WHITE, J. *Held:*

1. A verbal promise in the alternative to compensate a party by will, either in *land or money*, is within Section 5 of the statute against frauds and perjuries.

2. Where the agreement sued on is within such statute, and it is fairly to be inferred from the petition that it is not in writing, the defense of the statute is available on demurrer.

3. A verdict cannot be regarded as a finding of the value of services as upon a *quantum meruit*, where the case is not submitted to the jury for such finding, but under instructions to assess the damages according to the terms of a void agreement.

4. Under the Act of April 18, 1870, (67 O. L. 113), husband and wife are competent witnesses for and against each other, except as to the matters therein specified. *Westerman v. Westerman*, (25 O. S. 500), approved and followed.

Judgment of the district court and that of the common pleas reversed; verdict set aside, demurrer to the petition sustained, and cause remanded to the court last named for further proceedings.

JOHNSON, J., dissented from the first proposition.

192. Dille v. Ingersoll et al. Error to the District Court of Athens County.

JOHNSON, J. *Held:*

In an action to recover damages for assault and battery, where an issue was joined on an answer justifying the alleged trespass, the court allowed defendant to begin and close, in offering testimony and in the argument: *Held:*

1. That unless there were special reasons authorizing the court to otherwise direct, the right to begin and close was in the plaintiff.

2. Unless it affirmatively appears that special reasons did not exist, which would authorize the court to change the order of proceeding at the trial, or, that the plaintiff was prejudiced thereby, a judgment for the defendant will not be reversed.

Judgment affirmed.

158. William T. West, Trustee, v. August Klotz and others. Error to the District Court of Erie County.

OKEY, C. J.

1. A mechanic furnishing material for the construction of a mill, under a contract with the owner, may, by his agreement as to the manner of payment, and his acts with respect to the claims of other creditors, be precluded from asserting a mechanic's lien, as against such creditors, although he has made no express promise that he will not assert such lien.

2. The proposition of a manufacturing company incorporated under the laws of New York, to build a rolling mill at S., in this state, if its citizens would donate to the company ten acres of land and lend it \$150,000, to be evidenced by the bonds of the company secured by mortgage on the property, was accepted by certain citizens of S., who conveyed to it such land, loaned to it said sum, receiving from the company such bonds and mortgage. Among the persons advancing money, and accepting bonds so secured, was K., who afterward sold such bonds to other persons. After the mortgage was recorded, but before any considerable part of said sum was advanced to the company, and before any written consent of stockholders of the company to the execution of the mortgage was filed in the office where mortgages are recorded, as provided in the statutes of New York, K. commenced furnishing material for the construction of the mill, under an agreement that he should be paid in monthly instalments out of the moneys received for the bonds. His account amounted to \$76,000, and during the time it accrued, he received thereon, in instalments, from the moneys so loaned to the company, \$57,000, and the company paid out of the moneys advanced to it various sums to other creditors. Subsequently, when the company was in failing circumstances, K. asserted a mechanic's lien for the balance due him, and brought suit to enforce it: *Held*, conceding but without deciding that the objections to the mortgage would under other circumstances be fatal, that K. is precluded by his acts and agreement from asserting such objections, and that on the facts stated the mortgage lien is superior to the lien of K.

Judgment reversed and cause remanded for further proceedings.

205. James N. Stark v. Zenas Harrison, administrator &c. Error to the District Court of Delaware County. Dismissed for want of preparation.

207. Van Hyning Co. v. William Jennings et al. Error to the District Court of Columbiana County. Dismissed for want of preparation.

208. Eugene Powell v. John J. Reicherta. Error to the District Court of Delaware County. Dismissed for want of preparation.

210. Andrew Warner, administrator &c. v. Brighton Tanner et al. Error to the District Court of Geauga County. Passed for proof of service of plaintiff's brief.

216. George F. Avery v. Noah Thomas. Application for a writ of *habeas corpus*.

Application refused, on the ground that it should be made in the inferior courts, in accordance with *Ex parte*, Shean 25, Ohio St. 440.

920. Ohio on relation of the Attorney General v. The Cincinnati Street Railway Co. Dismissed.

921. Ohio on relation of the Attorney General v. Robert M. Shoemaker. Dismissed.

Ohio Law Journal.

COLUMBUS, OHIO, : : : DEC. 22, 1881.

NEW BOOKS.

USAGES AND CUSTOMS. THE LAW OF USAGES AND CUSTOMS WITH ILLUSTRATIVE CASES. By JOHN D. LAWSON; pp. LXIX, 552, \$6.00. St. Louis: F. H. Thomas & Co., 1881.

Every lawyer in active practice finds himself compelled, at times recurring with greater or less frequency to battle with the prevalence or otherwise of a custom or usage which is held to extend or restrict the meaning or interpretation of some express or implied contract. At such times it is frequently also very hard indeed to find case law to fit the emergency. The editor of "Usages and Customs" has, by collecting all decided cases wherein rulings have been made upon any custom or usage, conferred an especial boon upon the profession at such trying times. The self gratulation of the author to the effect that no apology is needed for entering upon a field not properly filled by the many books treating upon the same subject, is especially opportune and full of suggestiveness of the fact that this work is practically the first in a wide, and hitherto barren field. The immense amount of labor which has been necessary in the preparation of the book before us will be appreciated when we say that between three thousand and four thousand cases are cited. These necessarily cover the entire range of custom or usage and we can hardly imagine any case or circumstance not met and covered by some of this great number of citations. Hundreds of cases are given in full, and the book is upon the whole such an one as must be seen and read to be appreciated, and should be placed in every lawyer's library as a safe guard against the day when questions will arise upon usages and customs.

COMPENSATION FOR LEGAL SERVICES. THE ETHICS OF COMPENSATION FOR LEGAL SERVICES. *An address before the Albany Law School, and an answer to Hostile Critics.* By EDWIN COUNTRYMAN. 12 mo; pp. 150. Albany, N. Y.: W. C. Little & Co., 1882.

This little book before us is positively refreshing in the remarkably cool and scientific manner in which it goes after and secures the scalplock of Irving Brown, Esq., of *Albany Law Journal*

fame. Judge Countryman, in his address before the Albany Law School, in speaking of the proper reward for the services of the attorney, said: "He may require prepayment in whole or in part, or special security for subsequent payment, or he may stipulate for contingent compensation out of the proceeds of the litigation." To this language Brown took exceptions, as a bull excepts to the flaunting of a red rag. His attacks upon the lecturer were so intemperate and so senseless, that in self defense Judge Countryman took up the cudgel and at the first pass demoralized Brown, although through the columns of his own organ. Brown responded, led on by the Judge's peculiar method, and placed himself in a trap out of which even the instinct of a blind man ought to have kept him. But when the trap was sprung it did not catch the Honorable Mr. Brown, for he refused to publish the Judge's communication. That communication with a history of all the facts and circumstances now reaches the profession and is handed down to posterity through this little book. The few persons who read the *Albany Law Journal* will remember that the editor procured a few communications from his special cronies to bolster up his senseless theories of wickedness in taking contingent fees.

From these defenders of Brown's faith, Judge Countryman takes the lion's skin and shows the contemptible asses thereby concealed. Even Judge Cooley, of Michigan, is made to look very small as a preacher of morality when the fact is shown that while the State of Michigan pays him a salary for all his time he steals from the State a very large part thereof, devoting it to book making, while the litigants in his courts are praying for action to be taken on their pending cases.

But, to Mr. Brown, the author of "Legal Services," pays his particular respects. He shows that while at the bar, Brown was notorious for getting all the business he possibly could upon contingent fees. This portion is so pointed that we cannot resist the temptation to quote *verbatim*: "He rapidly outgrew in toto the percentage system. His conception of a contingency culminated in claiming the whole or nothing. Nor was he at all particular about limiting his operations to his own clientage. He was strictly impartial and even generous in the selection of victims—clients, dear friends, members of the bar, aye, even judges and his own partners—very few escaped. * * The man failed utterly at the bar and was obliged to find more congen-

ial employment elsewhere. The interesting and peculiar phase, however, consists in the upshot of the affair. He is now a self-constituted censor of the profession and is keenly sensitive to the slightest violation of professional duty and decorum!"

The quotations, from the *Albany Law Journal*, wherein Brown, a few years ago, as zealously defended the taking of contingent fees as he now denounces the same, show a conversion as rapid as that of Saul of Tarsus, although all the conditions are reversed; Brown was converted from sense to nonsense and his eyes have acquired scales which render him incurably blind.

Taken altogether the book is worth its weight in trade dollars.

SUPREME COURT OF OHIO.

ALONZO SIMMERSON, ADM'R,

v.

EMERETTA TENNERY.

December 6, 1881.

An action by an assignee of the claim of a married woman, against her husband for monies belonging to her and converted by the husband to his own use, is not barred by the limitations of Chap. 8 of the Code of 1853, (2 S. & C. 947), where less than six years have intervened between such assignment and the commencement of the action.

Error to the District Court of Sandusky County.

The action was originally brought December 23d, 1873, in the court of common pleas by the defendant in error against her father, Joseph Simmerson, now deceased. He having died during the pendency of the action it was revived against his administrator, the present plaintiff in error.

The petition of plaintiff alleged, that Rhoda Simmerson, her mother and wife of Joseph, died about October, 1871, leaving a will, whereby she devised to her daughter, the plaintiff, her interest in a lot of land in Clyde, Sandusky County, together with all her claims or rights of action against her husband. It further alleged, that in March, 1863, this lot was purchased by Joseph and Rhoda jointly for \$520, the conveyance being to them as tenants in common of equal shares, Rhoda paying \$200 of the purchase money out of her own separate monies. That at this time Rhoda owned a certain promissory note for \$100, which Joseph collected, and applied \$70 of the proceeds toward paying the purchase money, and applied the balance to his own use. The deferred payments were secured by a purchase money mortgage on the premises. To meet the deferred payments, when the same became due, Joseph and Rhoda sold a portion of the lot for \$450, out of which the balance of the purchase money \$250 was paid. The rest was appropriated by Joseph to his own use. The peti-

tion prayed judgment for the sums claimed to be due with interest and for an account.

The answer, among other matters of defense, alleged that the plaintiff's cause of action had not accrued to her within six years prior to bringing suit. This the reply denied.

The court of common pleas, without passing upon any other issues, held that the plaintiff's cause of action was barred by the Statute of Limitations and rendered judgment in favor of defendants.

This judgment was reversed in the district court.

BY THE COURT.

The district court did not err in reversing the judgment of the court of common pleas. The plaintiff's devisor was within the saving clause of the statute, (Code § 19, 2 S. & C. 949), during her coverture.

Judgment affirmed.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

MANASSEH GLICK, ADMINISTRATOR,

v.

SAMUEL CRIST.

December 6, 1881.

A payment by a principal debtor which will take a case out of the statute of limitations as to him, will have the same effect as to his surety, who is present for the purpose of seeing that the payment is made and credited, and makes no statement that any limitation shall be placed on the effect of such act.

Error to the District Court of Fairfield County.

On December 23, 1873, Manasseh Glick, as administrator of Jacob W. Alspach, brought suit in the Court of Common Pleas of Fairfield County, against Samuel Crist. The action was upon a joint and several promissory note, for \$453.64, dated December 10, 1853, due one day after date, payable to the order of said Jacob W. Alspach, and executed by Peter Brown as principal debtor, and Charles Brown and said Samuel Crist as his sureties. Crist pleaded the statute of limitations of fifteen years, and the sole question in the case is whether the action is barred. The facts are as follows: There are two credits, one of \$245, dated May 2, 1862, and the other of \$40, dated September 2, 1871, endorsed on the note, and said sums were actually received by Alspach, on the days stated, and then credited on the note. As to the first credit, the proof is that Peter Brown, who was in the army, sent to said Charles Brown \$245, and directed that it be paid to Alspach. Charles Brown took the money to Crist's house, informing Crist that Peter Brown had sent it. They then went together to Alspach's house, when Charles Brown informed Alspach that Peter Brown had sent the money, and thereupon Charles, in the presence of Crist, paid the money to Alspach, who credited it on the note. On a subsequent day Crist remarked to another person that they (Crist and Charles Brown) had paid to Alspach the money which

Peter Brown had sent; and that Alspach was getting uneasy about the note, but that he (Crist) was good enough and would stand by it. The other payment was made by Peter Brown. At his request Crist accompanied him to make the payment, and was present when the money was handed to Alspach and credited on the note. Crist made no objection to either payment, nor did he make any statement to indicate any limitation as to the effect which should be given to the payments. The court of common pleas, to which the cause was submitted on the petition, answer, reply and testimony, held that the action was not barred by the statute of limitations, and rendered judgment in favor of the plaintiff for \$734.92, but the judgment was reversed in the district court, and this petition in error is prosecuted by the administrator to obtain a reversal of the judgment of the district court.

M. A. Daugherty and J. S. Brasee for plaintiff in error.

Martin & McNeill for defendant in error.

By THE COURT.

By the statute (Civil Code, § 24, R. S. § 4992), when payment is made upon a demand founded on contract, an action may be brought thereon within the time limited, after such payment. In this case the limitation was fifteen years (Civil Code, § 13, R. S. § 4980), and each payment, as to Peter Brown, prevented the running of the statute for the period of fifteen years from the time of such payment. It is said, however, that the same result did not follow as to Crist. But we think otherwise. Crist, when the payments were made, stood by consenting, and there is no reason for saying that the payments had not the same effect as to him, that they had as to Peter Brown. The views expressed by Crompton, J., in *Jackson v. Wooley*, 8 Ell. & Bl. 778, and by Ross, J., in *Bailey v. Corliss*, 61 Vt. 366, in apparent conflict with the conclusion at which we have arrived, are founded on statutes different in terms from that above cited. In holding that the judgment of the district court should be reversed, and that of the court of common pleas affirmed, our decision is not in conflict with any of the cases decided in this court, and referred to by counsel for plaintiff in error, but is supported by them.

Judgment reversed.

[This case will appear in 37, O. S.]

SUPREME COURT OF OHIO.

GEORGE RUSSELL

v.

CHARLES T. SUNBURY.

December 6, 1881.

The right to commence an action for wrongfully causing death, under "An Act requiring compensation for causing death by wrongful act, neglect or default," passed March 26, 1861, (2 S. & C. 1139), abates by the death of the wrong-doer.

Error to the District Court of Ashtabula County.

The question which is decisive of this case arises on a demurrer to the petition.

For cause of action it is alleged, that John M. Anderson, died January 24, 1877, by the wrongful act of William H. H. Turner, who discharged a loaded gun at him, inflicting a mortal wound, that plaintiff was appointed and qualified as his administrator, that soon thereafter Turner died and defendant became his administrator, that Anderson left a wife and child still living, dependent on him for a support, that by said wrongful act, Turner injured the estate of said Anderson to the amount of five thousand dollars, and that a claim for that sum was duly presented and disallowed by the defendant as administrator of Turner.

The prayer is for a judgment for five thousand dollars against the estate of said Turner.

To this there was a demurrer, on the ground that the cause of action, if any, abated by the death of Turner.

The demurrer was overruled, issue was joined, and trial had, which resulted in a verdict for plaintiff, followed by a judgment. The same question that arose upon the demurrer was made during the trial, on a motion for a new trial, and on error to the district court where the judgment was affirmed.

It is now sought to reverse these several judgments.

JOHNSON, J.

The petition alleges that the death of Anderson was caused by Turner's wrongful act, and that he died before this action was commenced.

Did the right to institute and prosecute this action survive against the personal representative of Turner? This depends on a construction of the act requiring compensation for causing death by wrongful act, neglect or default, (2 S. & C. 1139), and of Sec. 398 of the Code of Civil Procedure.

This act was passed March 25th, 1851. It was an innovation upon the common law in allowing an action for damages resulting from death, and in authorizing an action in favor of the personal representative to recover such damages. The right to maintain such an action by the personal representative of the deceased for causing his death, is authorized against the person who, or the corporation which would have been liable if death had not ensued, whenever the death shall have been caused by the wrongful act, neglect or default of such person or corporation. The statute itself gives the test of the right to such an action. If the party injured, could, had death not ensued, have recovered for his injuries then where death does ensue, his personal representative may recover. The foundation of the former action is the personal injuries to himself by the wrongful act, neglect or default of defendant. The same injuries causing death are the foundation for the right of action in favor of his personal representative. The amount recovered is for the exclusive benefit of his widow and next of kin resulting from the death. In his action the measure of damages is determined by the

extent of the personal injury, enhanced, it may be, by punitive damages, while the measure of damages, in the latter action, is the pecuniary injury to the widow and next of kin, the loss to them caused by his death. In each case, the action is in form *ex delicto*. In the case at bar it arises from a wrongful act and not from neglect or default. It belongs to the class of actions classified at common law, as injuries to the person, as distinguished from injuries to the estate. By the express terms of the statute, the person, who, or the corporation which is guilty, is made liable, and not his heirs or personal representative.

At common law, all actions in form *ex delicto*, for the recovery of damages abated by the death of either party. The rule embraced injuries to person, to personal property and to real estate.

By the statute 4, Edw. 3, C. 7, this rule was so modified as to give an action in favor of a personal representative for injuries to personal property. This statute may be regarded as part of the common law of this state.

By statute 3 and 4, W. 4, C. 42, S. 3, the common law was further modified by giving an action in favor of the personal representative for injuries to real estate, and against personal representatives for injuries to real or personal property. But neither of these statutes changed the common law rule as to injuries to the person.

When the act of March 25th, 1851, was enacted, the civil practice act of 1831, with amendments, was in force in Ohio, and to a certain extent changed the common law as to abatement of actions. It provided that no pending action in any court (except for libel, slander, malicious prosecution, assault, assault and battery, actions on the case for nuisance or against justices of the peace), shall abate by the death of either or both parties. Sec's 62 and 64, act of 1831, Swan (Ed. 1840) p. 667. By Sec. 74 of the same act (Ibid 667), if any person have a right to commence and maintain an action of trespass or trespass on the case for mesne profits, or for an injury to his estate real or personal, or for deceit or fraud committed in the sale thereof; or if any person liable to either of said actions, shall die before such action is brought, the cause of action shall survive.

By the act of 1845, the rule as to pending action, was extended so as to provide that no action founded on a tort should abate by the death of the plaintiff, 43 O. L. 114 Sec. 2.

In none of these statutes was any provision made to modify the common law rule, that for injuries to the person, arising *ex delicto*, the right to bring the action abated by the death of defendant.

Sec. 398 of the civil code, is in terms, the same as Sec. 74, of the Act of 1831. It provides that in addition to the actions which survive at common law, cause of action for mesne profits, upon injury to real or personal estate, or for deceit or fraud shall also survive, and the action may be brought notwithstanding the death of the person entitled or liable to the same.

This relates to causes of action, or the right to commence and maintain actions and not to pending actions.

Section 399 of the Code relates to pending actions, and is the same in terms as Sec. 74 of the Act of 1831.

As the case at bar depends upon Sec. 398, the question is; does the act of 1851 give a right of action for injuries to the estate real or personal within the meaning of those terms used in the section.

The damages recovered are for the pecuniary injuries to the widow or next of kin, and not for injury to his estate. The legal injury for which a recovery may be had, is that done them by causing the death of the person standing in a certain relation to them.

His personal injuries for which an action would lie, if death had not ensued, are the basis of his recovery, while their injury for which damages commensurate with their pecuniary loss resulting from his death, is recoverable under the act of 1851, is the basis of their action. In each the liability arises from the same wrongful act, neglect or default, but in his action the amount of recovery is measured by his personal injuries, including pain and suffering, as well as loss of time, expenses of cure, and it may be exemplary damages; while in theirs the amount of recovery depends on none of these things, but on their pecuniary loss resulting from his death.

The law assumes that there is such pecuniary loss to the widow and next of kin, and awards to them damages therefor.

The petition alleges that defendant by his wrongful act injured the estate of Anderson, but as the act gives the remedy not to his estate, but to his widow and next of kin this cannot be so. The personal representative is only a trustee for them, to recover and distribute damages they are entitled to recover. The clause, "or for an injury to the real and personal estate," found in Sec. 398 and in the act of 1831, is borrowed from the classification known to the common law, to distinguish such injuries and rights of action from those to the personal or real estate.

We find the same terms in the act 3 and 4 W. 4 ch. 42. By that act injuries to the real or personal estate, survive against the representative of the defendant. It recites the fact, that there is no remedy for injuries to real estate of a deceased person committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime, to another in respect to his property real or personal, and among other things, provides for an action against the personal representative of a deceased wrongdoer, in respect to injuries to such property. 1 Ch. Plead. 79.

In using this phrase, "injury to the real or personal estate," the legislature is presumed to have used it in their well established sense, as distinguishing torts to property from injuries to person.

We conclude therefore, that Sec. 398 of the code, does not prevent the abatement of a right

of action for damages to a person. As the right of action given by the statute is for the pecuniary loss to the widow and next of kin, the legal injury is the one sustained by them, and not by him or by his estate. It is based upon the relation the deceased bore to them, and on his duty to provide for and support them. If there is no one occupying the relation of widow or next of kin no right of action accrues.

It follows, that the injury caused to them by the death, is a personal injury to them and not an injury to their estate.

We have been referred to the case of *Yerton v. Wiswall*, 16 How. Prac. 8, as an authority to the effect, that the New York statute, similar to ours, creates a *property* interest in the life of deceased, which survives under the New York statutes.

The case arose out of *negligence* in the performance of an implied contract, and not as in this case, from a wrongful act which was purely *ex delicto*. Again, the New York statute as to survivorship, is different in terms. But with the views of the judge who delivered the opinion, holding that their statute gave a vested *property interest* to the widow and next of kin in the life or rather in the death of deceased, we do not concur. To so hold is a confounding of legal terms and distinctions. Death gives this right of action under the statute, while at common law death terminated the right of the party injured.

The statute gives a right to maintain an action for loss occasioned by death. It does not vest in the widow and next of kin a property interest in the deceased. To say that the remedy is in its nature *ex contractu*, when the act is a naked trespass, or that the injury is to the estate of the deceased or of their estate is to confound the well settled distinction between injuries to the person and injuries to the estate.

Whatever may be the rule, where the death is caused by neglect or default, while the defendant is in the performance of a contract, express or implied, we hold that in this case, when the death is caused solely by the wrongful act of defendant's intestate, the right to commence and maintain the action, abated by the death of Turner.

The demurrer to the petition should have been sustained and the action dismissed.

Judgment accordingly.

[This case will appear in 37 O. S.]

Digest of Decisions.

NEBRASKA.

(Supreme Court.)

PLEULER v. STATE OF NEBRASKA. November 12, 1881.

Constitutional Law—Taxation.—1. To justify a court in pronouncing an act of the legislature

unconstitutional, it must be clear and free from reasonable doubt that it is so.

2. The rule of uniformity in taxation required by section 1, art. 9, of the constitution of this state, is satisfied if duly observed as to each jurisdiction for whose use the particular taxes are levied.

3. The exaction of license fees, under the act "to regulate the license and sale of malt, spirituous, and vinous liquors," &c., approved February 28, 1881, is not taxation, either in the ordinary or the constitutional signification of that term.

4. The above mentioned act conflicts with no provision of the constitution of this state, and is, in all respects, a valid law.

5. Privileges granted under the former license law, which was repealed by this one, were absolutely revoked upon its taking effect.

FREMONT, ELKHORN & MISSOURI VALLEY R. CO. v. WHALEN. November 12, 1881.

Railroad Law—Damages on Condemnation.—1. Where land is condemned for railroad purposes the owner is entitled to have as one item of damage, in all cases, the fair market value of the part actually taken; and where a portion of the tract remains, if it can be said with reasonable certainty that the road, properly constructed and carefully operated, will injure it, he is also entitled to recover for that; but injuries merely speculative and contingent upon the improper construction or negligent operation of the road are too remote and uncertain to be considered.

2. Special benefits may go to reduce the damages to what remains of the land, but cannot be set off against the value of the part taken.

3. Witnesses should not be permitted to express their opinions before the jury of the value of the land, *subject to the right of way*. This should be left to the jury to ascertain from facts affecting the value, and proper to be considered, uninfluenced by the opinion of others.

FREMONT, ELKHORN & MISSOURI VALLEY R. CO. v. LAMB. November 12, 1881

Ibid—Ibid.—1. Damages incident to the taking of land for right of way for a railroad, and for which compensation must be made to the owner, independently of the portion actually appropriated, are the result of facts and circumstances susceptible of proof, and they must be proved before the damages are allowed.

2. By the laws of this state, railroad companies are required to fence their track against stock running at large, and, failing to do so, are liable to the owner of any that may be killed or injured in consequence of the omission.

3. And, when requested by the owner of land crossed by the road of the company, are required to make and keep in good repair an adequate means of crossing the track.

FITZGERALD v. STATE OF NEBRASKA. November 12, 1881.

Dying Declarations.—Dying declarations, to be admissible in evidence, must be made under a sense of impending death; but it is unnecessary that the deceased should have stated, at the time of making the same, that he was about to die. It is sufficient if this state of mind appears from other testimony.

HOWARD ET AL. v. LAMASTER. November 12, 1881.

Tax sale—Practice.—1. If a tax deed fails to show that the tax sale was made at the place required by law, the deed is void.

2. In an action of ejectment, where the plaintiff in his reply pleaded a tender of the amount paid by the defendant for taxes due on the premises, but the court on the trial excluded proof of the amount, *held*, that the judgment in ejectment being right, the supreme court will order a reference to ascertain the amount due for taxes, and require the payment of the same as a condition of affirming the judgment.

NOBLE v. HIMOE. November 9, 1881.

Bailee—Constable's Bond.—1. One S., who kept a drug store, had certain patent medicines belonging to H. & Co., for sale on commission. A constable, with an execution against S., levied the same upon the property of H. & Co., and sold the same, although notified that S. was not the owner of it. *Held*, that the constable and his sureties were liable to H. & Co. for the value of the property.

2. The law requires a constable to give a bond, but makes no provision as to the amount of penalty. The amount of the penalty is not material to the validity of the bond, and is a mere limitation.

IOWA.

(*Supreme Court.*)

CUNNINGHAM v. GAMBLE. Oct. 22, 1881.

Homestead.—A surviving wife, left in possession of a homestead, has a reasonable time after the decease of her husband in which to make her selection whether she will retain the occupancy of the homestead, or claim one-third of the real estate in fee-simple; and during such time prior to her election, and while so in possession, she is entitled to receive the products and income of such homestead. Remaining in possession, and delaying for an unreasonable period to make election, would be regarded as waiver of her right to take a distributive share.

A widow remaining in possession of a homestead is entitled to the rents from a coal mine thereon, already opened and in a working condition at the time of her husband's death.

RYAN, TRUSTEE, v. ADAMSON AND OTHERS. Oct. 22, 1881.

Fire Insurance—Mortgagor.—A mortgagee has no interest in a policy of insurance taken out by a mortgagor, or one standing in the mortgagor's shoes, for his own benefit.

Where a mortgagee has no interest in a policy of insurance taken out by a mortgagor for his own benefit, he cannot, upon foreclosure, and his security proving scant by reason of the destruction of the house, be subrogated to the rights of the mortgagor against the insurance company for money due on the policy.

McFAUL v. WOODBURY COUNTY. Oct. 24, 1881.

Verdict—Interest.—A jury returned a sealed verdict as follows: "We, the jury, find for the plaintiff and assess the amount at \$500, with back interest at 6 per cent." They were not called together again to make their verdict more definite, and, at a proper time before judgment, plaintiff moved the court to amend the verdict so it might express the intention of the jury to add to the principal sum interest at 6 per cent. from time payment was demanded to day of trial, and to enter judgment for the amount of verdict so amended, which motion was overruled. The plaintiff did not appeal therefrom. *Held*, that he could not afterwards maintain an action in equity for the amount of such interest.

THOMAS v. DESNEY AND OTHERS. Oct. 24, 1881.

Agent—Mistake in name.—A person employed and paid by a borrower to negotiate a loan for him is the agent of such borrower, and notice to him of defects in the title is not notice to the lender. Two names taken and used promiscuously as the same name will be treated as identical, although differing in sound.

"Helen" and "Ellen" will not be regarded as the same name. So a judgment entered and indexed against "Ellen Desney" is not constructive notice that it is a lien upon lands of "Helen Desney." If a party is not charged with constructive notice by what appears in the index-book of judgments, he is not bound to look further.

BALDWIN v. OSKALOOSA GAS-LIGHT CO. Oct. 24, 1881.

Nuisance.—In an action for damages from nuisance in the erection and maintenance of gas-works, rendering plaintiff's property in the vicinity uninhabitable, the jury found that the works were permanent, but stated they were incompetent to decide whether the injury would be permanent, as ways and means might possibly be devised to operate them in such a manner that they might cease to be a nuisance. *Held*, equivalent to a finding that the injury was permanent; and the works having been erected in 1872, and plaintiff's cause of action accruing at the time of erection, it was barred by statute of limitations.

A party is only liable for the smells or nuisances caused by himself, not for those caused by others in the same vicinity.

HADLEY, ADM'R, ETC., v. GREGORY AND OTHERS. Oct. 24, 1881.

Law of foreign state.—The law of a foreign state will, in the absence of evidence to the contrary, be presumed to be the same as our own.

Where principal administration proceedings were had in another state, and more than four years subsequent to the commencement of such proceedings, application was made in this state in ancillary proceedings for leave to sell lands for the payment of claims, no peculiar circumstances, entitling claimant to equitable relief, being shown, *held*, that the application came too late, and would not be granted.

GETCHELL AND ANOTHER v. BENEDICT. Oct. 25, 1881.

Dedication of lands as public highway.—A party having dedicated lands for a public street by acts *in pais*, which have been accepted by the public, cannot afterwards change or defeat such dedication by a subsequent plat of the land. Declarations of a party in possession of land, and having at the time a conditional estate therein, coupled with subsequent acts, *held*, competent to show an intention to dedicate land for a street when the title finally became perfect in him.

Where land is dedicated as a public highway by acts *in pais*, the fact that it may be subsequently assessed for taxation will not operate to defeat the easement of the public therein.

Where plaintiffs received a conveyance of a certain lot according to a plat which did not recognize a highway dedicated by acts *in pais* prior to the filing of such plat, *held*, that they were not thereby estopped from asserting the existence of such highway.

WISCONSIN.

(*Supreme Court.*)

NAT. BANK OF DELAVAN v. COTTON, ADM'R, ETC. Sept. 27, 1881.

Joint Debtors—Statute of limitations.—1. In the absence of any statute to the contrary, payment by one joint debtor will remove the bar of the statute of limitations as to all, on the ground that each joint debtor is the agent of all the rest for making such payment.

2. Section 4248, Rev. St. provides that no one of several joint contractors shall lose the benefit of the provisions of that chapter relative to the limitation of actions, "so as to be chargeable, by reason only of any payment made by any other or others of them." B. and G., being jointly indebted on a note to X., and also jointly indebted to Y., agreed with each other that B. should pay a certain sum on said note to X., and G. a like sum on the indebtedness to Y.; and the payments were made accordingly, before the statute had run upon said note. *Held*, that such payment upon the note by B. during the life of G., pursuant to such agreement, removed the bar of the statute as to G., and as to his personal representatives after his death.

3. The fact of such payment *held* to be established by the evidence, notwithstanding a contrary finding by the judge of the court below.

NEUBRANDT v. THE STATE. Sept. 27, 1881.

Burglary—Particular Intent.—1. Under an information for burglary which charges that the breaking and

entry were with intent to steal the goods of B., no conviction can be had without proof of such particular intent.

2. Under such an information, however, where it appears that B. was owner of the house at the time of the criminal act, and had personal property therein which might be the subject of larceny, and which was in the same room with property of C., and was stolen and carried away at the same time with the latter, the state may show that the property of C. was afterwards found in defendant's possession.

3. An instruction that the burglary "could not be inferred" from the fact that the stolen property was found in defendant's possession, was properly refused where there was proof, not only that the property was so found shortly after the burglary, but also of other suspicious circumstances. *Ingalls v. State*, 48 Wis. 647, 657.

4. Personal property of a boarder left in B.'s saloon or bar-room, during the night, while the boarders slept in some other part of the house, was in the actual possession of B. during that time; and under section 4621, Rev. St., proof of the intent to steal such property would sustain an averment of an intent to steal the property of B.

FENELON v. BUTTS. November 3, 1881.

Venue—Evidence—Damages in Tort—False imprisonment.—1. A change in the place of trial for prejudice of the judge cannot be granted under section 2625, Rev. St., where a change for that cause had already been granted before that section took effect.

2. In an action for false imprisonment, proof of the circumstances of plaintiff's family, and of the filthy condition of the jail used for the imprisonment, is admissible upon the question of mental anguish etc.

3. In such an action, statements of an attorney at law in reference to the second imprisonment of the plaintiff, then threatened, are admissible, where such attorney had acted for the defendant throughout the proceedings which resulted in the first imprisonment, and there is evidence for the jury that he was still so acting when he made such statements; or where there is evidence that he was a conspirator with the defendant; or where such statements were made in the defendant's presence, while the latter was plotting the further imprisonment of the plaintiff, and the evidence was accompanied, or might have been followed, by proof of defendant's assent.

4. In such an action, defendant's affidavit for the supplementary proceedings in which the imprisonment occurred is admissible to show that the imprisonment was for his benefit, and may also be considered with other acts of the defendant as tending to show that he caused the imprisonment. *Fenelon v. Butts*, 49 Wis. 342, distinguished.

5. A question is not improper merely because one possible answer to it would be immaterial; and a question which could not be admitted to establish a distinct liability not charged in the complaint, may be admitted to show the interest, participation, and intent of defendant in the proceedings on which the action is founded.

6. It is the settled law of this state that, while proof of defendant's good faith is admissible to mitigate punitive damages, it cannot be considered to mitigate compensatory damages, including those allowed for injury to the feelings.

7. The court is not required, by section, 2858, Rev. St., to direct a special verdict when not so requested by either party; and a mere request by one party that certain specific questions, and no others, be submitted, is not sufficient.

8. There is no error in refusing to submit instructions, for the determination of defendant's liability, not containing all the essential requisites upon which that liability depends.

9. A party is liable for a false imprisonment if it was for his benefit, and he approved of it.

10. A verdict for \$1,000, for a false imprisonment in this case, *held* not excessive.

MICHIGAN.

(*Supreme Court.*)

DOWLING v. BERGIN. Oct. 26, 1881.

Agreement to convey land.—A son was in possession of land standing in the name of the father, and owned a

growing crop thereon. *Held*, that an agreement of the father to convey the land, made with one who had knowledge of the son's rights, would not be specially enforced, the father having refused to give the deed except subject to the son's claim.

CRANSON v. SMITH AND ANOTHER. Oct. 26, 1881.

Bill in aid of execution.—A person desiring to file a bill in aid of an execution, for the purpose of vacating an alleged fraudulent transfer of land, should do so after levy and before the sale.

Where a party levied upon and proceeded to sell and purchase, under his execution, lands claimed to have been transferred in fraud of creditors, and afterwards, and more than a year subsequent to such fraudulent sale, filed a bill to set aside the same, *held*, that no relief would be granted.

DAYTON v. MONROE. Oct. 26, 1881.

Fraud.—A party is not bound, as condition precedent to maintaining an action for fraud, to surrender the unsecured personal obligation of the defendant received in the proceeding.

Waiver of fraud, in controversies not within the statute of limitations, is a question of fact.

Where the fraud complained of was the result of a conspiracy, evidence of other transactions by the same parties of a similar character is admissible.

HUNT v. POTTER. Oct. 26, 1881.

Landlord and Tenant.—Where a tenant is given the privilege of putting up fixtures and removing them during his term, the right given to remove includes the right to do such damage to the freehold as such removal will naturally cause, and the tenant will not be liable for damages unless he unnecessarily causes the same.

HART v. BAXTER. Oct. 26, 1881.

Injunction.—Statements in an affidavit made in support of an answer to be used in opposition to an application for an injunction are privileged, provided they are not irrelevant and impertinent.

When therefore a bill was filed by a mortgagor to reform the mortgage, and the bill charged an agent of the mortgagee with fraud in connection with the drafting of the mortgage, and the agent made his affidavit in support of the answer, and averred therein that the charge of fraud was wilfully and maliciously false, *held*, that an action counting on these words as a libel would not lie.

The affidavit of one defendant may properly be used in support of the answer of another, in resisting an application for an injunction.

FOSS v. VAN DRIELE. Oct. 26, 1881.

Ejectment.—A tenant was practically evicted under proceedings in ejectment against him by a third person, and thereafter remained in possession under a lease from such person. Summary proceedings against him were then commenced for the possession by the original landlord.

Held, that the attornment by the tenant to the plaintiff in the ejectment suit was not voluntary, and the real controversy in the present proceeding being between the two claimants to the title to the premises, judgment for complainant should be reversed.

OSBORN v. RAWSON AND OTHERS. Oct. 26, 1881.

Contract—Warranty.—In an action upon a note given for a reaper, defendant pleaded general issue, and gave notice of a warranty of machine and breach thereof. The warranty was, among other things, that the machine would do first-class work when properly handled. Should there be difficulty in operating it, reasonable notice to be given to Rawson & Thatcher, or their agent from whom purchased, and also reasonable time for them to remedy the difficulty, and in the event of their not doing so, machine to be returned and a perfect machine delivered in its place or money and notes refunded.

Evidence tended to show that it did not do first-class work; that plaintiffs' agents had been notified; and that defendant wanted them to take back the machine and deliver up the notes. No place for the delivery of the machine, in case of return, was stipulated or provided for, and no effort to return it made by defendant. *Held*, that defendant did all he was bound to do, and judgment was erroneously directed for plaintiffs.

FINN v. PECK. Oct. 26, 1881.

Conversion—Trespass.—A deputy sheriff, under a precept for the collection of a liquor-license tax, due from a mortgagor, entered the premises, at the time in possession of the landlord and mortgagee of the chattels of the tenant, and seized some of the mortgaged chattels in payment of the tax. Action for the conversion of the chattels was brought by the landlord and mortgagee, and judgment recovered. *Held*, that he could not afterwards maintain an action against the sheriff for the alleged trespass in entering the premises at the time of the conversion.

ILLINOIS.

GEORGE W. UPDIKE v. MARY W. TOMKINS ET AL. Opinion by WALKER, J., affirming. Filed September 30, 1881.

1. *Will—Construction.*—As speaking from what time.—As a general rule a will is held to speak from the death of the testator, but this is otherwise when the language used repels the presumption, taking into consideration the entire instrument.

2. *Same—Particular expressions must yield to general purpose.*—Particular expressions will not control where the whole tenor or purpose of the will forbids a literal interpretation of the specific words. Wills, like contracts and other writings, must be construed according to the intent of the maker, and that must be ascertained from an examination of the instrument and all its provisions, without the aid of extraneous testimony.

3. *Same—Construed as to cancellation of notes.*—Whether embracing subsequently acquired notes.—Where a testatrix, in her will, stated that she held a number of notes against her brother, one for \$900, which she desired to be cancelled absolutely at her death, and as to the others, if she survived her mother, directed that they be also cancelled and surrendered to him, otherwise he to pay interest on them to her mother during her life, when they should be cancelled and surrendered, he to inherit equally with her other heirs, notwithstanding such surrender of said notes, his full share in the estate, it was *held*, that the notes to be cancelled and surrendered were the notes she held at the time of making the will, and that other notes acquired by the testatrix afterwards on her brother were not included in the direction to cancel and surrender, it appearing from other parts of the will that provision had been otherwise made for her mother.

JAMES G. WRIGHT ET AL. v. LIZZIE H. GAY ET AL. Opinion by SHELDON, J. Filed September 30, 1881.

1. *Infants.*—When not bound by suit in their names.—Where suit in equity is brought in the name of infants by one as their next friend without any authority other than being administrator of their father's estate, and the proceeding is adverse to them instead of being in their interest, the decree rendered may be avoided by such infant parties on bill filed to impeach the same.

2. *Parol evidence.*—To show a deed is a mortgage.—It is well settled in our courts that parol evidence is admissible in equity to show that an absolute deed was intended as a mortgage.

3. *Trust.*—May be shown by parol.—Where a person at a sale of land becomes the purchaser under the promise to hold for the benefit of the children, of the former owner upon being repaid the sum advanced by him, this is sufficient to raise a trust in favor of such children, on the ground of fraud, and this may be proved by parol.

4. *Statute of frauds.*—Where three brothers furnished

money to purchase the land of their sister on judicial sale, for the benefit of her children, and one of the brothers bought the land under this arrangement, taking the deed in his own name to secure himself and two brothers for the money advanced, the promise to hold in trust for the sister's children being verbal only, and it also appearing that the purchaser had made and delivered a deed to such children, which was returned to him to get his wife's signature and release of dower, it was held, that a court of equity would compel an execution of the trust by a conveyance to the children of the sister.

NEW YORK.

(Court of Appeals.)

PERRY v. THE PEOPLE. October 11, 1881.

Witness.—Prior to the amendment of § 832 of the Code in 1879 an unpardoned felon was not a competent witness in criminal trials.

Where a witness testifies without objection to the fact of his conviction for felony and that he has not been pardoned, he cannot thereafter object or claim that his conviction was not proved by competent evidence.

ROBINSON ET AL., TRUSTEES v. THE CHEMICAL NATIONAL BANK OF N. Y. October 18, 1881.

Agency—Conversion.—One L., who was employed by B., plaintiffs' predecessor, as an agent to collect rents, received a check payable to B., which he endorsed, as attorney, to his own order, and deposited with defendant to his individual credit, and checked the proceeds out for his own use. *Held*, That he was not authorized to use or endorse the check; that his endorsement passed no title to defendant; that the moment the check was taken it became a part of the trust estate, and that plaintiffs have sufficient title to maintain an action for its conversion.

WYLLIE v. LOCKWOOD. October 11, 1881.

Wills.—A testator devised his property to such of his children as should be alive when his youngest child came of age, as tenants in common during their lives; and directed that in case of the death of either leaving issue, the share of the one dying should go to such issue and their heirs forever; if without issue, such share to go to the survivors equally for life, remainder to their issue respectively. E., the youngest child, having come of age, died in 1850, leaving one child W. Another daughter of testator, F., died in 1864, leaving three sisters, who were married and had issue. *Held*, That E. having died before F. never took any portion of F.'s share, and that on the death of F. her share descended to her three living sisters.

SCHUMLE v. REIMANN, ASSIGNEE. October 11, 1881.

Jurisdiction—Injunction.—Where separate proceedings to accomplish the same object are pending in two tribunals of concurrent jurisdiction, an order may be granted restraining proceedings in all but one action. To warrant this, however, it must appear that such action was brought in behalf of others having an interest in the fund, and not in behalf of the plaintiff alone.

LORELLARD v. CLYDE ET AL. October 11, 1881.

Co-partners—Pleading.—An allegation in a complaint that a corporation was duly organized imports that the requisite number of persons united for that purpose. It is unnecessary to allege the precise steps taken to accomplish the organization.

A provision in an agreement to form a corporation that property should be taken to represent the whole capital is not necessarily illegal.

An agreement providing for the details of management made in advance of the incorporation may not be binding on the trustees of the corporation when organized, but is not illegal.

FULLER ET AL. v. ROBINSON. October 11, 1881.

Evidence—Usage.—Evidence of a usage in a particular

trade or business is incompetent where such usage is unreasonable or absurd.

In an action to recover damages for false representations made by a broker respecting the credit of purchasers, the defendant may show that the plaintiff did not in fact rely upon and was not influenced by such representations, but that fact cannot be shown by proof of a custom or usage in that particular trade, that no reliance was placed by manufacturers upon such representations by the brokers, but that the principals ascertained for themselves whether the purchasers were entitled to credit.

STIMSON ET AL. v. WRIGLEY. October 11, 1881.

Statute of Frauds—Sale.—The statute of frauds applies to a sale on execution as against the purchaser, whether he is the plaintiff in the execution or a third person.

Plaintiffs, judgment creditors of a corporation, purchased on the execution sale certain heavy machinery, and a bill of sale was made to them. They did not remove the goods from the mill, but put an agent in charge, and locked the door. One of the plaintiffs afterwards hired the mill and stored the machinery there. A short time after, defendant levied on said machinery by virtue of tax warrants issued against the corporation before an actual change of possession took place. In an action to restrain defendant from selling: *Held*, That the case, without explanation or evidence of good faith, justified the inference of fraud; that something tantamount to an actual delivery was necessary to sustain the sale.

GREEN v. COLLINS. October 4, 1881.

Deeds—Easement.—An appurtenance which is conveyed by general terms in a deed must be something which necessarily attaches to the land conveyed as a matter of right; beyond this the right to the enjoyment of an easement depends upon the language of interest.

General terms cannot convey a right which the grantor is not authorized to impose upon the land of an adjoining owner or render the grantor liable in an action for a breach of the covenant of warranty. In order to bind the grantor where he had no interest or title whatever in the easement claimed to be conveyed, there should be a recital or representation in the conveyance, or covenant that he is the owner of such easement.

Parol evidence to show that the words, "with the appurtenances," were intended to include the easement claimed to have been conveyed, is inadmissible.

MINNESOTA.

(Supreme Court.)

CARLI v. STILLWATER STREET RAILWAY & TRANSFER Co. Oct. 27, 1881.

Railroad—Tracks upon street of city—Riparian Rights.—The construction and maintenance by the defendant, under an ordinance of the city of Stillwater, upon a public street, of a railroad operated by animal power, for the main purpose of transferring freight cars from the terminus of one line of railroad to that of another running into the city of Stillwater, and thereby connecting such railroad lines, is the imposition of an additional servitude upon the street so as to entitle the owner of the servient estate to compensation.

The owner of land bounded by a navigable stream has the right, by virtue of the ownership of the bank, to enjoy free communication between his abutting premises and the navigable channel of the river, and may fill out into the river, beyond low-water mark, to navigable water, so as to make the shore available for the uses connected with navigation, and to this extent is entitled to the exclusive occupancy of the bed of the stream, subordinate and subject only to the rights of the public with respect to navigation, and such needful rules and regulations for their protection as may be prescribed by competent legislative authority; and such riparian rights are property, and cannot lawfully be taken for public use without just compensation; following *Erie* v. *St. Paul & Sioux City R. Co.* 23 Minn. 114.

CALIFORNIA.

(Supreme Court.)

HUNGARIAN HILL GRAVEL MINING CO. v. MOSER ET AL.
September 27, 1881.

Mortgage of Water Rights—Improvements of Mortgagor—Inure to Benefit of Mortgagee.—Plaintiff, in action to quiet title, traced through a mortgagor (Gurnee)—the payment of the mortgage (of water rights) being assumed by plaintiff, but which payment he declined to make. Defendants, under foreclosure proceedings, obtained title to the water rights mortgaged. Intermediate execution of the mortgage and conveyance to plaintiff, the mortgagor (Gurnee) constructed the ditch in dispute: *Held*, The case showed the construction of the ditch to be for the purpose of employing to better advantage the use of the water rights mortgaged, and that it passed to defendants by purchase at the foreclosure, sale of the water rights mortgaged.

Action to Quiet Title—Affirmative Relief.—In an action to quiet title it is error to grant affirmative relief in the absence of a cross-complaint or of a prayer for such relief.

Evidence—Sheriff's Certificate and Deed.—A certificate of sale and Sheriff's deed of mortgaged premises are admissible in evidence.

PEOPLE v. CLEMENTSHAW. October 8, 1881.

Instructions in Criminal Case.—The objection that the Court took from the jury the facts upon which depended the materiality of the testimony of defendant before the Coroner's jury; *Held*, not sustained. If instructions asked by defendant are given, in effect, in the general charge, defendant cannot complain.

TEXAS.

(Court of Appeals.)

JAMES W. SHIPP v. THE STATE OF TEXAS. October 20, 1881.

Waiver—Charge of Court—Practice.—The right of the defendant in a felony case to be present when additional instructions asked by the jury are being given by the court, can not be waived, tacitly or otherwise, by his counsel.

MILES THOMPSON v. THE STATE OF TEXAS. October 29, 1881.

1. *Rape—Evidence—Cross-Examination—Practice.*—Testimony that the defendant, who is charged with rape, at the time of committing the crime, knocked down and badly injured the witnesses' father-in-law held admissible as part of the *res gestæ*.

2. On cross-examination the extent to which the witnesses may be interrogated must, necessarily, and is, in a great measure, confided to the discretion of the trial judge.

NEW JERSEY.

(Supreme Court.)

HUGHES v. McDONOUGH. November Term, 1881.

Action—Intent to injure business.—*Held*, 1. A person is answerable at law for all the consequences of his wrongful act, which were reasonably to be foreseen and which were the results, in the usual order of things, of such wrongful act.

2. A declaration shows a legal cause of action which alleges that the plaintiff's trade was that of a horse shoer; that he shod a horse for one V. R.; that the defendant with the intent of making V. R. believe the work was badly done, privily loosened such shoe, etc. *Held*, actionable, if such artifice succeeded and plaintiff lost custom of V. R.

SUPREME COURT OF OHIO.

JANUARY TERM, 1881.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

FRIDAY, December 16, 1881.

GENERAL DOCKET.

No. 184. City of Springfield v. Edward Myers & Co. Error to the District Court of Clarke County. Judgment affirmed. There will be no further report.

213. Ford & Co. v. Sears, Mahoney & Co. Error to the District Court of Fairfield County. Judgment affirmed at the cost of plaintiff in error, including attorney's fee of \$25.00, and also a penalty of \$5.00, according to Rev. Stat. § 6712. There will be no further report.

216. C. Windisch, Muhlhauser & Brother, v. M. Witte & Son. Error to the District Court of Hamilton County. Judgment affirmed, at the cost of plaintiffs in error, including attorney's fee of \$50.00, and also a penalty of \$25.00, according to Rev. Stat. § 6712. There will be no further report.

827. Eli Swanner v. Jacob Swanner. Error to the District Court of Richland County. Death of defendant in error suggested, and Thomas West, his administrator, appearing by his attorney and by consent made party defendant. And thereupon by agreement signed by counsel, on file, the cause is dismissed at the cost of defendant in error. No record to be made.

MOTION DOCKET.

No. 217. Cleveland & Mahoning Railroad Co. v. Himrod Furnace Co. Motion to vacate the judgment in cause No. 24, on the General Docket. Motion continued until next term.

218. George W. Castlen v. Thomas Roberts et al. Motion to re-instate cause No. 159, on the General Docket, heretofore dismissed for want of preparation. Motion granted when and on condition that plaintiff in error pays to the clerk \$5.00, to be credited on the costs.

219. Samuel Hoffmire v. A. H. Cunard. Motion for leave to file printed record in cause No. 1135, on the General Docket. Motion granted.

220. Edward W. Nye v. John Newton. Motion to re-instate cause No. 200, on the General Docket, heretofore dismissed for want of preparation. Motion overruled.

221. Cleveland, Tuscarawas Valley & Wheeling Railway Co. et al. v. Wheeling and Lake Erie Railroad Co. Motion for leave to file a petition in error to reverse the orders of the Probate Court of Stark County. Motion overruled.

222. George C. Butts v. Charles K. Leonard et al. Motion to re-instate cause No. 180, on the General Docket, heretofore dismissed for want of preparation. Motion overruled.

223. James G. Miles, assignee, &c. v. B. W. Simington et al. Motion to advance cause No. 1136, to be heard with No. 228, on the General Docket. Motion granted.

224. John Newcomer, administrator, &c. v. Robert Malony et al. Motion to re-instate cause No. 199, on the General Docket, heretofore dismissed for want of preparation. Motion overruled.

225. *Ex parte* John Larney. Motion for leave to file a petition in error to reverse the judgment of the Court of Common Pleas of Hamilton County. Motion overruled. There will be no further report.

On the meeting of the court, January 3, 1882, seventy-five cases will be called. Attorneys interested in the call should be present.

During the year 1881, two hundred and fifty-seven cases on the General Docket, and two hundred and twenty-two on the Motion Docket were disposed of.

Ohio Law Journal.

COLUMBUS, OHIO, : : : DEC. 29, 1881.

MR. ORANGE FRAZER, Deputy Clerk of the Supreme Court, has compiled the rules of the court as adopted December 16th, 1881, a copy of which from the advance printed sheets, was kindly laid on our table last week. The court has made some radical changes in regard to the practice and procedure therein, and we will publish the rules entire, next week, that our subscribers may be fully advised in the premises.

WE publish this week a sketch of an eminent Ohio lawyer, Judge William Kennon, late of St. Clairsville. This outline of the life of a conscientious, honorable counselor, is from the pen of J. H. Collins, Esq., of this city, who, through many years of close personal acquaintance, and practice with and before Judge Kennon, had an opportunity to learn and know his various noble qualities, and here lays before our readers, well chosen words of commendation, which are surely well bestowed.

We will take pleasure in publishing like accounts of the many Ohio lawyers, who have, from time to time, in years gone by, passed from their labors, and will be glad to hear from our subscribers, who may know of the well spent lives of the honorable members of the profession, and of incidents connected therewith. We have the promise of two or three such sketches from prominent judges of the State, of their associates and friends of former days. These articles will be read with great interest by the profession everywhere.

EMINENT OHIO LAWYERS.

WILLIAM KENNON.

Judge William Kennon died at his home in St. Clairsville, Ohio, on the 2nd day of November, 1881, in the 84th year of his age. Judge Kennon was born in Fayette county, Pa., May 13th, 1798, and removed with his father's family to the vicinity of what is now Barnesville, Belmont county, Ohio, in 1804, where he remained until he grew to early manhood, receiving such common school education as was afforded in those days. At the age of 20 years he entered Franklin College where he continued several years but did not graduate. He studied

law with Hon. W. B. Hubbard (then of St. Clairsville, Ohio, but subsequently for many years, a citizen of Columbus), and was admitted to the bar at Chillicothe, Ohio, in 1824, and commenced the practice of the law at St. Clairsville in partnership with his preceptor.

In 1825 he was married to Mary Ellis, who is still living. One sister of Mrs. Kennon afterward married Geo. W. Manypenny, now of Columbus; another married Wilson Shannon, afterwards Governor of Ohio, and subsequently of the territory of Kansas; another H. J. Jewett, now president of the Erie Railroad, another Hon. Isaac E. Eaton, now of Kansas—all now dead except Mrs. Kennon and Mrs. Eaton.

In 1828 Judge Kennon was elected to Congress, and on the 4th of March, 1829, took his seat as a member of the 31st Congress and served through the term, and for several years previous to his death was the only surviving member of that Congress. He was twice re-elected and served through two ensuing terms.

During his Congressional service Judge Kennon participated in the discussion of many of the questions then before Congress, at one time coming in conflict with the venerable John Quincy Adams, in a heated debate.

In 1840 he was elected by the Legislature, President Judge of the Common Pleas Court of the 13th Judicial District, which position he held for seven years.

In 1850 he was elected a member of the Constitutional Convention and began his duties in that body May 6th, 1850,—serving through the whole session of the Convention as Chairman of the Committee on Judiciary, having for his associates on that committee, Judge Swan, Henry Stanbery, W. S. Groesbeck, Judge Ranney and S. J. Kirkwood, late Secretary of the Interior. To the labors of Judge Kennon as a member of that committee and in the convention, are we indebted, perhaps more than to any one else for our present system of Judiciary.

After the adoption of the Constitution of 1851, Judge Kennon was appointed a member of a commission to revise the Code of Civil Procedure, and that commission framed the present Civil Code of Ohio, which has been the code of practice in this State ever since.

In 1854 Judge Kennon was appointed one of the judges of the Supreme Court of Ohio, and his opinions may be found in 4th and 5th Ohio State Reports.

From 1824 until 1868, except while in the performance of the duties of the official posi-

tions named above, Judge Kennon was actively engaged in the practice of his profession in the eastern part of the State—having for his contemporaries, such men as Benjamin Ruggles, Charles Hammond, John C. Wright, John M. Goodence, W. B. Hubbard, H. J. Jewett, Wilson Shannon, and Edwin M. Stanton. And it was as an advocate that Judge Kennon appeared to the greatest advantage. His skill in the cross-examination of witnesses, in the analysis of a case, and as an advocate before a jury was seldom equalled by those whom he met at the bar.

The last case in which Judge Kennon was engaged, was that involving the validity of the will of the late Alexander Campbell, at Wellsburg, West Va. Some of the heirs of Mr. Campbell brought suit to invalidate the will, upon the ground of the mental incapacity of the testator. Mr. Campbell being the founder of the sect called Deciples and sometimes Campbellites. the case created intense excitement and much bad feeling.

Judge Kennon and the late Col. G. W. McCook represented the contestants, and Judge Jeremiah S. Black and James A. Garfield the defendants—among the clients of the latter being Archie Campbell, who had the tilt with Conkling in the Chicago Convention. The parties met for trial at Wellsburg in 1867, but on the motion of Judge Black, was continued, and on the same day Judge Kennon had a stroke of paralysis, which partially affected his power of speech, and which compelled him to abandon the practice of the law, and although he lived twelve years after this, he never was able to resume the labors of his profession.

Of Judge Kennon it has been truly said, that he was a ripe scholar, a wise counselor and legislator, an able advocate, a profound lawyer and a just judge. He was a constant reader of the bible and from that sacred book drew largely in all his arguments, sometimes making quotations with wonderful effect. While in his 75th year, he began the study of the Hebrew language, and during one winter mastered the language so far as to be able to read some of the books of the bible in that language.

But the crowning beauty of the life and character of Judge Kennon is the fact that he was an humble follower of the lowly Nazarene, and this was true of him when in the zenith of his power and popularity and amid the busy scenes of professional life, as well when he walked through the valley of the shadow of death.

SUPREME COURT OF OHIO.

LAKE SHORE & MICHIGAN SOUTHERN RAILROAD COMPANY.

v.

JOHN C. HUTCHINS, GUARDIAN, &c.

November 1, 1881.

1. A petition by a guardian alleged that his wards were owners in fee simple of a certain woodland, that the timber thereon was cut down and removed by a person unknown and without any authority whatever, and that the same was taken, used and possessed for its own use and without any authority whatever by a certain railroad company, which company was afterwards consolidated with other railroad companies, under and by the name of the defendant, and that by reason of the conversion by said first named company his wards were greatly damaged, &c., praying judgment against the consolidated company, &c. *Held*: That on demurrer, the petition stated sufficient facts to constitute a cause of action for the conversion of personal property.

2. Where a discretionary power to sell lands is given by a will to the testator, such discretion cannot be delegated. But where an attorney in fact of such executor assumes to make such sale, the subsequent receipt of the purchase money, by the executor, is an adoption and ratification of the sale, and is equivalent to the exercise of the discretion by the executor himself.

3. A judgment determines the rights of the parties according to the facts stated in the pleadings; and if, after issue joined, a change takes place in the rights of the parties, it must be shown by supplemental pleading, otherwise it should be disregarded.

4. In an action for the conversion of chattels against an innocent purchaser from a person who had previously converted the property to his own use, and had afterward added to its value by his own labor, the measure of the damages is the value of the chattels when first taken from the owner, whether the first taker was a willful or an involuntary trespasser. *L. S. & M. S. R. R. Co. v. Hutchins*, 32 Ohio St. 371, approved.

Error to the Court of Common Pleas of Cuyahoga County. Reserved by the District Court.

The petition in the original action was as follows:

THE STATE OF OHIO, } IN THE COURT OF
Cuyahoga County, ss. } COMMON PLEAS.

JOHN C. HUTCHINS, Guardian
of JOSEPH R. and EDWARD
C. BARBOUR, minor children,
Ptff.

vs.

THE LAKE SHORE & MICH-
IGAN SOUTHERN RAIL-
WAY COMPANY, *Def't.*

PETITION.

John C. Hutchins, the above named plaintiff, says that on the 9th day of September, 1869, he was duly appointed and qualified as guardian of the estate of the said minor children, by the Probate Court of Cuyahoga County, Ohio, having due authority. That on the 24th day of May, 1862, said minor children were the owners in fee simple of the following described land: "Situate in the township of Mentor, County of Lake, and State of Ohio, and is known as being in the northeasterly part of the Ely tract, so called, in said Mentor township, and is bounded on the south, east and north by said tract lines, and on the west by the continuation of the main south tract line, north, till it strikes the north line of said Ely Tract, at a point in said north line 23 chains and 81 links from the northeast quarter

of said tract, the east and west lines of the land hereby conveyed being 13 chains and 34 links in length, containing (31) thirty-one acres of land."

Said land, when owned by the said minors, was thickly wooded with excellent timber and was very valuable on that account; that all, or nearly all of said timber, while said land was owned by said minors was cut down and removed by persons now to this plaintiff unknown, without any authority whatever, and the same taken, used and possessed, for its own benefit, without any authority whatever, by the Cleveland, Painesville and Ashtabula Railroad Company, which was, on or about the 1st day of April, 1869, consolidated with certain other railroad companies, under the name and style of the Lake Shore and Michigan Southern Railway Company, which last named Company is made the defendant in this action.

By reason of the said timber being taken from said land and converted to its own use by the said Cleveland, Painesville and Ashtabula Railroad Company, said minor children were damaged in the amount of four thousand six hundred and fifty dollars (\$4,650.00), for which sum, by reason of the premises, plaintiff asks judgment against the defendant, the Lake Shore and Michigan Southern Railway Company.

HUTCHINS & INGERSOLL

Att'ys for Plaintiff.

To this petition a general demurrer was overruled.

Thereupon issue was joined by answer as follows:

The said Lake Shore and Michigan Southern Railway Company, defendant for answer says that for want of information it denies that the said minors, wards of the plaintiff, were, on the 24th day of May, A. D. 1862, the owners in fee simple of the land in the petition described. It denies the allegation in the petition that said land was then, or when alleged to have been owned by said minors, thickly wooded with excellent timber, and that the same was very valuable on that account. It denies the allegation that all, or nearly all of said timber, when said land was owned by said minors, was cut down and removed by any person or persons without authority. It denies that the same or any part thereof was either taken, used or possessed by the said Cleveland, Painesville & Ashtabula Railroad Company, as is alleged against it. It denies that any damages have been suffered by said minors, and denies its liability to the plaintiff for any amount.

JAMES MASON,

Att'y for Def't.

On the trial a verdict and judgment were rendered for the plaintiff for \$1,820.00.

A motion for a new trial was overruled and a bill of exceptions taken, setting out all the testimony and divers exceptions to the introduction of testimony, refusing testimony and to charges given and charges refused.

A petition in error was filed in the district court, by the defendant below, also a cross-peti-

tion by the plaintiff below, which were reserved by the district court. A further statement of facts will be found in the opinion.

McILVAINE, J.

It is claimed by plaintiff in error that the overruling of the demurrer to the petition was error. That sufficient facts to constitute a cause of action were not stated.

Under the liberal rules of the code of civil procedure, which require a construction favorable to the pleader, the court is of opinion that the demurrer was not well taken. As against a demurrer, we think a cause of action for damages for the conversion of timber, after the same had been severed from the land and had become the personal property of the plaintiff, by the defendant to its own use, is sufficiently stated, whatever the rule would have been on a motion to make the petition definite and certain.

As to the ownership of the chattels alleged to have been converted by the defendant to its own use, the plaintiff relied on the title of his wards to the land before and at the time the timber was severed from the realty.

On the part of defendant, it is claimed that the plaintiff's wards had no title whatever to the land or the timber.

To maintain the issue on his part the plaintiff proved title to the land in one Justin Ely, and then offered the last will and testament of said Justin Ely, from which the following extracts only are material:

"All the residue and remainder of my estate, real and personal, wherever situate, I give, devise and bequeath to my son Charles and my daughter Lucy, to have, receive and enjoy the use, income and profit thereof in equal shares during their natural lives, respectively; and upon their decease I give, devise and bequeath the same to all my grandchildren then living, to be equally divided among them, and to their heirs forever; provided, however, that if the wife of my son Charles shall survive her husband, then she shall have the use and income of his portion thereof during her life, and the devise to my grandchildren shall not take effect in respect to such portion until her decease.

"I hereby constitute and appoint my son Charles and my daughter Lucy executors of this my last will and testament, and it is my direction that they be not required to give bonds for the discharge of the duties of said trust, nor to return an inventory of my estate.

"And I do authorize my said executors to sell at their discretion any part of my real estate not herein specifically devised, and to change at their discretion any of the securities belonging to my estate."

he *locus in quo* was part of the residue so devised. Next was offered a power of attorney from said Charles and Lucy to one Heman Ely, purporting, in ample form, to authorize said attorney to sell and convey any part or all of said lands, and upon such terms as he might deem best. Next a deed from Heman Ely as such attorney for the lands described in the petition

to one Bowles; and then mesne conveyances from Bowles to the wards of the plaintiff. Testimony was also offered tending to show that the consideration received by said Heman Ely upon the sale to Bowles was paid to said Charles and Lucy Ely. And also that actual possession of the premises had passed with and by the several mesne conveyances.

Upon this state of the testimony, the court charged the jury, in effect, that if they found the facts in accordance with the tendency of the proof, then the ownership of the plaintiff was sufficient to sustain the action, although his wards were seized only of an equitable estate in the land.

We think there was no error in the charge to the prejudice of the defendant, and that the finding of the jury under it should not be disturbed. True, the power conferred upon the executors of Justin Ely to sell these lands, (beyond the life estates), was to be exercised in the discretion of the executors, and clearly, the exercise of this discretion, could not be delegated by them to another. If, however, the executors had exercised the discretion and had contracted to sell the lands, it would have been competent for them to have transferred the title to the purchaser by an attorney in fact. For in such case, the act of the attorney would be ministerial merely and not at all discretionary. In the case before us, the attorney having assumed to sell and convey, the subsequent receipt of the purchase money by the executors was such an adoption and ratification of the contract of sale as was equivalent to an exercise of the discretionary power of sale by the executors themselves, so that, after possession taken by the purchasers, their ownership in the lands was sufficiently established to maintain an action for the conversion of timber. And if the court below were wrong in holding that plaintiff's wards were seized of an equitable estate in the lands, and not of the legal estate, the defendant was not prejudiced thereby.

During the progress of the trial, testimony was offered tending to show that during the pendency of the action, the plaintiff's wards had each arrived at the age of twenty-one years, whereupon the defendant asked leave to amend its answer so as to show such fact, but declined to amend on condition of the payment of costs. And after the testimony was closed, the defendant moved the court to dismiss the action or direct the jury to return a verdict for defendant on the following grounds:

"For cause defendant says that it appears from the testimony that the ward Joseph became of full age some time in 1870, and the ward Edward became of full age some time in the year 1877, for which reasons defendant says plaintiff is not entitled to the money if recovered. That it does not belong to him as guardian. That since 1877 he has not been the guardian of either or for either of said alleged wards."

We need not stop now to inquire what action the court should have taken if the facts here stated had been pleaded by supplemental answer

before trial. It is enough to say that during the trial, leave to amend was at the discretion of the court, and no issue having been tendered upon this point, it was not error to refuse the motion to dismiss. The rights of the parties as they existed at the commencement of the action should prevail, unless a subsequent change in those rights be shown by supplemental pleadings.

Several other matters, also, are alleged for error, by the plaintiff in error, but we find in the record no cause for reversal of the judgment on its petition.

By the cross-petition in error, the defendant alleges for error the charge of the court as to the measure of damages. For the purpose of resolving this question, the case may be stated thus: The plaintiff was the owner of land upon which trees were standing and growing. By an act of wilful trespass, the plaintiff's trees were cut and felled. After the cutting down of trees, the trespassers converted the same into cord-wood and railroad ties and sold and delivered the wood and ties to the defendant who being ignorant of the trespass applied the same to its own use. The value of the standing trees was proved; also the value of the ties and wood at the time the same were delivered to and received by the defendant. Testimony was offered by the plaintiff to show that the value of the trees after they were felled was greater than while standing, although less than when converted into ties and wood, which testimony was rejected.

This case was before the Supreme Court Commission and is reported in 32 Ohio St. 571, wherein it was held "Timber was cut from lands of B. by trespassers, who, by their labor, converted it into cord-wood and railroad ties, thus increasing its value three fold. It was then sold to an innocent purchaser who was sued by B. for the value of the wood and ties. Whatever might be the rule of damages" (as against the trespassers) "as against innocent purchasers, B. cannot recover the value of the timber as enhanced by the labors of the wrong-doers after it was severed from the realty," and a judgment for such enhanced value was reversed. The cause being remanded to the court below for a new trial, the court among other things charged the jury as follows:

"The Supreme Court have given us a different rule of damages from that laid down upon the former trial of the case in this court. There, upon the former two trials of this court the judges charged the jury that the plaintiffs would be entitled to recover the value of the wood or ties, as the case might be, as they were when delivered to the railroad company, and they actually received them. The Supreme Court say that that was not the proper rule.

"Now whether the Supreme Court was wrong or not I don't propose to question. And counsel don't claim that I ought to question it.

"There has been some little discrepancy in the opinion of the different counsel as to what the Supreme Court did say. But I have put the interpretation upon it that, as I believe, the Su-

preme Court did say, and as I give it to you, and you have not any more right to question whether I am wrong than I have to question whether the Supreme Court was wrong. Now that rule is simply this: That if the plaintiff is entitled to recover, they will be entitled to recover the value of the timber, as it stood in the woods at the time it was cut down by these wrong-doers."

As we understand the rule laid down by the Commission, the value of the timber, as enhanced by the labor of cutting down, was the true measure of damages. And surely, as the labor of felling the trees was a trespass on the real estate of the plaintiff who has waived the wrong done to his realty, such labor was not an accession to the value of his personal property, which the trees first became after they were cut down and severed from the land. The value, at least, of the property after it became personal was the measure of the injury complained of by the plaintiff. This charge of the court, as well as the refusal to hear testimony as to the value of the trees after they were severed from the realty, was to the prejudice of the plaintiff.

But the plaintiff below is not content with this view. He claims that the court erred in refusing to give as the measure of damages, the value of the ties and wood, at the time and place they were delivered to the defendant; thus, bringing into review, the decision of the Commission as reported in 32 Ohio St. 571. A decision of the Commission, which was a court of last resort in this State, equal in authority and dignity with this court, stands as a precedent for our decisions, and should not be overruled except for most cogent reasons. The question then before the Commission, and now before us, is one of great importance and no little difficulty. Many cases were reviewed by the Commission, as will appear from the report, and after consulting those authorities and some others, it is apparent to us that reported cases are at variance at almost every point in the line of reasoning. It is true, that some principles involved are not disputed and from these and some others that are indisputable, we think, the true solution of the question can be obtained. We admit as a general rule, that no man can be deprived of his property without his consent, except by operation of law. Hence, where his property has been taken from him, not by operation of law, and without his consent, he may follow and reclaim it, *in specie*, into whose hands soever it may come, so long as he can establish its identity. And in all cases where the owner seeks to reclaim the possession of his property, being able to establish its identity, the fact that accessions to its value have been made by the labor of those who have wrongfully withheld it, cannot be interposed against the right of the owner to the possession of his property. And in all such cases, it does not matter whether the person from whom it is reclaimed, or the person who enhanced its value by his labor, is a wilful trespasser or a person who came into possession without intentional wrong. A question often

arises, whether property, by reason of changes wrought upon it, has lost its identity, but no such question is made in this case, as the plaintiff, if he had so elected his remedy, most clearly could have re-claimed the cord-wood and railroad ties from the original trespasser, or from the defendant who purchased them. But no such remedy was sought by the plaintiff.

Another undoubted doctrine of the law is, that a person whose property is wrongfully taken or withheld from him, may waive his right to the property in specie, and elect to pursue a remedy for damages only; and in such case, the general rule for the measure of damages is the value of the property at the time it was taken or converted by the wrong-doer. The principle upon which this rule of damages is based is, that justice requires that the injured party should be made whole; but justice to him requires nothing more. This rule is sometimes modified for the sake of the principle, as when the value of the property is subsequently enhanced by an advance in the market price; but the principle, as a matter of legal right, is never departed from. True, the law permits an award of damages in excess of this rule of compensation, when the wrongful act was wanton or otherwise aggravated. But this is permitted by way of punishing the wrong-doer and for example's sake. It is not a matter of legal right in the injured party. For every wrong done, if it can be redressed in damages, the rule is that the injured party shall have compensatory damages, and if the wrongful act was wilful, wanton or malicious, punitive damages may also be awarded. Indeed it appears to me to be axiomatic, that as between man and man where no wrong was intended, equal and exact justice is done when the party wronged is made whole for all that he lost by reason of being deprived of property. Upon this principle it is now established by a clear weight of authority, that a person deprived of his property by an unintentionally wrongful act, who seeks redress in damages, is not entitled to recover from the wrong-doer, an increase of damages by reason of accessions to the value of the property from the labor or skill of such wrong-doer. 3 N. Y. 379; 33 Mich. 205; 37 Mich. 332; 84 Penn. St. 333; 21 Barb. 92; 81 Ill. 359; 49 Miss. 236; 39 Wis. 456; 7 Up. Can. Q. B. 338; 15 Grant (Up. Can. Chy.) 304; 18 Grant (U. C. Chy.) 7; 13 Com. B. 729; 41 Pa. St. 291; 55 Pa. St. 176; 23 Cal. 306; 26 Maine, 306; 3 Ad. & El. (N. S.) 440.

Such being the rule, in an action against one who takes the property of another and converts it to his own use without intentional wrong, it certainly follows: that in an action against an innocent purchaser from such unintentional wrong-doer, the measure of damages would not include the enhanced value of the property by reason of the labor of the first taker. It seems clear, that such purchaser, having been mulcted in damages at the suit of the owner, could not have recourse against his vendor for greater damages, than the

owner of the property could have claimed against him.

It only remains therefore, in this line of reasoning, to inquire as to the measure of damages in an action by the owner against an innocent purchaser of the property enhanced by the labor of a wilful trespasser. In such case it is clear that the defendant is not a proper subject of punishment; and it is equally clear, that the plaintiff's loss is no greater than it would have been, if the trespasser had been innocent of all intentional wrong; nor is the guilt of the defendant greater. Hence, it seems to a majority of the court, that exact justice would be done as between these parties by limiting the plaintiff's damages to the amount of his actual loss, to wit: the value of the trees when they were first taken as personal property.

It is said, however, that the property was the plaintiff's at the time the defendant received it in its enhanced condition and converted it. This claim is technically correct. But whereby did he become entitled to the enhanced value of the property? His merit is that of reaping where he did not sow. The party whose labor enhanced the value is the meritorious owner of the increase. True, being a wilful wrong-doer, his interest in the property was subject to forfeiture at the will of the owner by way of punishment and for example's sake; but the owner has not demanded the forfeiture from the wrong-doer. The demand is made upon an innocent purchaser. There is no suggestion that the purchaser did not exercise ordinary care in making the purchase. If after the purchase the plaintiff had notified the purchaser of his title, and had demanded the possession of the property, we are not prepared to say that a refusal to deliver would not have shown such a wilful conversion of the plaintiff's property as would have entitled him to recover the enhanced value as the true measure of his loss. But that is not the case before us. The plaintiff did not desire to reclaim the property from the defendant. By bringing his action for damages, he voluntarily abandoned his right to the property; and having brought his action against the innocent purchaser, instead of the wilful trespasser, we think his damages should be limited to the value of the property when it was taken from his possession.

The suggestion that the rule of damages here adopted will induce purchasers of property to be careless as to the title of their vendors, is of little weight. Actual knowledge or wilful ignorance of the owner's rights on the part of the purchaser, would, no doubt, make him liable for the full value at the time of purchase. And, on the other hand, it might be suggested with, at least, equal force, that another rule might make owners negligent in pursuing remedies, until the property greatly enhanced in value by the labors of others, would come into the hands of innocent, but more responsible persons, than the wilful wrong-doer. We see no good reason for overruling the decision of the Supreme Court Commission.

The defendant in error having waived the error of the court below in limiting the damages to the value of the standing trees, the judgment below is affirmed.

BOYNTON, C. J., dissented from the ruling respecting the measure of damages.

While I concur in the reversal of the judgment upon the ground stated in the opinion, I dissent from the rule of damages laid down by the court as applicable to a case of this character. Upon a thorough search of the decided cases bearing on the subject, I have been unable to find one that supports the conclusion reached by a majority of the court, except the case between the same parties, and relating to the same conversion, decided by the Commission and reported in 32 Ohio St. 571. An examination of the authorities reviewed in that case, and others, has led me to the conclusion that that case was incorrectly decided. The facts conceded are, that wilful trespassers felled standing timber or trees growing on land of the defendant's wards, cut the same into railroad ties and wood, and sold the same to the railroad company, by which the wood was consumed, and the ties placed in the bed of its road before the defendant had knowledge of the fact. That the original trespassers could have obtained no abatement from the value of the wood and ties by reason of the labor bestowed in their production, had an action for their conversion been brought against them, is the settled doctrine of all the authorities. So long as the property can be identified the original owner may recover it, *in specie* by an action of replevin, or recover its value in its improved state, in an action for its conversion.

In *Snyder v. Vaux*, 2 Rawle 423, trees were cut and converted into rails and posts; in *Smith v. Gouder*, 22 Ga. 353, into railroad ties; in *Heard v. James*, 49 Miss. 236, into staves; in *Halleck v. Mixer*, 16 Cal. 574, *Moody v. Whitney*, 34 Me. 563, and *Brewer v. Fleming*, 51 Penn. St. 102, into fire wood; in *Betts v. Lee*, 5 John, 348 and 9 do. 362 into shingles; in *Brown v. Sax*, 7 Cow. 95, sawlogs into boards; in *Eastman v. Harris*, 4 La. An. 193, a raft of logs into fire-wood; in *Riddle v. Driver*, 12 Ala. 590, and in *Curtis v. Groat*, 6 John 169, wood into coal; in *Hyde v. Cook*, 26 Barb 592, hides were manufactured into leather; and in *Silsbury v. McCoon*, 3 Combst. 379, corn, into whiskey. There are numerous other cases of similar character, and in all of them it is held, that the title of the original owner is not affected by reason of the fact that the value of the property has been enhanced by the skill or labor of the wrong-doer voluntarily bestowed upon it. The same principle is applied to the case of one who voluntarily erects a building on the land of another without his consent. In such case the building becomes a part of the freehold, with no right in the person erecting it to remove it, or to compensation for his labor or material. 1 Hilliard on Real Prop. 5; *Bonney v. Foss*, 62 Me. 248, *Linahan v. Barr*, 41 Conn. 471, *Mather v. Dobshuetz*, 76 Ill. 438. It is also held, where a party having charge of the prop-

erty of another, so confounds and confuses it with his own, that the distinction cannot be traced, and the other's property identified, that the party so mixing and confusing the property, loses his own.

The Idaho, 93 U. S. 575, *Hart v. Ten Eyck*, 2 John. ch. 62, 108, *Jewett v. Dringer*, 30 N. J. Eq. 291, 2 Kent's, Com. 364, Story on Agency, §§ 206, 333, and cases there cited. The principle underlying all these cases, is, that no man shall be deprived of his property without his consent, except upon due process of law. The particular ground upon which the judgment of the court proceeds in the present case is, that because the railroad company was an innocent purchaser of the wood and ties from the original trespassers, a different rule is to be applied in measuring the damages the owner of the wood is to receive, from that that would prevail had the action been brought against the trespassers themselves. To this position I do not assent. The plain logic of the proposition is that the purchaser acquired by his purchase something which his vendors did not own, and consequently had not the ability to impart.

It is admitted that at the moment before the sale the whole property in the wood and ties was in the original owner, but the instant the sale was consummated, it is said, that some part of that property, without his consent, and in a transaction to which he was not a party, has passed to the purchaser; and passed from one who, admittedly, had no title to or lien upon any part of it. And yet it is agreed that the original owner, by reason of his continued ownership, may, in an action of replevin take the property from the purchaser, without accounting to him for any part of its value. The purchaser's rights are thus not only made to depend on the form of the action, but if the action be brought for conversion of the property, instead of giving damages against the purchaser for his conversion, to be measured by the value of the property when he converted it, which, of course, was long after the timber was cut into wood and ties, he is made liable as of the date that the trees were cut from the soil, a point of time long anterior to the date of purchase. How this rule would work or how the liability of the purchaser would be affected, if the wood and ties when purchased were of less value than the timber when severed from the soil, we are not advised. But if anything is settled by the decided cases, it is, that where one wrongfully in possession of the property of another, refuses to deliver it to the owner on demand, he is liable in conversion to the full value of the property at the time of the refusal, not that demand and refusal are necessary prerequisites to the action, but when they appear, they, as a general rule, settle the fact and time of conversion. *Gilman v. Newton*, 9 Allen 171. The conversion, however, is just as complete, and the time at which the liability therefor is incurred, is as definitely fixed and ascertained, when the property is consumed or

destroyed, or has been converted into realty, as in the case of demand and refusal. The unauthorized act of another in assuming dominion and control over the property by which the rightful owner is deprived thereof, is conversion. *Pease v. Smith*, 61 N. Y. 477. Hence when the wood and ties in the present case, were used by the company, they were as liable for their conversion as if demand and refusal had been made while it was in the company's power to deliver the same to the owner, and liable for the amount recoverable had demand and refusal been made upon the day the company purchased the property from the original takers. And if demand and refusal had then been made, and the company had refused to deliver the property to the owner, I know of no rule of law, that would relieve it from liability to damages for the full value of the property at the time of refusal. If such is not the rule, what results? When the purchaser is required to pay the real owner for the property, he may recover back the price paid to the wrong-doer, as upon a failure of consideration. This principle is well settled. *Eichholtz v. Banister*, 17 C. B. (N. S.) 708; *Chapman v. Speller*, 14 Q. B. 621; *Benj. on Sales*, § 423. The company would therefore get the wood and ties by paying the original owner the value of the timber when felled to the ground. Either this results or the absurdity follows, that while the original trespasser had neither title to, nor lien upon, the wood or ties, he is enabled in an action for the price paid by the purchaser, to recoup the amount which his labor added to the value of the property. He would thus gain and accomplish by the sale, what otherwise, he could not have obtained. The principle that the purchaser in such case, however innocent, sustains no better relation to the property than did the party from whom he purchased it, is well supported by authority.

In *Silsbury v. McCoon*, supra, it was said by Ruggles, J.; that "the thief who steals a chattel or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession by the thief or trespasser is a continuing trespass; and if during its continuance the wrong-doer enhances the value of the chattel by labor and skill bestowed upon it, as by sawing logs into boards, splitting timber into rails, making leather into shoes, or iron into bars or into a tool, the manufactured article still belongs to the owner of the original material, and he may re-take it, or recover its improved value in an action for damages. And if the wrong-doer sell the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give. The owner of the original may still re-take it in its improved state, or he may recover its improved value. The right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may re-take the thing by an action of replevin, in its improved

state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages." This doctrine was adhered to in *Joslin v. Cowee*, 60 Barb. 48, where it was said, "It is only innocent purchasers who purchase property converted into another species, that can be protected, and not even the innocent purchaser is so protected who takes the title from a trespasser or wrong-doer, because he had none to give."

The case of *Tuttle v. White*, recently decided by the supreme court of Michigan, and reported in the 9th volume of *The Northwestern Reporter* 528, is quite in point. The action was in trover for the conversion of certain saw-logs. The defendants purchased the logs in good faith, from parties who wrongfully cut them upon the land of the plaintiff. The court in disposing of the case, said "A person in purchasing personal property runs his risk as to the title he is acquiring, and if he is unfortunate enough to purchase from a trespasser, or one who has no title and can give none, he must suffer the loss or look to his vendor." The plaintiff was held entitled to the value of the logs at the time the defendant purchased and assumed control over them.

To same effect is *Nesbit v. The St. Paul Lumber Co.*, 21 Minn. 491.

These cases are in accord with the large and uniform current of authority which holds that in purchasing personal property the purchaser must abide by the title of his vendor, and can acquire no better rights than he possessed.

WHITE, J., concurred in the dissenting opinion.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

ANDREW NESBIT

v.

GEORGE WORTS ET AL.

December 6, 1881.

1. Where an indemnity mortgage is conditioned to save the mortgagee harmless, and to pay the note on which the mortgagee is surety, the protection of the mortgage extends to a liability incurred by the mortgagee jointly with the mortgagor for money borrowed to pay the first note, and with which such note was paid.

2. The affidavit on an indemnity mortgage, under Section 2 of the Act relating to chattel mortgages as amended May 7, 1869, (66 O. L. 345), must show that the mortgage was taken in good faith, to make it valid against creditors. A statement that the claim on which the mortgage is surety is just and unpaid, is not sufficient.

Error to the District Court of Lucas County.

The plaintiff in error, Nesbit, in an action of replevin in the court of common pleas, recovered judgment for the possession of certain personal property under a chattel mortgage executed to him by Mathew Rooney. The defendants in error, Worts & Co., attaching creditors of the mortgaged property, in whose favor judgment had been rendered against Rooney, and Patrick W. Keegan who held a second mortgage on the same

property, filed answers, in the nature of cross-petitions setting up their respective liens and praying an account against the plaintiff, of the proceeds of the sale of said mortgaged property. A copy of the condition and affidavit of the plaintiff's mortgage is as follows:

"The condition of the above conveyance is such, that whereas the said Nesbit has become liable as indorser for said Rooney, in the sum of \$300 on a certain promissory note given to the Second National Bank of Toledo, O., and whereas said Rooney is indebted to said Nesbit for money borrowed in certain other sums, and \$50 endorsed for to William Rooney by said Nesbit,

Now, if said Mathew Rooney shall save said Nesbit harmless, and shall well and truly pay said sum of money as the same shall fall due, then this conveyance to be void, otherwise in force."

"The State of Ohio, Lucas County, ss. Personally appeared before me, Almon Hall, a Notary Public of said county, Andrew Nesbit, who being by me duly sworn according to law, deposes and says that he is the mortgagee above mentioned, that the above mortgage is bona fide, and that the claim secured by said mortgage as therein set forth, amounts to six hundred dollars, and that the same is just and wholly unpaid.

ANDREW NESBIT.

"Sworn to and subscribed before me this 16th day of April, A. D. 1875.

"ALMON HALL.

"Notary Public in and for said County."

The following is a copy of the condition and affidavit of the Keegan mortgage:

"The condition of the above conveyance is such, that whereas the said Patrick W. Keegan has heretofore endorsed a certain promissory note given by said Rooney to Schumaker & Egley, for \$160.75, and the said Rooney is indebted to the said Keegan in the sum of forty dollars, due as follows, to wit: on the 7th day of November, 1875,

"Now, if the said M. Rooney shall pay said note at maturity, and save said Keegan harmless, and shall also well and truly pay said sum of money as the same shall fall due, then this conveyance to be void; otherwise in force.

"State of Ohio, Lucas County. Personally appeared before me, Patrick W. Keegan, who being duly sworn according to law, deposes and says that the claim described in and secured by said mortgage as therein set forth, amounts to two hundred dollars and — cents, and that the same is just and wholly unpaid.

PATRICK W. KEEGAN.

"Sworn to and subscribed before me, this 28th day of October, A. D. 1875.

"BYRON F. RITCHIE,

"Notary Public, Lucas County, Ohio."

Both of said mortgages were duly filed for record, and the levying of the attachment of Worts & Co. was subsequent thereto.

On the trial it appears that the \$300, note to the Second National Bank which the Nesbit mortgage was given to secure, was paid by Rooney, except \$100. At the instance of Nesbit the remaining \$100, with which the balance of the note was paid, was borrowed from Keeler, Holcomb & Co., under an arrangement made by Nesbit, for which Rooney and Nesbit gave their joint judgment note. In this note, Rooney and Nesbit were described as principal debtors, but Nesbit was in fact surety.

It also appeared that the mortgagee, Nesbit, having sold the mortgaged property, from the proceeds paid the \$100 note, and the balance due him on the mortgage; and likewise paid to Keegan the amount due him on his mortgage including the note on which he was endorser for Rooney to Schumaker & Egley. And the balance he brought into court to be disposed of as the court should order.

The court adjudged both mortgages valid, and, in effect confirmed the payments made by Nesbit, and ordered the balance to be paid over to Worts & Co.

The order of distribution is excepted to by Worts & Co., only in respect to the payment of the \$100 note to Keeler, Holcomb & Co., under the Nesbit mortgage; and the payment of the \$160 note to Schumaker & Egley, under the Keegan mortgage.

On petition in error filed by Worts & Co. in the district court, the judgment of the court of common pleas was reversed.

The only errors assigned in the district court were the payment of the \$100 to Keeler, Holcomb & Co., and the \$160 on the note to Schumaker & Egley.

The object of the present petition in error is to obtain the reversal of the judgment of the district court.

WHITE, J.

1. The first question is whether Nesbit's mortgage operated to protect him against his liability on the hundred dollar note to Keeler, Holcomb & Co. If it did so operate, he was justified in paying the note out of the proceeds of the sale of the mortgaged property.

The primary object of the mortgage, as respects the note held by the Second National Bank, was not to secure the bank, but to secure Nesbit against his liability for Rooney. If Nesbit had been released from such liability, by the bank or otherwise, the mortgage would have been discharged to that extent. The bank it is true was paid, but the liability of Nesbit for Rooney was not discharged. There was a mere exchange or substitution of the liability to Keeler, Holcomb & Co. for that to the bank. The liability incurred by Nesbit to Keeler, Holcomb & Co. was not an independent transaction, but the direct consequence of his liability to the bank, his liability to the former being incurred solely for the purpose of raising the money with which to discharge his liability to the bank. We are of opinion therefore that, under the mortgage, he

was entitled to be protected against the new liability thus incurred.

At the time of the commencement of the suit and the recovery of the possession of the property, the time had not arrived for the filing by the mortgagee of a new statement showing his interest in the mortgage, after the payment of the two hundred dollars to the bank by Rooney.

2. The next question is, whether the affidavit of Nesbit on the mortgage is sufficient to cover his liability as endorser to the bank.

It was held in *Gardner v. Parmlee* (31 Ohio S. 551), that the affidavit need not be in any particular form, that if it contains the requisite facts, the form in which they are stated is immaterial. And it was also held that where the affidavit refers to matters contained in the mortgage, the matters thus referred to are to be regarded as part of the affidavit. Under the authority of that case we think the affidavit is sufficient to cover such liability.

The affidavit states that the mortgage is *bona fide*, and that the claim *accrued* by the mortgage, as *therein set forth*, is just and wholly unpaid. This taken in connection with the mortgage is a sufficient statement, we think, of Nesbit's liability as accommodation endorser for Rooney to the bank, and of his claim to indemnity against any loss resulting therefrom, and that the mortgage was taken in good faith to secure such indemnity.

3. The remaining question is, whether the affidavit on Keegan's mortgage is sufficient to cover his liability as accommodation endorser to Schumaker & Egley.

This affidavit is good under the first clause of sec. 2 of the Act relating to chattel mortgages as amended May 7, 1869, (66 O. L. 345), which provides for the case where the mortgage is given "to secure the payment of money only." In such case the affidavit is required to contain "a true statement, in dollars and cents, of the amount of his claim, and that it is just and unpaid." But under the second clause of the section which provides for the case of mortgages given to indemnify the mortgagee against any liability as security for the mortgagor, the affidavit is required to state, in addition to the other requisites, that the mortgage "was taken in good faith."

The affidavit now in question, unlike the affidavit on the Nesbit mortgage, contains no statement in regard to the good faith or *bona fides* of the mortgage. Nor does it seem to us that in an indemnity mortgage taken under the second clause of the section, the statement of the amount justly due on the claim can be regarded as a compliance with the statute. The claim due the creditor may be just; and yet the mortgage given to the surety may be collusive and fraudulent. In so far, therefore, as Keegan's mortgage is intended to indemnify him against his liability as endorser it must be held invalid as against the attaching creditors. *Hanes v. Tiffany*, 25 Ohio S. 549.

Judgment of the district court reversed, and

that of the court of common pleas modified to conform to this opinion.

[This case will appear in 37 O. S.]

Digest of Decisions.

NEW JERSEY.

(Supreme Court.—November Term, 1881.)

HUNTER v. RILEY.

Eviction—Covenant for Rent.—This was an action of covenant brought by plaintiff against sureties on lease of Henry W. Abbott for rent of the Lake House at Spring Lake.

Held—1. Eviction by a landlord of his tenant from the whole, or a part of the demised premises, causes a suspension of the entire rent and all remedy for its recovery, during the continuance of the eviction.

2. But the eviction to have the effect of suspending the rent must be effected before the rent becomes due; for the rent already accrued and overdue is not forfeited by the eviction, although the rent be payable in advance.

3. In an action of covenant for rent on a lease under seal, the tenant cannot recoup his damages for a breach of covenant in the lease on the part of the landlord, at common law, or by our statute.

WEINER v. VAN RENSSLAER.

Replevin from Sheriff—Custody of the law.—*Held*, 1. Property in the sheriff's hands by virtue of a writ of replevin is in the custody of the law, and cannot be taken from him by a second writ of replevin, before he has executed his writ. Replevin and execution distinguished.

2. As soon as he has perfected service of the writ, the property may be replevied from the person to whom the officer has delivered it.

3. While the property remains in the sheriff's custody the Court may make such order touching it as will enable a third person who may claim it to effect service of his writ upon it. Rule to show cause made absolute.

STATE, PERTH AMBOY, PROS. v. BROPHY

License—Penalty—Insolvent act—Civil and Criminal Proceedings.—On certiorari to Middlesex Pleas. Brophy was convicted for keeping beer saloon in Perth Amboy without license. He being unable to pay fine imposed, his body was taken pursuant to ordinance. On being imprisoned in county jail he applied to be discharged under the insolvent act. It was held that the proceeding was criminal and not civil, a mere police regulation to carry out the general policy of the State, and that the insolvent laws would not apply to him. Discharge refused.

KENTUCKY.

(Court of Appeals.)

WHITTAKER v. MILLIEN. Filed Oct. 15, 1881.

Venue is not entitled to judgment for purchase money for land, when the legal title to the land is held by a non-resident, although such non-resident is made a defendant and constructively summoned.

MINTON v. COMMONWEALTH. Filed June 20, 1881.

Self-defense—rule, as to, stated by the court.—"Whenever a man is in imminent danger of great bodily harm, or it is being inflicted on him, whether it endangers his life or not, he has the right to use such force as appears to him in the exercise of a reasonable judgment to be necessary to repel or deliver himself from, unless by his own wrongful act he makes the harm or danger to himself necessary, or excusable in the person who is inflicting or about to inflict it upon him."

IOWA.

(Supreme Court.)

KELLY, ADM'R, v. MANN, EX'R, AND OTHERS. Oct. 19, 1881.

Life Insurance.—A policy of life insurance, payable to the "legal representatives" of the insured, is not liable for the debts of the assured, but is collectible by his administrator, to be by him distributed according to law.

Where an insurance policy, payable to the legal representatives of the insured, was collected by his administratrix, and the proceeds by her converted to her own use, *held*, that an action for the amount of such policy could not be maintained by the administrator *de bonis non* upon the bond of the delinquent administratrix, but the action must be brought by those who, under the statute, were entitled to the proceeds of such policy.

MCCLURE, EX'R, v. JOHNSON. Oct. 19, 1881.

Life Insurance.—Where life insurance is by its terms payable to a person other than the one whose life is insured, or his representatives, such person cannot, by his will, make a different disposition of it from that directed by the policy.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Dec. 27, 1881.]

1239. Jefferson W. Davis v. Philip Baner. Error to the District Court of Crawford County. S. R. Harris for plaintiff in error.

1240. Joseph E. Britton v. John W. Robins et al. Appeal—Reserved in the District Court of Guernsey County. J. C. Steele for plaintiff.

1241. The Farmers' and Mechanics' Insurance Company v. Benjamin Hey. Error to the District Court of Hamilton County. Long, Kramer & Kramer for plaintiff.

1242. William C. Howard, adm'r. et al v. Medora Stevens, Sylvester Everett et al. Error to the District Court of Montgomery County. Gunckle & Rowe for plaintiffs; C. Alghed & Craighead for defendants.

1243. Neil Macneale v. Louis Rabin. Error to the District Court of Hamilton County. J. D. Macneale for plaintiff; Long, Kramer & Kramer for defendant.

1244. Jacob Frank v. M. E. Ingalls, receiver, &c. Error to the District Court of Hamilton County. Yapple, Moos & Pattison for plaintiff; Hoadley, Johnson & Colston for defendant.

1245. The First National Bank of Washington C. H. v. The Continental Life Insurance Company of Hartford, Conn., et al. Error to the District Court of Fayette County. M. J. Williams for plaintiff; Maynard and Hadley for defendants.

1246. D. C. Sharp v. Tobias Dubois. Error to the District Court of Clermont County. Penn & Townsley for plaintiff.

1247. Abram Sharp v. John Ball. Error to the District Court of Hocking County. F. W. Wood for plaintiff.

1248. Jasper Liming v. E. J. Hemphill. Error to the District Court of Brown County. White, McKnight & White for plaintiff; David Thomas for defendant.

1249. Joseph McBeth et al. v. Lemuel Teasdale, Sheriff. Error to the District Court of Clermont County. White, McKnight & White for plaintiffs.

1250. Same v. Same.

1251. Maier Rothschild v. Caroline M. Hudson executrix, &c. Error to the Superior Court of Cincinnati. Yapple, Moos & Pattison for plaintiff; A. J. Pruden for defendant.

1252. Benninger, Ireland and Bailey v. Charles Hess. Error—Reserved in the District Court of Hamilton County. Moulton, Johnson & Levy for plaintiff; Lotse & Bettinger for defendant.

Ohio Law Journal.

COLUMBUS, OHIO, : : : JAN. 5, 1882.

SUPREME COURT.

THE January Term, 1882, of the supreme court, met on Tuesday morning with Chief Justice Okey, Judges White, Johnson, McIlvaine and Longworth, all on the bench.

Seventy-five cases on the new docket, commencing with No. 1, (The State of Ohio v. Fryinger), were called, ending with No. 75, (Lloyd v. Moore & Welch).

Prominent attorneys from all parts of the state were present, interested in the call of the docket.

A class of thirteen applicants, for admission to practice, was examined by Messrs. E. L. Taylor, M. A. Daugherty, O. W. Aldrich, A. W. Krumm and H. J. Booth, members of the committee for this year.

VOLUME 36 OHIO STATE REPORTS.

This interesting publication has had an unprecedented run, being in demand by hundreds more than can be supplied.

We have scores of orders on file for the work and have vainly tried to get from the printers in New York enough books to fill the orders.

We have received, and have distributed in the order as to date, in which the books were sold, promised, or the orders taken, a large number, but, like the contractors, H. W. Derby & Co., we have not been able to get any for several weeks.

We have exhausted prayers, tears and profanity; and have found both love and money unavailing to procure more rapid work on the part of the printers, Messrs. Banks & Brothers, New York.

We therefore beg of those who are patiently waiting, to consider the great benefits we all receive from having the Reports printed outside the State; and to let curses fall upon the heads of those only who delay the work.

THE AMERICAN DECISIONS.

Volume 30, of this valuable series has been received. We have been taught by the experience of the past two years, in practice and in the verification of various legal propositions published in our own and other law journals, to rely

upon the American Decisions for a full and correct showing of all important cases preceding the dates to which each succeeding volume brings its exhaustive report. We never look in vain for the leading cases down to that time and we never fail to find in each volume a rich mine of notes and citations from later decisions and upon all topics of the first importance to lawyers.

We find in the volume before us an important and leading case from 15 Wendell, wherein the law of *Quo warranto* is laid down with clearness by Savage, C. J. This is supplemented by an able compilation of all later authorities upon the pleadings and proceedings therein, by the editor. This we commend to the consideration of Attorney General Nash.

Some of the other questions upon which the authorities have been collected and compared are:

<i>Rights of Purchasers Who by Reason of Void Sales have Paid off Claims on Real Estate.</i> —pages.....	177-182
<i>Implied Power of Municipal Corporation to Borrow Money.</i>	190-194
<i>Power of Feme-covert over Separate Estate in Absence of Statutory Regulation.</i>	233-241
<i>Admissions as Evidence.</i>	544-549
<i>Who may submit to Arbitration while acting for another.</i>	628-634
<i>Rules governing where Description of Land is Inconsistent or Uncertain.</i>	734-742

There are many others which we cannot enumerate for lack of space, and they all justify the high esteem in which the "Decisions" and their editor are justly held.

SUPREME COURT OF OHIO.

T. P. HANDY, ET AL.

v.

AETNA INSURANCE COMPANY.

December 6, 1881.

1. A policy of marine insurance, which contained a stipulation that in case of loss or misfortune the insurer would contribute ratably to expenses incurred by the assured or their agents in and about the recovery of the insured cargo, was issued by a corporation of the State of Connecticut, also doing business in the State of Ohio. The cargo was sunk in waters of the State of Michigan, and labor was expended in efforts to recover it. *Held*, That the breach of such stipulation on the part of the insurer constitutes a cause of action against the company, cognisable by the courts of this State.

2. After the filing of a petition on such cause of action and the issuing of a summons, which was returned served on the defendant by delivering a true and attested copy on an agent of the defendant, the defendant filed a motion to dismiss the action "for the reason that this court has no jurisdiction of the case, it appearing from the petition on file that said defendant is a foreign insurance company, and that no part of the alleged cause of action arose in this State." *Held*, That the filing of such motion

was a voluntary appearance in the action and a waiver of any defect in the service of the summons.

Error to the District Court of Cuyahoga County.

The original action was brought in the Court of Common Pleas of Cuyahoga County, by plaintiffs in error, owners of a schooner, which, with its cargo of iron ore owned by the Saginaw Mining Company, was lost in Lake Michigan, State of Michigan, on the 17th of October, 1873, to recover from the defendant, a corporation of the State of Connecticut, on a marine insurance policy issued to the owners of the cargo, at Marquette in the State of Michigan, contribution for expenses incurred, in efforts to save the sunken cargo, by the owners of the schooner, to whom the owner of the cargo had assigned its rights under the following stipulation contained in the policy of insurance:

"And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured or insurer, their agents, factors, servants and assigns to sue, labor and travel for, in and about the defense, safeguard and recovery of the said goods and merchandise, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability, under this policy, but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party.

"To the charges whereof the said company will contribute in such proportion as the sum herein insured bears to the whole value of the property so insured; having been paid the consideration for this insurance by the assured at and after the rate and premium as hereon endorsed."

A summons was issued in the case, which was returned as served on the defendant "by delivering to C. C. Carlton, agent of said company, a true and attested copy thereof."

After the rule day for answer, the defendant filed a motion to dismiss the action "for the reason that this court has no jurisdiction of the case, it appearing from the petition on file that said defendant is a foreign insurance company, and that no part of the alleged cause of action arose in this State." This motion being overruled, defendant excepted, and thereupon filed a demurrer to the petition, upon the ground, among others, "That the court had no jurisdiction of the person of the defendant." The demurrer being overruled, the defendant answered, and upon the trial, judgment was rendered for the plaintiffs.

The defendant afterwards filed a petition in error in the district court, alleging, among other matters, that the court of common pleas had erred in overruling the motion to dismiss the action, and in overruling the demurrer to the petition.

Without considering other matters assigned for error, the district court reversed the judgment

of the common pleas upon the ground that the motion to dismiss for want of jurisdiction, and the demurrer alleging want of jurisdiction of the person of defendant were improperly overruled.

It is now sought to reverse this judgment of reversal.

MCLLVAIN, J.

No objection is made to the jurisdiction of the court of common pleas, over the person of defendant, on the ground that service of summons was not made upon a "managing agent" as authorized by section 68 of the Civil Code of 1853, in force at the time the action was brought. And, indeed, if no summons had been issued in the case, the voluntary appearance of the defendant for the purpose of submitting to the court the sufficiency of the petition in its statement of the cause of action, which was done by the motion to dismiss for want of jurisdiction on the ground stated in the motion, would have constituted a waiver of the summons, as well as the service thereof. "The voluntary appearance of the defendant is equivalent to service" of a summons. Section 65. True, the voluntary appearance of a defendant for the sole purpose of objecting to the mode or manner of service is not within the rule of this section; such, however, was not the purpose of defendant in making the motion in this case, but the motion, as expressed, involved the merits of the action as stated in the petition. The true ground of objection as raised, first by the motion, and afterwards by the demurrer, was, that the defendant, upon the facts stated in the petition, was not liable to be sued in that court, for the reason that the cause of action or any part of it, did not arise in this State, nor was the defendant a corporation of this State.

It is not claimed that courts of this State may not exercise jurisdiction over foreign corporations; but it is contended: 1st. That jurisdiction over foreign corporations can be exercised by courts of this State, only in cases where the cause of action or some part of it, arose in this State; and 2d, that the foreign insurance corporations can be sued in this State, only in the county where the cause of action, or some part thereof, arose.

Power to hear and determine a controversy is jurisdiction, and it is complete when both the subject matter of the controversy and the parties to it, are properly before the court. In determining whether a given subject matter is within the jurisdiction of a court, regard to the parties is not involved. The subject matter of the original action was a contract alleged to have been broken by defendant. There is no question but that the court of common pleas had jurisdiction of this subject matter without regard to the place where the contract was made or where it was violated.

The point made by the defendant is, that the court, upon the facts stated in the petition, had no power to issue its process against the defendant, or even, after a voluntary appearance, to

proceed to render judgment against it upon the cause of action stated in the petition.

The general jurisdiction of the court of common pleas, over the person of litigants, is not confined to residents or natural persons. Non-residents of the State and foreign corporations are as much subject to its jurisdiction as are residents and domestic corporations. Except in actions of a local nature, our courts are open to all who may seek relief therein, against any one who may be reached by its process. We know of no principal that will exempt a foreign corporation, which voluntarily comes into this State, from liability to answer any complaint which may be preferred against it in the courts of this State, that would not exonerate natural persons under like circumstances.

The county in which actions are to be brought as well as the mode of acquiring jurisdiction by notice to defendants, is regulated by statute. Among other provisions on this subject, section 52 of the code of 1853 provided, that "an action * * * against a non-resident of this State or a foreign corporation, may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found; but if said defendant be a foreign insurance company, the action may be brought in any county where the cause or some part of it, arose." The general rule here declared has no reference to actions upon causes arising in this State. No matter where the cause arose, if the subject matter be within the jurisdiction of the court. Nor is the rule confined to corporations other than insurance companies. Any foreign corporation which may be found in this State may be sued in any county of this State, in any court having jurisdiction of the subject matter of the suit. And the defendant in error, having voluntarily appeared in the action in the court of common pleas, is not in position to allege that it was not found in this State and in the county where the action was brought.

Nor is the claim of the defendant in error, that, being a foreign insurance corporation, under the last clause in the section above quoted, it was liable to suit in this State only in the county where the cause of action or some part of it arose. This clause was intended to give an additional remedy against foreign insurance companies doing business in this State; remedy, to make them liable to action in the county where the causes of action arose, although they might not have property or debts due in such county, or might not even be found in such county.

It was alleged in the petition below that the defendant was an insurance corporation of the State of Connecticut, doing business in the State of Ohio, and much has been said in argument in relation to section 20 of the act of April 27, 1872, regulating foreign insurance companies, as amended April 24, 1873, (70 Ohio L. 147), and among other things it is contended by the defendant that the process authorized by said sec-

tion to be acknowledged by or served upon any agent of a foreign insurance company doing business in this State, is confined to process in actions founded upon causes of action accruing in this State. Whether this be so or not, we deem to be immaterial in the case before us, as we have based our conclusion that the court of common pleas had jurisdiction of the person of the defendant, not upon the fact of service of process on an agent, but upon the voluntary appearance of the defendant in the action.

Judgment reversed and cause remanded to the district court for further hearing upon the petition in error.

[This case will appear in 37, O S.]

SUPREME COURT OF OHIO.

WILLIAM T. WEST, TRUSTEE,

v.

AUGUST KLOTZ, AND OTHERS.

December 18, 1881.

1. A mechanic furnishing material for the construction of a mill, under a contract with the owner, may, by his agreement as to the manner of payment, and his acts with respect to the claims of other creditors, be precluded from asserting a mechanic's lien, as against such creditors, although he has made no express promise that he will not assert such lien.

2. The proposition of a manufacturing company incorporated under the laws of New York, to build a rolling mill at S., in this state, if its citizens would donate to the company ten acres of land and lend it \$150,000, to be evidenced by the bonds of the company secured by mortgage on the property, was accepted by certain citizens of S., who conveyed to it such land, loaned to it said sum, receiving from the company such bonds and mortgage. Among the persons advancing money, and accepting bonds so secured, was K., who afterward sold such bonds to other persons. After the mortgage was recorded, but before any considerable part of said sum was advanced to the company, and before any written consent of stockholders of the company to the execution of the mortgage was filed in the office where mortgages are recorded, as provided in the statutes of New York, K. commenced furnishing material for the construction of the mill, under an agreement that he should be paid in monthly instalments out of the moneys received for the bonds. His account amounted to \$76,000, and during the time it accrued, he received thereon, in instalments, from the moneys so loaned to the company, \$57,000, and the company paid out of the moneys advanced to it various sums to other creditors. Subsequently, when the company was in failing circumstances, K. asserted a mechanic's lien for the balance due him, and brought suit to enforce it: *Held*, conceding but without deciding that the objections to the mortgage would under other circumstances be fatal, that K. is precluded by his acts and agreement from asserting such objections, and that on the facts stated the mortgage lien is superior to the lien of K.

Error to the District Court of Erie County.

H. & L. H. Goodwin for plaintiff in error.

W. A. Collins and G. & W. H. Mills for defendants in error.

OKEY, C. J.

The Nes Silicon Steel Company erected a rolling mill at Sandusky, and subsequently failed, and the question presented is to the priority among its creditors.

On December 10, 1875, Klotz & Kromer filed in the Court of Common Pleas of Erie County, a petition to enforce a mechanics' lien on property in

that county belonging to the Steel Co. Among the defendants in the action, beside the Steel Co., was William T. West (plaintiff in error), who claimed as successor of Lester S. Hubbard, under a mortgage on the same property executed by the Steel Co. to Hubbard as trustee for its bondholders. Answers, cross-petitions and replies were filed, and after a decision of the cause in the court of common pleas, it was appealed to the district court, where it was held that the lien of Klotz & Kromer, as mechanics, was superior to that of West as such trustee under the mortgage, and the court ordered that the property should be sold to satisfy the liens thereon; and thereupon, on leave of this court, this petition in error was filed by West to reverse the judgment of the district court.

All the evidence is set forth in the record, and there is no material conflict therein. Klotz & Kromer furnished to the Steel Co. a large quantity of material to be used, and which was used by the Steel Co. in the erection of a rolling mill on the premises above referred to, at Sandusky City. This was done under a written proposition of Klotz & Kromer, assented to in writing by the Steel Co. on December 24, 1872, though the proposition embraced materials already furnished as well as materials to be thereafter furnished. The acceptance was in these words: "The Nes Silicon Steel Co. hereby accepts the above proposition and agrees to pay as follows: eighty-five per cent. to be paid on delivery of work once in each month, and balance to be paid on the completion of the rail mill;" and the acceptance was signed by the president of the Steel Co. The first material was furnished on the 10th of November, 1872, and the last on March 14, 1874. The materials were furnished continuously, so that the whole constituted one account, which account amounted to \$76,531.42. The first payment was made on the account on December 19, 1872, and the last on December 31, 1873, the payments in the aggregate amounting to \$57,769.83, and leaving a balance due Klotz & Kromer of \$18,761.59. On March 20, 1874, they asserted, in the form prescribed by statute, a mechanics' lien for their claim, and subsequently brought suit and recovered judgment thereon in the Court of Common Pleas of Erie County. No doubt their lien for such balance is entirely valid and should date from November 10, 1872; but the question is whether such lien is superior to the lien of a mortgage.

Previous to August, 1872, the Nes Silicon Steel Company was incorporated under the laws of the State of New York, and engaged in the business of manufacturing steel at Rome, in that state. On August 7, 1872, that company made a proposition to the citizens of Sandusky City, with a view to the erection of a rolling mill at that place. The proposition, signed by the president of the company, was as follows:

"The Nes Silicon Steel Co., of Rome, N. Y., proposes to the citizens of Sandusky, Ohio, as follows: If the citizens of Sandusky will donate five acres of land to the Nes Silicon Steel Co., in

some suitable location for a rolling mill in said city, and loan on bond and other security hereafter named, and on the conditions hereafter named, one hundred and fifty thousand dollars in cash, the Nes Silicon Steel Co. will erect on said five acres of land, in a good and workmanlike manner, and of good and suitable material, a rolling mill for rolling railroad rails, of a capacity of at least fifty to sixty tons per day of twenty-four hours, and puddling furnaces sufficient for re-rolling; to commence and prosecute the same vigorously, as soon as notified by the citizens of Sandusky that this proposition is accepted, to an early completion of the same, to be done within one year from said notice, and when completed, to stock and run and operate the same for five years, at least, after its completion, destruction by the elements excepted. This proposition is as follows: The Nes Silicon Steel Co. proposes, as soon as the aforesaid land is deeded to it, to execute a mortgage on the same, to a trustee appointed by both parties, for one hundred and fifty thousand dollars, to secure the payment of bonds for one hundred and fifty thousand dollars, and to issue bonds to the same amount, payable in five years, bearing ten per cent. annual interest, payable semi-annually, and to place the same in the hands of said trustee, agreed upon by both parties. Coupons for said interest to be attached to said bonds. Interest shall only be paid on said bonds from the time the moneys are actually received by said company, to be adjusted by the trustee before delivering the bonds. Said bonds are to be guaranteed by Elisha P. Wheeler, Charles H. Horton, Coe Robertson, William Evans, W. L. Graham, David Robertson, J. C. Robertson, E. Gulick, and as many other persons as the above named may choose to do so. The duties of said trustee are to hold the bonds in trust for the parties hereto, and to receive the money from the citizens of Sandusky for said bonds at par, and to dispose of said bonds and money as follows: When said company shall present to him bills or accounts for materials, work or machinery, used in erecting said rolling mills and puddling furnaces, eighty-five per cent. of the amount of said bills or accounts shall be advanced to said company, he receiving the receipt therefor, and describing the bill or account; and when said mill and furnaces are completed, the fifteen per cent. remaining shall be paid on the same, not exceeding the amount of said bonds, and when the amount of said bonds has been paid to said company, said trustee shall deliver said bonds to the parties subscribing for the same, to the amount each has so subscribed. In case of the failure of the Nes Silicon Steel Co. to pay said bonds or the coupons attached thereto, then, at the request of any bondholder then unpaid, said trustee shall proceed to collect said bond or coupon from the company, or guarantors of said bond, and pay the avails to the holder of said bond. Said Nes Silicon Steel Co. is to get and keep its works insured against loss or damage by fire, and the policies assigned or payable to said trustee, for the benefit of the

bondholders. Any bondholder is to have the privilege, at any time within one year after the completion of said mill, to take the stock of said company at par in place or lieu of the amount of bonds he may hold, by delivery of such bond or bonds."

On August 16, 1872, a large number of the citizens of Sandusky assented to the proposition. Several of them agreed to advance to the Steel Co. certain sums of money and receive therefor bonds so secured. Among the citizens who had interested themselves in the matter was William H. Mills, one of the defendants in error, who owned lands adjoining Sandusky. In consideration that he was not to be called upon to loan to the company any money, he agreed to and did convey to the company ten acres of land, on which the rolling mill was to be and was erected, its value then being, it is said, ten thousand dollars. And among the subscribers to such loan were Klotz & Kromer, plaintiffs below, who on October 16, 1872, agreed to lend to the company \$5,000, and receive from the company bonds therefor, so secured. They were subsequently released, however, as to one-half of the amount, but performed the agreement as to the other moiety. And it was agreed by all persons interested that Lester S. Hubbard should be trustee for the bondholders under such mortgage.

On October 28, 1872, the following instrument was signed by stockholders of the Steel Co. owning more than two-thirds of the stock of the company, they being the persons mentioned as guarantors in the proposition already set forth:

"The Nes Silicon Steel Co., an incorporation duly organized under the laws of the State of New York, located at Rome, Oneida County, New York, having negotiated with Lester S. Hubbard, of the city of Sandusky, Ohio, and others, for a loan of one hundred and fifty thousand dollars, to be secured by the bonds of said company, issued at Rome, aforesaid, payable to the said Lester S. Hubbard or bearer, on the first day of January, 1878, with interest at the rate of ten per centum per annum, payable semi-annually, for which interest coupons are to be attached to said bonds, the payment of which bonds are to be secured by a mortgage of ten acres of real estate of said company, situated in Sandusky aforesaid, to said Lester S. Hubbard, as trustee for the holders of said bonds, and which loan was agreed to be made upon condition that the undersigned should personally guarantee, in writing, the payment of said bonds, both principal and interest, and should deposit with said trustee such guarantee for the benefit of said bondholders. Now, therefore, in consideration of the promises and of one dollar to the undersigned and each of us, paid by said Lester S. Hubbard and said bondholders and each of them, and for the purpose of carrying into effect the agreement for said loan, and the conditions upon which the same was to be made, we, the undersigned, hereby covenant and agree to and with said Lester S. Hubbard and said bondholders to and do hereby guarantee the payment of said loan, both principal

and interest, and of said bonds and each of them, both principal and interest, and of the coupons and each of them attached to said bonds and each of them."

That instrument was, in October or November, 1872, delivered by the Steel Co. to Hubbard, the trustee, who in June, 1874, caused it to be recorded in the office of the recorder of Erie County and filed in the office of the clerk of the court of common pleas of that county.

On October 28, 1872, the Steel Co., by its president, executed, acknowledged, and delivered, in due form, to Hubbard, as such trustee, and to his heirs and successors, a mortgage on the premises, "with the buildings, engines, machinery, fixtures and appurtenances," which mortgage contained the following provision: "Provided always, and these presents are on this express condition, that if the said Nes Silicon Steel Co., the party of the first part, shall well and truly pay or cause to be paid to the party of the second part, as such trustee, his certain attorney, heirs, executors, administrators, successor or assigns, the sum of one hundred and fifty thousand dollars and interest at the rate of ten per cent. per annum, by paying the bonds given by the party of the first part therefor, and which this mortgage is given to secure, viz: seventy-five bonds bearing even date herewith, made by the Nes Silicon Steel Co. for the payment to L. S. Hubbard, trustee, or bearer, of \$1,000 each, on the first day of January, 1878, with interest coupons attached for the payment of the interest semi-annually, and one hundred and fifty bonds of the same date, made by the said Nes Silicon Steel Co. for the payment to L. S. Hubbard, trustee, or bearer, of \$500 each, on the first day of January, 1878, with coupons attached for the payment of interest at the rate aforesaid, payable semi-annually to the said party of the second part, which said sums the said Nes Silicon Steel Company hereby covenants and agrees to pay, then these presents shall cease and be void. And in case default shall be made in the payment of the principal sum hereby intended to be secured, or in the payment of the interest thereof, or any part of such principal or interest, as above provided, then the said party of the second part, his successor, executors, administrators or assigns, are hereby authorized, pursuant to statute, to sell the premises above granted, or so much thereof as will be necessary to satisfy the amount then due, with costs and expenses allowed by law, rendering the overplus, if any there may be, to the said party of the first part."

The mortgage was deposited by Hubbard in the office of the recorder of Erie County, where it was recorded on November 7, 1872.

Clothed with this authority, Hubbard, the trustee, under direction of the Steel Co., proceeded to dispose of the bonds from day to day. Before November 10, 1872, he had received from the proceeds thereof for the Steel Co., \$8,000; before November 19, 1872, he had received \$21,000; and on August 6, 1873, he received for the Steel Co.

the proceeds of the last bond, and had thus received the full sum of \$150,000.

On December 19, 1872, it was agreed between Klotz & Kromer, the Steel Co., and Hubbard, the trustee, that Klotz & Kromer should present their bills to the company once a month, and that upon approval of the bills by its superintendent, they should be presented to Hubbard for payment out of the money received by him for the bonds. This arrangement, though not incorporated in terms in the writings between the parties, was carried out to this extent, that payments were made by Hubbard to Klotz & Kromer in December, 1872, and each of the months of the year 1873, except January, the payments, as already stated, amounting to \$57,769.83, and leaving a balance of \$18,761.59. The payment made August 22, 1873, was in full of the amount due Klotz & Kromer, including the fifteen per cent., down to July 23, 1873. Of the amount so received by them, the sum of \$16,888, was paid after the whole sum of \$150,000, had come to the hands of Hubbard. Hubbard also paid money to divers other creditors of the Steel Co. He died before the commencement of this suit, leaving in his hands, it is said, no portion of the moneys so received, and William T. West (plaintiff in error) was appointed by the court, in this case, as his successor.

On behalf of Klotz & Kromer, it was successfully claimed in the district court that the mortgage was invalid as against the claims of the mechanics and the judgment creditors. The court so held, it is said, on two grounds, first, that the mortgage was given to secure future advances, and that the mechanics' lien attached before any considerable portion of the bonds had been purchased; and, secondly, that by the statute of New York, under which the Steel Co. was incorporated, it is made a condition precedent to a valid execution of a mortgage by the company, that the owners of two-thirds of its capital stock should consent in writing that such mortgage might be made, and that such consent should be filed in the office where the mortgage is to be recorded, at the time or before such mortgage is presented for record.

With respect to the first objection, it is certainly true that this court has held, that where a mortgage is given to secure future advances, a subsequent mortgage will have priority over it as to any advances made after such subsequent mortgage is placed on record. *Spader v. Lawler*, 17 Ohio, 371; *Choteau v. Thompson*, 2 Ohio St. 114; cf. *Jones v. Guaranty and I Co.* 101 U. S. 622. We are not disposed to intimate any dissatisfaction with this rule, and, for a reason hereinafter stated, we need not express any opinion whether the rule applies to a mortgage of this character.

The other objection to the mortgage, that is, non compliance with the statutes of New York, referred to in the record, has been discussed at length. Originally corporations of this character in New York were prohibited from mortgaging their property. Subsequently such power

was given, and the amendatory act, in force when this mortgage was made, authorized the execution of a mortgage like this. *Central Gold Mining Co. v. Platt*, 3 Daly, 263. But the latter act contains the provision, "that the written assent of the stockholders, owning at least two-thirds of the capital stock of such corporation, shall first be filed in the office of the clerk of the county where the mortgaged property is situated." 2 Rev. Stats. N. Y. (6th ed.) 501. Sections 22 and 23 on the same page, relating to the filing of such consent, show, it is claimed, that the provision quoted applies as well to mortgages of lands situated beyond the limits of New York as to lands within that state. The statute of that state further provides that mortgages shall be recorded in the office of the county clerk.

The questions as to the construction of these statutory provisions, and their application to mortgages of real estate situated within this state, have been considered. No doubt, if the provisions apply to such mortgages of lands in this state, the recorder's office is the proper place to deposit the consent, and perhaps recording it on the margin of the record of the mortgages, as in this case, may be a substantial compliance with the statute as to filing, leaving out of view in this statement the matter of time of filing and the form of the consent. So, we would probably have no difficulty in holding that such guaranty signed by stockholders of the company owning two-thirds of its capital stock, and thus recorded, was such substantial compliance with the statute as to the form of the instrument. *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328; *Amerman v. Wiles*, 24 N. J. Eq. 13. It is also urged that the statute of New York on this subject, however clear its words may be, can have no application to mortgages of lands situated in this state. The same objection was urged and left undecided in *Amerman v. Wiles*, supra. Again, it is insisted that this mortgage is in the nature of a purchase money mortgage, and that as to a mortgage of that character no such written consent is necessary; and, furthermore, that the statutory provisions requiring such written consent were enacted for the benefit and protection of the stockholders, who alone can take advantage of a non-compliance therewith. These views with respect to those statutory provisions are stated in the opinion of the court in *Greenpoint Sugar Co. v. Whitin*, supra, but the points were not decided. Finally it is urged that in any view the mortgage became effectual, as of November 7, 1872, the day it was filed for record, when the guaranty was recorded in the office of the recorder of Erie county.

We do not find it necessary to decide whether the objections to this mortgage might not, under other circumstances, be held as well taken. We are relieved from determining whether the principle declared in *Spader v. Lawler*, supra, applies to such a mortgage as this, or whether the New York statute, as to making and filing the written consent of stockholders, applies to such a mortgage, or has not been substantially complied with.

Klotz & Kromer are, upon the plainest principles of equity, precluded by their acts and agreements with the Steel Co., from asserting such objections to the mortgage. They joined other citizens of Sandusky in accepting the proposition of the Steel Co. to build the rolling mill; they subscribed and paid for bonds issued by the company and secured by the mortgage, and thereby induced others to do the same thing; they are beneficiaries under the mortgage; they received from the Steel Co., in payment of more than two-thirds of their claim, the sum of fifty-seven thousand dollars, which they knew had been advanced to the Steel Co. on the faith that this was a valid mortgage; they sold to others the larger portion of the bonds they received from the company, and it is fair to say that their purchasers relied on the mortgage as a security. Under such circumstances, there can be no justice in saying that, because they were not fully paid, as they expected to be, out of the moneys so loaned to the Steel Co., they may, on discovering that the company and its guarantors have failed, assert a mechanics' lien for the balance of their debt, and thereby defeat the mortgage, which everybody interested in it believed to be valid, until the whole sum of \$150,000 had been advanced on the faith of it and expended.

The judgment must be reversed and the cause remanded for further proceedings. All the facts with respect to the mechanic's lien asserted by Barney & Ferris (defendants in error) are not before us, and hence we are unable to say whether the remarks as to the claim of Klotz & Kromer apply to their claim. We do not think they should be concluded on a further trial by their failure to offer proof on the trial in the district court. As to the judgment of William H. Mills for \$10,000, it is said that it is founded on a claim for the value of the land, but this does not appear. The claim upon which it was founded is, however, a matter of no importance in the case as now presented, for it is stated in his answer that the judgment only "became a lien on the premises in said petition described on the 19th day of October, 1874," and hence, on the facts appearing in the record, his lien is inferior to that of the mortgage. And the views here expressed dispose of all questions as to other judgment liens asserted against the property.

Judgment reversed.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

CAROLINE LOOMIS

v.

SECOND GERMAN BUILDING ASSOCIATION ET AL.

December 13, 1881.

L. recovered a judgment in the common pleas court against R. for \$247.48, in an action for money only. R. obtained a second trial under the statute. R. then gave a mortgage to a Building Association. Afterward, upon second trial, L. recovered a judgment against R. for \$251.80 damages and \$135.98 costs, and levied execution upon the mortgaged premises. In an action by the Building Association to fore-

close the mortgage, marshal liens, and distribute proceeds:

Held: 1. That the lien of L., to the extent of the original judgment, with interest from the first day of the term at which it was rendered, was the first in order of priority.

2. That the mortgage was second in order of priority.

3. That the lien of the second judgment, to the extent that it exceeded in amount the first judgment with interest, was the last in order of priority.

Error to the District Court of Scioto County.

At the October term of the Court of Common Pleas of Scioto County, beginning October 3d, 1870, the plaintiff in error obtained a judgment against Eliza Redinger, one of the defendants below, for the sum of \$200 damages and \$47.48 costs of suit, being an action then pending in said court, wherein the plaintiff in error was plaintiff and the above named Eliza Redinger was defendant.

Thereupon the defendant in that action, Mrs. Redinger, gave notice of her demand for a second trial, which was granted, bond given and the case continued.

At the time said judgment was rendered against Mrs. Redinger, she was the owner of certain real estate in said county, and which is described in the petition of the Second German Building Association, plaintiff in the court below and defendant in error in this court.

On the 10th day of May, 1872, a mortgage was given by Mrs. Redinger to the Second German Building Association, and which was the same day filed and recorded.

The case of Loomis v. Redinger was continued from time to time until the June term, 1874, commencing June 1st, 1874. It was tried at that term and a judgment was rendered in favor of Mrs. Loomis for the sum of \$251.80 and \$135.98 costs accruing since the first trial and including the costs of the second trial.

Then executions were issued for the judgment and the costs at the following named dates, to wit: Sept. 4th, 1874, and July 14th, 1875, and were levied on the premises described in the petition of the Second German Building Association, then the property of Mrs. Redinger. These increased costs, as shown by the agreed statement of facts, amounted to the sum of \$110.80, and were the costs of issuing the executions, levying on the premises, advertising them for sale, &c.

On the 12th day of January, 1876, Eliza Redinger ceased paying her dues to the Building Association, and it brought suit to foreclose its mortgage on the premises and made the plaintiff in error a defendant to that action.

Mrs. Loomis filed her answer and cross-petition, setting forth the amount of her claim, her lien, judgment, interest and costs, and asking that it be adjudged to be prior to that of the Building Association. The premises were sold on the 14th of April, 1877, on an order of sale issued in favor of the Building Association, and on the order of distribution the common pleas held that Mrs. Loomis had a lien on the premises prior to that of the Building Association for the judgment of \$251.80, being the amount rendered on the sec-

ond trial, the costs of the first trial, the costs of the second, and the increased costs.

The Building Association thereupon appealed the case to the district court, and the same was heard at the April term, 1878, on the agreed statement of facts and the pleadings in the case. The district court held that Mrs. Loomis had a lien on the premises prior to that of the Building Association, for the sum of \$200 and \$47.48 costs, being the amount of the judgment and costs of the first trial, and that the interest on the \$200 and the costs accruing between the first and second trials and the increased costs of issuing execution, &c., on the judgment, also the costs of the second trial, were *not* prior to the mortgage lien of the Building Association, for the reason that the mortgage was filed prior to the time the second trial took place and the increased costs were made. To review this judgment the present proceeding in error was instituted.

LONGWORTH, J.

The district court was clearly right in holding that the costs made between the first and second trials, and the increased costs for issuing and levying execution, and advertising, were a lien upon the lands of the judgment debtor, subsequent in order of priority to the mortgage of the Building Association. As to the costs made between the first and second trials, they were not adjudged against either party until the rendition of the second judgment of which they formed a component part; as to the costs accruing after the second judgment, they were wholly unconnected with the former judgment and were incurred upon final process.

A judgment lien is a creature of the statute and does not exist except by its authority. By the provisions of the code, such lien attaches upon the debtor's lands and tenements, on the first day of the term, at which such judgment is rendered; in no case does it antedate the term.

A pending action may, it is true, affect the title to land from the time of its commencement; but this is wholly disconnected with the subject of which we are speaking. Such cases are in the nature of proceedings *in rem*, and directly affect the defendant's title to or interest in the land. With no propriety can such pending action, or the judgment rendered therein, be called a lien upon the land in dispute.

The judgment of Mrs. Loomis was for money only, and could not affect the land otherwise than in being a charge upon it as provided by statute. The statute concerning second trials, (2 S. & C. 1160), declares:

"In all cases where a party against whom a judgment is rendered obtains a second trial under the act to which this is amendatory and supplementary, the lien of the opposite party so obtaining such second trial created by said judgment shall not be by the obtaining of such second trial removed or vacated, but the real estate of said party so obtaining such second trial shall be bound in the same manner as if said second

trial had not been demanded until the final determination of the case."

It cannot be claimed that the lien of the first judgment is preserved only "until the final determination of the case," and that it then becomes merged in the lien of the final judgment. Since, inasmuch, as it could not be asserted until the final determination of the case, if such final determination *removed the lien*, it would be an unavailable and valueless thing, and the statute asserting it an absurdity.

On the other hand, is is equally unreasonable to assert, that the lien of the second judgment, when rendered, relates back to the term of the first judgment. The statute does not so provide in terms; nor would it seem reasonable to suppose that the legislature intended to give to an action for the recovery of money only, where a second trial has been obtained, the effect of a *lis pendens* binding the lands of the defendant to answer any judgment which may be rendered in the future; an effect which no other action for the recovery of money has.

The statute regulating the lien of a judgment, vacated by an appeal to the district court, is worded substantially like that under discussion, and under it this court has held, that the lien of a judgment so vacated has precedence of a lien attaching during the pendency of the suit in the district court. *Moore v. Rittenhouse*, 15 O. S. R. 310.

If, upon the second trial, the defendant recovers judgment, or if the plaintiff recovers a judgment less in amount than that formerly obtained, this will operate as a satisfaction, complete or *pro tanto*, but it cannot be said that it affects the lien as such.

We are therefore clearly of opinion, that the district court was right in deciding that the lien of the first judgment had precedence of the mortgage. We are equally clear, however, that the court was wrong in holding that the interest on the judgment was postponed to the mortgage lien. The right of the judgment creditor to interest is derived from the judgment itself. It is part and parcel of it as much as the principal sum therein adjudged to be due him, and the lien of the judgment covers both.

Freeman in his work on judgments says:

"The lien of the judgment includes all amounts for which execution may properly issue. In the absence of any statutory provision, interest could only be recovered by an action on the judgment, and was therefore no lien until it merged into the second judgment. But in all cases where the statute has provided for the collection of interest by execution, it is as much a lien as the principal recovered."

Freeman on Judgments, marginal page 341.

This we take to be a correct statement of the law.

We think that the judgment of the district court should be so far modified as to allow the plaintiff in error, as the first lien upon the land in dispute, the amount of her first judgment, (\$200 damages and \$47.48 costs), with interest

thereon from the first day of the term when rendered.

In other respects the decree should be affirmed.

Judgment accordingly.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

WM. DILLE

v.

LORENZO R. LOVELL AND OTHERS.

December 13, 1881.

In an action to recover damages for assault and battery, where an issue was joined on an answer justifying the alleged trespass, the court allowed defendant to begin and close, in offering testimony and in the argument.
Held:

1. That unless there were special reasons authorizing the court to otherwise direct, the right to begin and close was in the plaintiff.

2. Unless it affirmatively appears that special reasons did not exist, which would authorize the court to change the order of proceeding at the trial, or, that the plaintiff was prejudiced thereby, a judgment for the defendant will not be reversed.

Error to the District Court of Athens County.

The plaintiff brought his action against Thomas Lovell, Sr., Thomas Lovell, Jr., and Lorenzo Lovell, to recover damages for assault and battery.

The defendants filed separate answers, justifying the alleged trespass, the first named, on the ground that he acted in defense of his son, the said Lorenzo, the second, that he acted in defense of his master, the said Lorenzo, who alleged that he acted in necessary self defense.

The reply denied each and every allegation of each of said answers.

The trial resulted in a separate verdict for each of the defendants. A motion for a new trial was overruled. Judgment was rendered on the verdict and a bill of exceptions taken by plaintiff.

This judgment was affirmed by the district court.

Among the grounds for a new trial, and the only one saved by the bill of exceptions, is, that the court, on the trial, and against the objection of the plaintiff, allowed the defendants to open and close, both in the introduction of testimony and in the argument.

It appears that this objection was made before any testimony was offered, and again, after all the testimony was closed on both sides.

None of the testimony is set out, and it does not appear, that there were not special reasons why this order was adopted by the court, nor is there anything tending to show that plaintiff was prejudiced by the order of the court.

JOHNSON, J.

Did the court of common pleas err in permitting the defendants in error to open and close the evidence and argument of the case?

"When the jury has been sworn the trial shall proceed in the following order, unless the court for special reasons otherwise directs."

* * "Third—The party who would be defeated if no evidence were given on either side,

must first produce his evidence." Code, Sec. 266.

Upon the issues joined in the case, if there existed no special reasons authorizing the court to direct a different order of proceeding, the plaintiff was entitled to begin and close.

It was an action for *unliquidated damages*, with pleas in justification which were put in issue by the reply.

Upon such issues, both reason and the weight of authority is, that the plaintiff should begin and close.

1 Greenleaf Ev. Sec. 77 and notes.

1 Whart. Law of Evidence Sec. 353, 357 and 358.

Mercer v. Wall, 5 Ad. & El. N. S. 447 (5 Q. B. 447.)

Page v. Osgood, 2 Gray (Mass.) 260.

1 Phillips on Evidence, * 816 note 223.

Conceding this to be so, it does not follow that this judgment should be reversed.

The code vests a discretion in the court to change the order of proceeding on the trial, which may be exercised where there are special reasons therefor. For aught that appears such reasons may have existed. The bill of exceptions does not show that they did not. Error will not be presumed, and to authorize a reversal on the ground of an abuse of this discretion it should appear that the party has been prejudiced.

Lord Abinger in *Huckman v. Fenice*, 3 M. & W. 516 correctly states the rule upon this point thus: "I cannot say that we should interfere in a very doubtful case; but if the decision of the judge were clearly and manifestly wrong the court would interfere to set it right. This is sometimes a very important matter, and a departure from the usual rule might be attended with serious consequences."

In *Geach v. Ingall*, 14 M. & W. 97, Pollock, C. B., in speaking of this case as settling the English practice, says; "Where it is clear, that wrong has been done by the ruling of the judge at *Nisi Prius*, as to which party should begin by the *onus* of proof being thereby imposed on the wrong party, the court in banc, will interfere to correct the error."

The authority to change the order of proof and argument, is not an arbitrary discretion, but depends upon special reasons in the given case. To warrant this court upon error to reverse for allowing the wrong party to assume the *onus*, it must appear that wrong has been done.

This is the object of a bill of exceptions where it does not otherwise appear in the record.

It appears that each party offered all his testimony, and that the case was fully argued to the jury by counsel representing each side.

For aught that appears the verdict was supported by the law and the evidence after a full and fair trial.

In every stage of an action, the court must disregard any error or defect in the pleadings or proceedings, which does not affect the *substantial* rights of the adverse party, and no judgment

shall be reversed by reason of such error or defect. (Code, Sec. 138.)

We hold therefore that in the absence of anything in the record to the contrary, we must presume that the court had special reasons for changing the order of proceeding. *Dallas v. Ferneau*, 25 O. St. 635; *Courtright v. Stagers*, 15 O. St. 511.

This principle has a forcible application in *Fewster v. Goddard*, 25 O. St. 276, much relied on by counsel for plaintiffs.

That was a suit on a promissory note. The answer alleged payment in full. No reply was filed, but the case was tried as if the plea of payment was denied.

The court erroneously ruled that the plaintiff had the right to open and close.

The plaintiff offered the note and rested his case. The defendant then gave evidence tending to prove payment and rested. The plaintiff then gave evidence in rebuttal tending to prove admissions of defendant, that the note had not been paid. The defendant then offered evidence to rebut the plaintiff's evidence of admissions, but the court rejected this testimony.

This court holds, that in the absence of a reply, the defendant was entitled to a judgment, but that the parties proceeded upon the theory that a reply had been filed and that upon this supposed issue, the defendant would have been entitled to open and close.

The judgment was reversed for error in holding otherwise, and in rejecting the rebutting evidence offered by defendant.

The court below had erred in two particulars, in allowing the plaintiff to open and close on a plea of payment, and as a consequence in rejecting defendants' evidence in rebuttal.

The defendant was denied a right, that was manifestly prejudicial, the right to put in all the testimony he had. For a denial of this right the judgment was reversed. In the case at bar, no such error appears.

Dragoo v. Whisner 31 Ohio State 192, simply holds, that in an action for an assault and battery with a justification, it is not error to allow the plaintiff to open and close.

This is in harmony with our present holding. Judgment affirmed.

[This case will appear in 87 O. S.]

SUPREME COURT OF OHIO.

RULES OF PRACTICE,

Adopted December 16, 1881.

RULES PECULIAR TO THE BUSINESS OF THE SUPREME COURT.

RULE I. SESSIONS IN TERM.

The regular public sessions of the Supreme Court shall be held in the Supreme Court Room, in the Capitol, Tuesday and Thursday of every week during the term of the Court, commencing at ten o'clock a. m. on Tuesdays, and nine o'clock a. m. on Thursdays, and only on other days of

the week by special assignment, as the convenience of business may require it.

And the sessions in the Consultation Room shall be between the hours of nine o'clock a. m., and six o'clock p. m.

RULE II. ORDER OF BUSINESS.

The business of the General Docket shall be proceeded in as follows:

1. On the opening of Court, on the first day of the stated term, the first seventy-five causes on the docket will be called, and afterwards the further call of the docket will be proceeded with on the first Tuesday of each month during the session of Court to the extent of seventy-five causes more on each day, in the order in which they appear on the docket, provided a sufficient number have not already been called, to occupy the attention of the Court during the ensuing month.

2. Any cause may be submitted, however, on behalf of either or both parties at any time, whatever may be its place on the docket.

3. When a cause is called on the docket, and neither party appears in person or by attorney, it shall be marked submitted, and when reached for decision, shall be disposed of as the Court shall deem fit and proper, according to the state and condition of the cause.

4. Causes will be taken up for decision in their order on the docket, and not otherwise, except on motion duly filed; and for special reason, a cause may be taken out of its order and assigned for hearing or decision at a particular time, as authorized by section 440, Revised Statutes.

5. Parties desiring to be heard in oral argument, must notify the Court of that fact, and have their causes set for oral argument at the time of the call of the causes on the docket, if not previously done; otherwise oral argument will be considered as waived.

6. When a cause is reached for decision which has not been argued, and in which the plaintiff, or party having the affirmative has filed no printed argument or brief, as required by Rule IV, the cause will be dismissed, remanded, or otherwise disposed of, at the discretion of the Court.

7. The sessions of the Court, on Thursday of each week, will be devoted to the business of the motion docket.

8. A motion for leave to file a petition in error shall not, without special leave of the Court, be orally argued beyond fifteen minutes on either side.

9. Each party shall have half an hour for the oral argument of any cause or matter on the motion docket (except those specified in the last preceding clause); which time shall not be exceeded, unless the Court, for special reasons to be assigned before the hearing, shall extend the time.

10. The day before a cause is to be heard in oral argument, each member of the Court, and the Reporter, must be furnished with a brief statement of the case, and the points intended to

be made by counsel with a reference to any statutory provisions or adjudicated cases which may be relied on.

RULE III. ORAL ARGUMENT.

When a cause on the general docket is argued orally, the time allowed for each side shall not exceed two hours, unless, for special reasons to be adduced before the argument commences, the Court shall extend the time.

RULE IV. BRIEFS AND TRANSCRIPTS.

No civil cause will be heard or considered, unless the plaintiff, or party holding the affirmative, shall have caused to be filed with the Clerk, for the use of the Court and Reporter, ten printed copies of so much of the record, testimony and documents therein, necessary to be considered by the Court, in octavo size, pamphlet form, and suitable for binding, with index and marginal references (the cost of which printed copies shall be taxed as costs in the cause), and shall also have filed with the Clerk a like number of printed copies in like form of a brief or argument therein, *containing a statement of the questions presented, and a succinct statement of so much of the cause, referring to the pages of the printed record, as is necessary to show how the questions arise*, with marginal references to the headings and points made; and for want of such printed copies, unless good reason be shown to the contrary, the cause may be dismissed as for want of prosecution.

And no brief or argument on behalf of the defendant or party holding the negative will be read or considered, unless it be printed with like references, and a like number of copies filed with the Clerk.

A copy of the printed record, and briefs or argument, shall be furnished to opposite counsel a reasonable time before the cause will be heard.

RULE V. PRINTING RECORDS, ETC.

It shall be the duty of the Clerk, on the written precept of either party, his or their attorney to any suit pending in this Court, and on such party depositing with the Clerk such sum of money as may be reasonably necessary to defray the expenses, to make up from the files, in proper order to be printed for the purposes of the hearing or trial of the cause, a copy of the pleadings, exhibits, evidence and proceedings therein, preserving the date of the commencement of the action and the date of the filing of each pleading, dispensing with the formal captions, verifications and official certificates, where the same may not be material to the questions to be adjudicated, and to cause to be printed fifteen copies thereof for the use of this Court and the counsel in the cause; and the cost thereof, unless otherwise ordered by the Court, shall be taxed in the cost bill, and such disposition or application shall be made of the said deposit as to the Court shall seem equitable. Where the case is reserved, or is on error, the matter to be printed shall be prepared by the party filing the precept, in accordance with Rule IV.

RULE VI. POINTS DECIDED.

A syllabus of the points decided by the Court, in each cause, shall be stated in writing by the Judge assigned to deliver the opinion of the Court, which shall be confined to the points of the law arising from the facts of the cause that have been determined by the Court.

And the syllabus shall be submitted to the Judges concurring therein, for revisal, before publication thereof; and it shall be inserted in the book of reports without alteration, unless by the consent of the Judges concurring therein.

RULE VII. APPLICATIONS IN ERROR.

When an application for leave to file a petition in error, has been made in vacation to a Judge of the Supreme Court and disallowed, no other application therefor shall be made, except to the Court in session.

RULE VIII. NOTICE OF APPLICATIONS IN ERROR.

In cases where leave to file a petition in error is required by either the Court when in session or a Judge thereof in vacation, notice in writing of the intended application, briefly specifying the errors relied on, shall be given to the adverse party, or his attorney, at least ten days when made to the Court, and five days when made to a Judge, before the application shall be acted on, unless, in view of special circumstances attending the case, the Court or Judge should determine that justice required the time of such notice to be abbreviated or such notice to be dispensed with.

A copy of such notice with proof of the service thereof, shall accompany the application.

RULE IX. PAPERS IN RESERVED CASES.

When a cause shall be reserved in a District Court, to be sent to the Supreme Court for decision, an entry of the reservation shall be made on the journal of the District Court; and the papers, with a certified copy of the entry of reservation, shall be sent to the Clerk of the Supreme Court at Columbus; *Provided, however*, That copies of any or all of the original papers may be sent, instead of the original papers, when the District Court, on motion of either party, so direct.

The papers may be sent by the counsel of either party, who shall give his receipt to the Clerk of the District Court for the same.

Before being delivered to the counsel, the Clerk of the District Court shall seal them up and direct them to the Clerk of the Supreme Court at Columbus. If the cause be reserved more than thirty days before the term of the Supreme Court, the papers shall be filed with the Clerk at Columbus on or before the first day of the term. If reserved within thirty days, they shall be so filed on or before the eighth day of the term; upon default in either case, they shall not be filed without leave of the Court.

If they be not filed at the term of the Supreme Court next after the reservation, the cause shall be proceeded with in the District Court as if it had not been reserved.

RULE X. RETURN OF PAPERS.

After the decision of a cause in the Supreme Court, in which a final record is not required to be made in that Court, the papers shall be returned to the Clerk of the proper Court; when so returned, the Clerk of the Supreme Court shall seal them up and direct them to the Clerk of such Court, and forward them as said Clerk may in writing direct. If not so directed within a reasonable time, they may be sent by express.

RULE XI. FILES OF CASES DISPOSED OF.

The papers in cases heretofore or hereafter disposed of (and not returned to the counties or withdrawn by leave of the Court) shall be filed away in convenient packages by the Clerk, with a label on each package, on which shall be written or printed, "Cases Decided," "General Docket, or "Motion Docket," (as a the case may require,) and also the term at which the same were disposed of, and the numbers of the cases in each package; which numbers shall correspond with those of the docket of said term.

The papers in cases on the General Docket shall be put in separate packages from those on the Motion Docket, and the papers of one term shall, as far as may be practicable, be kept in different pigeon-holes or places of deposit from those of any other term.

RULE XII. JURIES.

1. Whenever an issue of fact, which the law requires to be tried by a jury, shall be joined in proceedings in the nature of quo warranto, or in mandamus in the Supreme Court, the Clerk shall, at the instance of either of the parties, make out a venire facias, directed to the Crier of this Court, commanding him to summon from the State at large sixteen jurors, having the qualifications of electors, to appear before the Court at the day named therein, which day shall be determined by the Court before the issuing of the venire. The venire shall be served and returned at least one week before the day named therein for the appearance of the jurors; and the Crier shall attach to, or incorporate in his return, a list of the names of the jurors summoned.

2. Challenges for cause to the array and peremptory challenges, may be made by either party, as is now provided by law in other cases, and the validity of such challenges shall be determined by the Court.

If, from challenge or any cause, the panel shall not be full, the Court may order the Crier to fill the same from the bystanders or neighboring citizens having the qualifications of electors.

3. The jurors, summoned as above provided, or such of them as are not set aside or challenged, together with so many of the bystanders and neighboring citizens having the qualifications aforesaid, not set aside on challenge, as will make up the number of

twelve, or if the whole array be set aside, twelve of such bystanders or neighboring citizens having the qualifications aforesaid, as may not be set aside on challenge, shall constitute a jury for the trial of said issue of fact.

4. Each juror shall be entitled to the same compensation and mileage as are provided by law for jurors, in civil causes, in the Court of Common Pleas.

RULE XIII. THE MINUTE BOOK AND ITS CONTENTS.

There shall be kept by the Clerk a book, to be called the Minute Book, in which shall be separately entered every cause and motion hereafter docketed in this Court, except motions in pending causes, which motion shall be noted in their proper causes, but shall not be separately entered in said book, whether the same be an original or reserved cause, and also the date of docketing the same, and the payment of his fees and by whom paid.

He shall also briefly note therein the issuing and date of all process sued out of this Court, the return day thereof, when returned, whether served or not, and the date of service, if made; also, under the proper dates, the filing of all pleadings, depositions, briefs, or other papers that may be filed in the cause, in this Court; and briefly note all motions in the cause that may be placed on the Motion Docket; and all orders and judgments of this Court in the cause, with a reference to the journal and page where the same may be entered and to the volume and page of the complete record thereof, if there be one.

He shall also note therein by whom and when any papers may be taken from his office, and when returned.

RULE XIV. WITHDRAWAL OF BRIEFS.

After a cause has been decided and reported, counsel may withdraw manuscript briefs from the files.

RULE XV. WHEN RECORDS ARE TO BE COMPLETED.

In cases decided before the first of May in any term, if complete records therein are to be made in this Court, they shall be completed before the first day of the ensuing October.

RULE XVI. ADMISSION TO THE BAR.

1. Applications for admission to the Bar will be received on the first Tuesday of each month when the Court is in session, and at no other time.

2. At the commencement of each term of the Court there shall be appointed a Committee of fifteen discreet and judicious attorneys and counselors-at-law, to be known as the Standing Committee on Examinations, whose duty it shall be to examine all applicants for

admission to the Bar, any three of whom may conduct an examination.

3. Examinations shall be conducted in open Court, or by two Judges thereof, or in the presence of at least three members of said Standing Committee; and each member of the Committee present at an examination shall report, in writing, for or against the admission of the applicant.

4. No applicant shall be admitted to the oath of office unless a majority of the Examiners present shall certify that they find him to have a competent knowledge of the law and to have a sufficient general learning to discharge the duties of an attorney and counselor-at-law, and shall recommend his admission.

5. If the applicant, on examination, shall be rejected, he shall not again be admitted to an examination within six months from the date of such rejection.

6. Except as provided in section 561 of the Revised Statutes, each applicant must produce a certificate of qualification as required by section 560 of the Revised Statutes, signed by his preceptor; and in no case will the certificate of any other attorney or counselor-at-law be received unless it be shown by the affidavit of the applicant that his preceptor is dead, or that his certificate can not, for some reason satisfactory to the Court, be obtained. And when the certificate of an attorney and counselor-at-law other than the preceptor of the applicant is produced, it must show that the certifier has personal knowledge of the length of time the applicant has been engaged in the study of the law, and the name of his preceptor.

7. The certificate produced in conformity to the foregoing rule shall not be deemed conclusive evidence of the facts therein stated; but, in all cases, the Court must be satisfied of its truth before the applicant will be admitted to an examination.

8. The applicant must sustain a satisfactory examination upon the law of real and personal property, personal rights, contracts, evidence, pleading, partnerships, bailments, negotiable instruments, principal and agent, principal and surety, domestic relations, wills, corporations, equity, jurisprudence, criminal law, and upon the principles of the Constitution of the State and of the United States.

9. Examinations shall be conducted both by oral and written or printed interrogatories. The written or printed interrogatories and the answers of the applicant thereto shall be submitted to the Court with the report of the Examiners, and shall, together with the

certificate required by Rule No. 6, be filed and preserved by the Clerk.

Each applicant, upon receiving the oath of office, shall sign a roll showing the date of his admission and his place of residence.

RULE XVII. PETITIONS IN CRIMINAL CAUSES.

A motion for leave to file a petition in error in a criminal cause, with the transcripts, containing marginal references, together with the assignments of error, shall be filed with the Clerk at least five days before the same shall stand for hearing, unless, for good cause shown in any case, the Court otherwise order.

RULE XVIII. FILING OF MOTIONS.

A motion cannot be filed on the day set for its hearing, except by special leave of the Court.

RULE XIX. BRIEFS ON MOTION FOR LEAVE.

A motion for leave to file a petition in error will not be considered, unless counsel for the applicant file with the papers in the case either a printed or plainly written brief containing a statement of the questions presented, and short statement of so much of the case as may be necessary to show how the questions arise.

RULES

OTHER THAN THOSE PECULIAR TO THE SUPREME COURT.

RULE XX. MAKING UP RECORDS.

Records of cases decided shall be made as follows:

1. In all cases in which the Supreme Court and District Court have original jurisdiction, a full record shall be made up.

2. In cases in error in said Courts, no records shall be made, except at the request and costs of the party desiring the same to be done; but the papers in all such cases shall be carefully preserved, filed and labelled in packages, numbered with corresponding numbers upon the margin of the journal where the final orders, respectively, are made.

3. In every case reserved for decision (other than those in error), if an order or judgment be rendered therein by the Supreme Court making a final disposition of the case, a full record shall be made up by the Clerk of the Supreme Court, and no full record thereof shall be made, in the District Court.

4. In cases in error in which the appellate Court reverses the judgment of the Court below, and orders further proceedings below to be had in the original case, the record afterward made up below shall contain the judgment of reversal, and the further proceedings thereafter had in the Court below; but the files of the appellate Court, upon which said order of reversal was had, shall not be recorded in the Court below, except at the request and

costs of the party desiring the same to be done.

RULE XXI. PRESERVATION OF RECORDS AND FILES.

The Clerk of the Court shall be answerable for all records belonging to his office, and all papers filed in the Court; and they shall not be taken from his custody, unless by special order of Court, or on the written consent of the attorneys of record for all the parties; but the parties may at all times have copies on paying the Clerk therefor.

RULE XXII. MANDAMUS.

A writ of mandamus, unless otherwise specially ordered, shall be served on or before the second Monday next after the date thereof; and the writ shall command the defendant, or defendants, to return and answer the same on or before the third Saturday after said second Monday at the place of the holding of the Court, to be named in the writ.

RULE XXIII. CASES TAKEN UNDER ADVISEMENT ON CIRCUIT.

No cause in the District Court shall be reversed and taken under advisement for decision in another county on the Circuit, except by the consent of both the parties or their counsel; and in such cause an order shall be made on the Journal of the Court that the cause is so taken under advisement for decision in a county, in the district to be named.

And after a decision of a cause on the Circuit, it shall be certified back and entered in the Court of the county from which it was taken.

RULE XXIV. CONTINUANCES.

In all applications for the continuance of a cause in the District Court, and for a second continuance in the Common Pleas, on the ground of inability to procure the testimony of an absent witness, the party making the application shall state in his affidavit what he expects to prove by such witness, and also what acts of diligence he has employed to procure the testimony of such witness; and if the Court find the testimony material, and that due diligence has been used, said cause may be continued, unless the opposite party consent to the reading of such affidavit in evidence; in which case the trial may proceed, and said affidavit be read on the trial, and treated as the deposition of an absent witness.

First applications for continuance in the Common Pleas shall be subject to such regulations as that Court shall adopt.

RULE XXV. RECORD IN CASES APPEALED.

In cases in which notice of appeal is entered in the Common Pleas and perfected, no record shall be made up in the Court of Common Pleas, except at the request and cost of the party desiring the same to be done.

The foregoing rules are to take effect from and after January 1, 1882.

WHO TO BE ADMITTED TO EXAMINATION.

No person shall be admitted to such examination unless he is twenty-one years of age, has resided in the State for the year next preceding, and is a citizen of the United States, or has declared his intention of becoming a citizen thereof; nor until he has produced from some attorney at law a certificate setting forth that the applicant is of good moral character and that he has regularly and attentively studied law during the period of two years previous to his application, and that he believes him to be a person of sufficient legal knowledge and ability to discharge the duties of an attorney and counselor at law; but any person residing in the State, or coming into the State for the purpose of making it his permanent residence, upon producing satisfactory evidence that he has studied law for the period of two years under the tuition of some attorney at law, and has been regularly admitted as an attorney and counselor at law in some court of record within the United States, or that he has been in the practice of law in some one of the States or territories of the United States during the period of two years, may be admitted to such examination upon producing satisfactory evidence that he is of good moral character. [55 v. 17, § 3. Rev. St. Sec. 560.]

NOTE BY THE CLERK.—The following form contains all that is necessary for the certificate mentioned in Rule XVI, Section 6:

CERTIFICATE.

I hereby certify, That _____ *is a citizen of the United States and of the State of Ohio; that he has resided in said State for one year last past; that he is over 21 years of age, of good moral character; that he has regularly and attentively studied law under my tuition for the period of two years previous to this application for admission; and that I believe him to be a person of sufficient legal knowledge and ability to discharge the duties of an Attorney and Counselor-at-Law, and would therefore respectfully recommend his admission to the bar.*

Dated at _____

Attorney-at-Law

Where the application is made by an attorney who has been admitted in some Court of record within the United States; in addition to evidence of such admission, the fact that he has studied law for the period required under some attorney, must be authenticated by the certificate of such attorney, whose signature, if unknown to the Court, must be authenticated by the certificate of the clerk, under the seal of the Court; and also that the certifier is such attorney in good standing at the bar. Where two years' practice is relied on as the ground for examination, such practice must be certified to by a judge of the Court, or an attorney in good standing at the bar, authenticated in like manner.

Ohio Law Journal.

COLUMBUS, OHIO, : : : JAN. 12, 1882.

NOTICE.

Those of our subscribers who have ordered Vol. 36 Ohio State Reports, and have not yet received the same will please send us their names at once. While awaiting the books, the ink in which our list is written was somewhat faded.

We publish this week a case of the greatest importance to those who dwell within the Virginia Military Land District in Ohio. The opinion, written by Circuit Justice Stanley Matthews, is an able presentation of the law of the case. It follows however, the masterly argument of Hon. Wm. Lawrence, counsel for plaintiff, which we regret we can not publish because of our limited space.

SUPREME COURT OF OHIO.

WILLIAM BELL, ET AL.

v.

ARTHUR B. McCONNELL.

December 13, 1881:

The double agency of a real estate broker, who assumes to act for both parties to an exchange of lands, involves, *prima facie*, inconsistent duties; and he cannot recover compensation from either party, even upon an express promise, until it is clearly shown, that each principal had full knowledge of all the circumstances connected with his employment by the other which would naturally affect his action, and had assented to the double employment. But when such knowledge and consent are shown, he may recover from each party.

Error to the District Court of Mahoning County.

The original action was brought by McConnell, a real estate broker to recover certain commissions claimed to have been earned in making an exchange for the defendants, now plaintiffs in error, of certain real estate, to wit: certain city lots, with one Augustus Neal, for certain other real estate, upon terms satisfactory to the defendants, upon an express agreement for commissions at the rate of three per cent. of the value of the property exchanged.

The defendant by answer, among other things, alleged that before the alleged employment by the defendants, the plaintiff had been employed by said Neal to sell or exchange a certain farm of said Neal, to wit: the same property given in exchange to defendants, upon such terms as might be approved for an agreed compensation at the rate of four per cent. of the value thereof; and that at the time said exchange was effected said Neal had no knowledge or information of

the alleged employment of the plaintiff by defendants.

The plaintiff, by reply, alleged, in effect, that said Neal, at the time said exchange was negotiated, had knowledge of his employment by the defendants.

On the trial testimony was offered by each party tending to prove the issue in accordance with the respective allegations; and thereupon the plaintiff requested the court to charge the jury as follows:

"That if the jury find from the evidence that said defendants employed said plaintiff to act as their agent in the exchange of the property mentioned and described in the petition for the farm of Mr. Neal, located in said township of Boardman, or employed him to aid and assist in such exchange, and agreed to pay him three per cent. commission on said property, and at the same time knew that said plaintiff was the agent of said Neal for the sale or exchange of said farm, and that he was acting as his agent, and that said defendant assented thereto and agreed to pay said commission, and that said Neal knew that said plaintiff was acting agent of said defendant in said exchange, and assented thereto, and agreed to pay said plaintiff the commission stipulated in the written contract of agency, said plaintiff would be entitled to recover in this case," but the court refused to charge the jury as above requested, and did charge as follows:

"That if you find that Neal employed plaintiff to sell or exchange his farm in Boardman for cash or property, and agreed to pay him for such services, and if while so employed, defendants Bell employed plaintiff to find a purchaser for their, defendants, city property, or one who would exchange country property for it, and if plaintiff's duty was simply to bring the buyer and seller together, and for that service to defendants agreed to pay plaintiff a fixed amount, and if plaintiff performed that service the defendants are bound in law to pay said amount so fixed, even though plaintiff was acting as agent for the party—in this case Neal—so introduced."

"But I say to you, if the contract between plaintiff and defendants was that plaintiff should sell for, or assist the defendants in selling or exchanging their property, and did so sell or exchange defendant's property, or assist them in selling it to or exchanging it with said Neal while he was also acting for Neal, or assisting him in the same sale or exchange, under a contract with said Neal for pay as part of said Neal for such service so rendered him, then plaintiff is not entitled to your verdict in this case, even though both Bells and Neal were aware of, and assented to said plaintiff's employment and acts in the premises."

Exceptions were taken to the refusal to charge as requested and to the charge given.

Verdict and judgment were rendered for the plaintiff. On petition in error the judgment of the court of common pleas was reversed, and this proceeding was prosecuted to reverse the judgment of reversal.

McILVAINE, J.

This case presents the single question: Can a real estate broker, who assumes to aid both contracting parties in making an exchange of real estate, recover compensation for his services from either, upon an express promise to pay, in a case where each principal had full knowledge of and assented to the double employment?

It has been decided (*Rupp v. Sampson*, 16 Gray 398, and *Siegel v. Gould*, 7 Lans. 177) and it is not doubted, that such broker may recover from both or either where his employment was merely to bring the parties together; and it is equally clear upon both principle and authority, that in case of such double employment he can recover from neither, where his employment by either is concealed from or not assented to by the other. Several reasons may be given for this rule. In law, as in morals, it may be stated as a principle, that no servant can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other. Luke 16, 13. Unless the principal contracts for less, the agent is bound to serve him with all his skill, judgment and discretion. The agent cannot divide this duty and give part to another. Thereupon by engaging with the second, he forfeits his right to compensation from the one who first employed him. By the second engagement, the agent, if he does not in fact, disable himself from rendering to the first employer the full quantum of service contracted for, at least tempts himself not to do so. And for the same reason, he cannot recover from the second employer who is ignorant of the first engagement; and if the second employer has knowledge of his first engagement, then both he and the agent are guilty of the wrong committed against the first employer, and the law will not enforce an executory contract, entered into in fraud of the rights of the first employer. It is no answer, to say, that the second employer having knowledge of the first employment should be held liable on his promise because he could not be defrauded in the transaction. The contract itself is void as against public policy and good morals, and both parties thereto being in *pari delicto*, the law will leave them as it finds them, *Ex dolo malo non oritur actio*.

The non-liability of the second employer having knowledge of the first employment has been maintained in the following cases: *Farnsworth v. Hammer*, 1 Allen 494; *Walker v. Osgood*, 98 Mass. 348; *Smith v. Townsend*, 109 Mass.; *Rice v. Wood*, 113 Mass.; *Bollman v. Loomis*, 41 Conn. 581; *Everhart v. Searle*, 71 Pa. St. 256; *Morrison v. Thompson*, 9 Q. B. (L. R.) 480. But in each of these cases it is strongly intimated, if not distinctly announced, that a recovery may be had by such agent, where he acted with the knowledge and consent of both principals. In *Lynch v. Fallon*, 11 Rhode Isl. 311, the same general doctrine is held, and it is said that a broker acting at once for both vendor and purchaser assumes a double agency disapproved of by law, and which, if exercised without the full

knowledge and free consent of both parties is not to be tolerated. The same in *Meyer v. Hanchett*, 43 Wis. 246, wherein the question whether such double agency is consistent with public policy, though exercised with the consent of both parties is left undecided; but it is decided that mere knowledge of such double agency, without actual consent on the part of the principals, will not entitle the agent to commissions.

The validity of such contracts of double agency, where all the principals were fully advised and consented to the double employment was more directly before the courts, and affirmed, in the following cases: 35 N. Y. Sup. Court R. 189; *Rowe v. Stevens*, 53 N. Y. 621; *Alexander v. N. W. C. University*, 57 Ind. 466; *Joslin v. Cowee*, 56 N. Y. 626; *Adams Mining Co. v. Senter*, 26 Mich. 73; *Fitzsimmons v. Southwestern Ex. Co.*, 40 Georgia 330; *Rolling Stock Co. v. Railroad*, 34 Ohio st. 450; *Pugsley v. Murray*, 4 E. D. Smith 245. See also note by Bennett to *Lynch v. Fallon*, 16 American Law Register 333.

Raisin v. Clark, 41 Ind. 158, holds the contrary doctrine, if knowledge and consent on the part of the first employer is to be regarded as fully proved. Other cases bearing more or less directly on the point might be cited; but enough are given to show a want of harmony in the decisions; yet we think the decided current of authorities is in favor of the validity of such contracts, where the both both consenting principals to such double agency is clearly proved.

We admit that all such transactions should be regarded with suspicion; but when full knowledge and consent of all parties interested are clearly shown, we know of no public policy, or principle of sound morality, which can be said to be violated. It seems to us rather that public policy requires that contracts, fairly entered into by parties competent to contract, should be enforced where no public law has been violated and no corrupt purpose or end is sought to be accomplished. True, such agent may not be able to serve each of his principals with all his skill and energy. He may not be able to obtain for his vendor principal the highest price which could be obtained, or for the purchaser the lowest price for which it could be purchased. But he can render to each a service entirely free from falsehood and fraud—a fair and valuable service in which his best judgment and his soundest discretion are fully and freely exercised. And in such case, such service is all that either of his principals contracted for. Undoubtedly, if two persons desiring to negotiate an exchange or a bargain and sale of property, they may agree to delegate to a third person the power to fix the terms, and no suspicion of a violated public policy would arise. It may be said that such third person is an arbitrator chosen to settle differences between his employers, an agency or office greatly favored in the law. And so it is. But what is the distinction between that employment and the one in the present case, which should cause the law to favor the former and abhor the latter? I can see none. True, in the case put, the com-

tracting parties deal directly with each other, and in the case at bar, their minds meet through the medium of a third person, in whose judgment and discretion they mutually repose confidence. His judgment and discretion are invoked by each to aid in fixing the terms of a contract between them. And after the terms are thus adjusted through the aid of their mutual agent, and ratified by the parties, in the free exercise of their own volitions, to hold that the relation between such agent and either of his principals is in violation of a sound public policy supposed to rest on some moral abstraction, would be a refinement in legal ethics too subtle for my comprehension.

Of course, to relieve such double agent from suspicion that inconsistent duties have been assumed, which *prima facie* will be presumed, it is necessary that it should appear knowledge of every circumstance connected with his employment by either should be communicated to the other, in so far as the same would naturally affect his action; but when that is done, and free assent is given by each principal to the double relation of the agent, the right of such agent to compensation cannot be denied on any just principle of morals or of law.

The refusal of the court of common pleas to charge as requested and the second proposition given, if not plainly in conflict with the views above expressed, were at least so susceptible of such construction, that the jury may have been misled. Hence, we think the district court did not err in reversing the judgment.

Judgment of district court affirmed.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

WILLIAM HOWARD, ADM'R &C.

v.

ALEXANDER H. BROWER

December 13, 1881.

1. A verbal promise in the alternative to compensate a party by will, either in *land or money*, is within Section 5 of the statute against frauds and perjuries.

2. Where the agreement sued on is within such statute, and it is fairly to be inferred from the petition that it is not in writing, the defense of the statute is available on demurrer.

3. A verdict cannot be regarded as a finding of the value of services as upon a *quantum meruit*, where the case is not submitted to the jury for such finding, but under instructions to assess the damages according to the terms of a void agreement.

4. Under the Act of April 18, 1870, (67 O. L. 118), husband and wife are competent witnesses for and against each other, except as to the matters therein specified. *Westerman v. Westerman*, (25 O. S. 500), approved and followed.

Error to the District Court of Clermont County.

The original action was brought in the court of common pleas by defendant in error, Alexander H. Brower, against the plaintiff in error Wm. Howard as administrator of John Kugler, deceased.

The substance of the cause of action as stated in the petition is as follows:

"The plaintiff further says that after he came of age the said John Kugler stated to the plaintiff that he could not do without his services in his large business; and that if plaintiff would continue with him in his business, he would pay plaintiff a reasonable salary, from year to year, and would also provide for plaintiff liberally out of his estate, by his last will and testament, at least to the amount of ten thousand dollars, with real estate or money.

That in consideration of said promise and agreement of the said Kugler, so made to the plaintiff after he became of age, he continued in the service and employ of the said Kugler in and about his said business of milling, distilling, dry goods, farming and stock raising, for many years, and up to his death in the year A. D. 1868. That said Kugler died intestate and without providing for said plaintiff, &c.

"That he did not in his lifetime provide for him the said sum of ten thousand dollars in money or real estate, or any part thereof, or any other sum in lieu thereof, nor has his administrator since his death; wherefore plaintiff asks a judgment for \$10,000 with interest from January 4th, 1868, and for costs."

The petition was demurred to and the demurrer overruled. The answer joined issue, and among other defenses set up the following:

"3d. The defendant further answering says, as administrator as aforesaid, that each and every one of the supposed said promises made by the said John Kugler in his lifetime, as set forth in the said amended petition of the plaintiff, are within the statute of frauds and perjuries of the State of Ohio, not being evidenced by any writing."

The following is the plaintiff's reply to this defense:

"2d. He denies that the promises mentioned in the third clause of said amended answer are within the statute of frauds and perjuries of Ohio."

On the trial among other exceptions, exception was taken to the ruling of the court admitting the wife of the plaintiff to be a witness in his behalf.

The court charged the jury, among other things, as follows:

"6th. The plaintiff is required in this case to entitle him to a verdict in his favor, to prove by a preponderance of testimony, that the agreement set forth in his petition, was made between himself and the said John Kugler, and he may prove this by any testimony that will show or tends to show such agreement, and the testimony bearing on this question of contract between Kugler and Brower, that has been submitted to you is for your consideration, and you will apply it to the case and determine whether or not a contract, such as is set forth in the petition, has been established before you substantially.

"If, however, you find from the proofs that Brower entered into the service of Kugler on the distinct agreement and in consideration that

Kugler would pay Brower a stated salary per year, and in addition thereto, that for his services he would provide for him in his will, the sum of \$10,000, in real estate or money, and that Brower did in fact render the service to Kugler and received from Kugler his stated annual salary, but Kugler died without providing any sum to pay such additional compensation to Brower, then the agreement to be valid need not be in writing, for part performance takes the agreement out of the statute of frauds.

"The issue now before you grows out of an alleged contract between the plaintiff and John Kugler, touching the services to John Kugler in his lifetime. It is that plaintiff alleges that he entered into and continued in the service of John Kugler, under an agreement on the part of Kugler, assented to by plaintiff, that as a compensation for such services of plaintiff he would pay him a fixed salary from year to year, and would at his death, give him in his will \$10,000 in real estate or money; that he did render the services from year to year and received the stated compensation from year to year, but that Kugler did not provide any compensation for him in his will, and that he is entitled to the sum of \$10,000 in part consideration of his services and for this, suit is brought, with interest."

The trial resulted in a verdict for the plaintiff in the sum of \$11,530. A motion for a new trial was made on the ground, among others, that the verdict was against the law and evidence; and the motion being overruled a bill of exceptions was taken embodying all the evidence and the charge of the court. Motion was also made in arrest of judgment, which was likewise overruled, and judgment rendered on the verdict.

WHITE, J.

Under the Code the original action is one for money only. Prior to the adoption of the Code, it would have been an action at law as contradistinguished from a suit in equity. The case is not one calling into exercise the equity powers of the court.

The first question is whether the contract sued on is within Section 5 of the statute of frauds and perjuries. S. & C. 659.

The statute declares that no action shall be brought upon any contract for the sale of lands or any interest in or concerning them, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

The contract sued on, and which the plaintiff avers he accepted and performed, is thus described in the petition:

"The plaintiff further says, that after he became of age, the said John Kugler stated to the plaintiff, that he could not do without his services in his large business; and, that if the plaintiff would continue with him in his business he would pay plaintiff a reasonable salary

from year to year, and would also provide for plaintiff liberally out of his estate, by his last will and testament, at least to the amount of \$10,000, *either in real estate or money.*"

Brown in his work on the statute of frauds, in speaking of contracts in which a party promises to do one of two or more things, statute applying to one of the alternative engagements, but not to the others, uses this language:

"It is manifest that of such alternative engagements no action will lie upon that one which, if it stood alone could be enforced as being clear of the statute of frauds, because the effect would be to enforce the other; namely, by making the violation of it the ground of an action." Brown on the Statute of Frauds, Sec. 152. And in *Patterson v. Cunningham* it is laid down that a promise being in the alternative to pay money or convey lands does not exempt it from the operation of the statute, 12 Maine, 506. See also *Crawford v. Morrell*, 8 John. 253; *Van Alstine v. Wimple*, 5 Cow. 162; *Goodrich v. Nichols*, 2 Root. 498. The principle of the rule is that where the contract is entire, no one part being severable from the other, and part of it is within the statute, the other part cannot be forced.

To constitute a cause of action on the agreement it was necessary to aver a breach of both alternatives of the promise, and as under the statute there could be no breach of the promise in respect to the land, there could be no cause of action on the promise in respect to the money.

It is fairly to be inferred from the averments in the petition that the agreement sued on was not in writing; and where such is the case the defense of the statute of frauds may be made available by demurrer. *Randall v. Howard*, 2 Black. U. S. 585.

The court, therefore, erred in overruling the demurrer to the petition. But if the objection had not appeared on the petition the judgment could not be sustained. The answer set up the statute as a defense, averring that the supposed promises sued on were not evidenced by any writing. The reply did not traverse this averment. True, it denied that the promises were within the statute; but this was the statement of a mere legal conclusion. It did not aver that they were in writing. If the reply had any effect it could only be that of a demurrer, and as such it could not be well taken.

The verdict cannot be sustained as a finding of the value of the plaintiff's services as upon a *quantum meruit*. The case was not submitted to the jury upon that view of the law.

The court charged the jury in effect, that to entitle the plaintiff to recover, he must prove the making of the agreement set out in the petition; that if such agreement was proved it was valid, and the rights of the parties were to be determined by its terms; but this precludes all idea of a finding by the jury of the value of the plaintiff's services as upon a *quantum meruit* in the absence of such an agreement.

The only remaining question we deem it necessary to notice is the ruling of the court in allowing the plaintiff's wife to be examined as a witness. The question arises under the act of April 18, 1870, (67 O. L. 113), and was decided in *Westerman v. Westerman*, (25 Ohio S. 500), in accordance with the ruling of the court below. It is contended by counsel for plaintiff in error that the decision in that case is wrong, and numerous authorities are cited to show the grounds at common law upon which husband and wife were excluded from being witnesses for or against each other. We do not question the correctness of these authorities: but the case referred to was decided upon the construction of the code and its amendments, which regulates the whole subject of the competency of witnesses in civil cases. We are still satisfied that the decision in *Westerman v. Westerman* is correct.

Judgments of the district court and of the court of common pleas reversed, verdict set aside, demurrer to the petition sustained; and cause remanded to the court last named.

DISSENTING OPINION BY.

JOHNSON, J.

I am unable to concur in the first point of the syllabus as applied to the facts stated in the petition and admitted by the demurrer.

It is alleged, in 1833 when plaintiff was fifteen years of age, his father hired him to Kugler till he came of age. In consideration of the services to be rendered, Kugler promised to support and educate him, and when he should arrive at majority Kugler was to set him up in business. This contract he performed, but instead of setting him up in business as he had agreed, Kugler stated to the plaintiff that he could not do without his service in his business, and if he would continue with him he would in addition to a reasonable salary from year to year, provide for plaintiff out of his estate, by his last will and testament *at least to the amount of ten thousand dollars, either in real estate or money.* This was in 1841. The plaintiff on his part agreed to this contract, and continued in his service until Kugler's death in 1868.

The breach alleged is, that Kugler neither provided by will for payment in money or in real estate, nor otherwise paid said amount. This action is to recover said sum of ten thousand dollars, with interest from the date of Kugler's death. This was a contract to pay at least ten thousand dollars in real estate or money. The option was in the promisor, he in terms bound himself to compensate the plaintiff at least to the amount of ten thousand dollars, but reserved the election of doing so in either of two ways. It was to be done by a will. He died intestate, nor did he elect which mode of payment he would adopt. Thus in contemplation of law, he elected not to pay in land and left the debt to be otherwise paid. The majority of the court now holds that inasmuch as one of the modes reserved by himself to discharge this obligation, to wit: payment in land, is within the statute of frauds,

therefore no action will lie to enforce the other alternative, to wit: payment in money though not within the statute, and though the contract has been fully executed by the plaintiff. While it is conceded the plaintiff may recover for the value of these services upon a *quantum meruit*, yet it is said he cannot sue on the alternative clause, not within the statute, because the other alternative is within the statute.

It must not be forgotten that this was a money contract for services to be rendered and which were rendered. The parties had fixed the value of these services. The option related only to the mode of payment so that at Kugler's death, he owed ten thousand dollars "at least" which he could discharge in one of two ways, either to provide in his will for a payment in money, or of land of that value. It was not a contract to devise any specific tract of land, but to pay ten thousand dollars in any real estate he chose that was of that value. If it had been in writing an action for a specific performance would not have lain because no tract of land was specified. For a breach of such a contract in writing, the promisee could only recover a money payment. Where a contract is *entire* in its various parts, the "disability of the plaintiff to recover on one of those stipulations manifestly results, *not from the fact that the statute happens to apply to the remainder*, but from the tenor of the agreement by which it has been shown to be the *intention of the parties*, that if performed at all, it is to be performed as a whole." *Brown on Statutes of Frauds Sec. 144.*

The reason for the rule is, not because the statute of frauds happens to apply to one stipulation, but because on its face the contract shows it was the intention of the parties that the whole contract should be performed, in other words that it is not divisible. When the reason of the rule ceases, the rule itself ceases. In the case at bar the intention was not to pay *twice*, nor, to do *two* things, in land and money, but in one or the other at his election to the amount of ten thousand dollars. If one alternative was not enforceable, the other was. To allow Kugler's estate to escape liability on this contract on the ground that the option he reserved to pay in land was not enforceable because not in writing, is making the statute an engine of fraud, rather than a means of preventing it. The opinion of my brother White relies on a citation from section 152 of *Brown on Statute of Frauds*. The author states as the reason for the rule, "that it is manifest that on such alternative engagement no action will lie on that one which if it stood alone could be enforced as being clear of the statute of frauds, because *the effect would be to enforce the other; namely, by making the violation of it, the ground of an action.*" The reason thus given clearly shows that the learned author is speaking of alternative propositions, *where the violation of one gives a right of action on the other*, and not of a contract to do one of two things at the promisor's option; when both are violated.

Goodrich v. Nichols, 2 Root 498, cited by the author to support the text, illustrates his meaning. That was an action to recover \$100 as a penalty alleged to be forfeited to plaintiff on a verbal contract to convey lands which he had refused to convey.

Here, the right to an action for the penalty depended on a breach of the contract to convey. As the contract to convey was void, the action could not be maintained, as it would be to make the breach of this void promise the ground of action. The case at bar is not analogous.

Here Kugler violated the contract to pay in money, a promise not within the statutes, as well as the one to pay in land. The right of action here, is not founded on the breach of the contract to pay in land, but for failing to pay in either way. This case therefore does not support the application made of the text, to the case at bar.

Neither does *Van Alstine v. Wimple*, 5 Cow. 162, also relied on. That was not the case of two alternative promises. The head note, which embodies the point decided, is, "If part of an entire promise be void by the statute of frauds, the whole is void," a principle not disputed.

Rice v. Peet, 15 Johnson, 503, so far from sustaining the majority, or the text cited, is an authority in support of the proposition, that a breach of a verbal contract within the statute of frauds, cannot be made the foundation of a right in favor of the other party.

That was a verbal agreement to exchange lands on which plaintiff delivered a note of a third person as a pledge to be forfeited, if he failed to comply, which note the defendant collected.

The suit was to recover the money collected on the pledged note. It was held he could recover, as the verbal agreement to exchange lands being void, there is no consideration for the promise that the note should be forfeited. No right of forfeiture arose from a refusal to exchange lands.

This case rests upon the same principle as *Goodrich v. Nichols*, *supra*, namely, that the breach of a verbal contract, within the statute, cannot be made the foundation of a right.

The only case cited, in which the facts and decision support the text relied on, is *Patterson v. Cunningham*, 12 Maine, 503. This decision is based solely on authorities cited, neither of which sustains it, as will appear from a learned discussion of those cases, in *Rand v. Mather*, 11 Cush. 1.

The leading case there cited, is *Lord Lexington v. Clark*, 2 Ventris. 223, which was assumed, to recover \$260 on a verbal contract to pay \$160, the existing debt of a third person, a promise within the statute, and also to pay future rents, not within the statute. It was held to be an entire agreement and the action is brought for both sums, "and indeed could not be otherwise without a variance from the promise."

So, *Chater v. Becket*, 7 Term R., 197, was where there there was a promise to pay the debt of an-

other, which is void, and also, to do some other thing. It was held that it was an indivisible contract which the plaintiff could not separate. Numerous cases might be cited of this character, but they utterly fail to establish this as the rule, where contracts are not entire, as where there is a promise to do one of two distinct things, one of which is valid.

On the other hand, it is well settled that a contract which is not an entirety, but consists of two or more independent stipulations or promises, capable of severance, one of which is invalid, that fact will not permit the enforcement of the other.

Ohio ex rel. Laskey v. Board of Education, 35 O. St. 519, was a contract to pay a debt, with lawful interest, and also a promise to pay usurious interest, all based on a single promise of the relator. It was held that the plaintiff could recover on the valid promise.

In *Widoe v. Webb*, 20 Ohio St. 435, it was held that "where, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for as much as is lawful, and void for the residue."

So, "if one branch of an alternative becomes impossible, so that the promiser has no longer an election, *this does not destroy his obligation*, unless the contract expressly so provides, but he is now bound to perform the other alternative." 2 Parsons on Contracts *157.

In *Stevens v. Webb*, C. & P. 60, it was held that if an agreement is in the alternative, and one branch cannot by law be performed, the party is bound to perform the other.

In *State v. Ex'rs of Worthington*, 7 Ohio Pr. 1, p. 171, it was held that an alternative contract to pay money or convey land in a certain event, is not discharged by the death of the promiser, rendering it impracticable to convey the land. This action was on the special contract to recover the money alternative. It was insisted there, as it is here, "that when a contract is in alternatives, one of which becomes impossible by act of God, the obligor is released from the discharge of the other." But the Court held otherwise, quoting from Pothier on Obligations, "where several things are due under an alternative, the extinction of one does not extinguish the obligation." The Court adds: "It would be indeed startling to the good sense of an honest man, if one who contracted to do one of two things, need to do neither if unable to do both."

To the same effect is *The State v. Collins*, 6 Ohio 26.

The text books say: "If the promise be to pay money at a certain time, or deliver certain chattels, it is a promise in the alternative; and the alternative belongs to the promiser. He may do either the one or the other, at his election; nor need he make his election until the time when the promise is to be performed; but after that day has passed without election on his part, the promiser has an absolute right to the money, and may bring his action for it." 2 Parsons on Contracts, *651 and note (O).

In support of the foregoing principles I cite

the following cases which are more or less directly in point:

Mobile Marine Dock Co. v. McMillen & Son, 31 Ala. 711.

Wood v. Benson, 2 Tyner 93, a leading case.

Wiley v. Shoemaker, 2 Green (Iowa) 205.

Townsend v. Wells, 3 Day 327.

VanHooser v. Logan, 3 Scam 389.

Exparte Littlejohn, 3 Mon., Dea & DeGex 182.

Choice v. Moseley, 1 Bailey 136.

Rand v. Mather, 11 Cush. 1. This case is valuable as a discussion of the cases, and the reasons for the distinction between entire and severable stipulations, where part is within and part without the statute. It fully supports the principle here claimed.

The conclusion reached, is: That when one verbally promises to pay a sum of money agreed upon, "*in real estate or in money*," at the promiser's election, on performance by the other of his part of the contract, and the time of such payment is supposed to pass without his making his election or performing either alternative of his promise, the other party having fully performed, the sum agreed on becomes payable in money, and an action on the contract to recover the money agreed on may be maintained, although the alternative to pay in land is within the statute of frauds.

[This case will appear in 37 O. S.]

CIRCUIT COURT, N. D., OHIO, W. D.

CHAMBERLAIN v. MARSHALL AND OTHERS.

Equity—Bill Quia Timet—Requisites of.—In order to maintain a bill quia timet, the complainant must have a clear legal and equitable title connected with possession, and the pretended title or right which is alleged to be a cloud upon his title, must not only be clearly invalid or inequitable, but must be such as may, either now or in the future, embarrass the real owner in controverting it.

The facts of the case, so far as material are as follows: On March 17, 1807, Robert Marshall, the ancestor of the defendants, entered a Virginia military warrant No. 1763, for one hundred acres, being entry No. 5275, which was surveyed and the entry and survey recorded in the Surveyor's office of the Virginia Military District at Chillicothe, Ohio, on November 23, 1823, and April 6, 1824. This entry and survey were for the first time returned to the Land Office in July, 1877, and a patent was issued January 25, 1878, in the name of the United States, duly signed by the President and countersigned by the Recorder of the General Land Office, granting the tract described to the defendants, as only heirs at law of Robert Marshall, deceased, who is recited therein to have been the assignee of Robert Alvery, who was assignee of Francis Turner, the soldier, whose service in the Virginia line on continental establishment, is declared to be the consideration of the grant, and the grant therein made purports to be in pursuance of the act of Congress, of August 10, 1790, and other acts of Congress amendatory thereto. The act aforesaid is entitled, "An Act to enable the officers and soldiers of the Virginia line on

continental establishment to obtain titles to certain lands lying northwest of the river Ohio, between the Little Miami and Scioto."

It appears from the records of the office of the Auditor of Logan County, that in the list of lands in that county, returned delinquent by the treasurer of the county for taxes for the year 1841, with the interest and penalty thereon, including the simple tax for the 1842, was this tract of land described as the property of Robert Marshall—who was the original as well as present proprietor—containing 100 acres in Perry township listed at 100 acres and delinquent as to \$11.32 tax.

Notice was given that the tract or so much thereof as necessary, would be sold at the Court House in said county on the last Monday in December (26th), by the treasurer.

It further appears by the same records under date of February 27th, 1843, that on December 26th, 1842, the county treasurer had sold the tract as above described to Jeremiah Asher, the said delinquent sale having been advertised according to law for four weeks in succession in the Logan Gazette, a newspaper published and printed in the town of Bellefontaine, in said county.

On May 20th, 1845, the auditor of Logan County executed and delivered a deed, which was duly recorded, conveying to Jeremiah Asher the tract so sold, described as 100½ acres of land and number of entry 5275, that was charged for taxation to Robert Marshall's name and situated in Perry Township. This deed recites that the treasurer of said county, on the last Monday in December, (26), in the year 1842, did sell according to the provisions of the Statute in that case made and provided to Jeremiah Asher, the said tract of land for the taxes, interest and penalty charged thereon amounting to \$8.37.5, which were paid by the purchaser and that more than two years had elapsed from the time of said sale, and the tract so sold had not been redeemed, and that the certificate of sale had been produced to him.

On August 6th, 1849, Jeremiah Asher sold and conveyed the tract to Eliza Ann Chamberlain, wife of William Chamberlain, by a deed duly executed and recorded.

In the fall of 1849, the grantees entered into actual possession of the tract, enclosed it, cleared it in part, built a dwelling upon it, cultivated and otherwise improved it. The possession has ever since been kept up by their successors in the title, the present complainant deriving title by several mesne conveyances from them. Since the fall of 1849, the possession of the claimant has been with that of his predecessors under color of title, adverse, open, notorious and uninterrupted. Prior to that time the tract was in forest, and not reduced to any actual occupancy.

On November 20th, 1879, the defendants in this suit commenced in this court their action at law against the complainant, to recover possession of the land in controversy.

The object and prayer of the bill in this suit is that the patent be cancelled, and perpetually to

enjoin the prosecution by the defendant of their action at law; that they be required to release and convey all claim to the land to the complainant, and to establish and quiet the title and possession of the complainant.

William Lawrence, of Ohio, for plaintiff.

Jeremiah Hall, for defendants.

MATTHEWS, Circuit Justice.

The claim of the complainant is, that he is in possession of the land, with a complete and perfect equitable title, as against the defendants, which he has a right to have established and quieted by the process of this court.

This claim is based on three grounds:

1. That the patent of January 25, 1878, is void, there being at that time no law in force authorizing its issue, and that consequently the naked legal title is outstanding in the United States.

2. That the tax title under which the complainant, and those through and from whom he derived title, claim, if not shown by the proof to be sufficient and valid, will, after long continued adverse possession, under such circumstances as are shown in proof, be presumed to be good.

3. That a similar presumption will arise that the original equity of Robert Marshall under his entry and survey, to a patent, was transferred and conveyed to the complainant or those under and through whom he derives title.

It is obvious that this bill cannot be supported as a bill *quia timet*, as known to the equity jurisprudence of Chancery Courts. In describing the grounds of that jurisdiction, the Supreme Court of the United States, in the case of *Phelps v. Harris*, 101 U. S. 376, say:

The questions, what constitutes such a cloud upon the title, and what character of title the complainant himself must have, in order to authorize a court of equity to assume jurisdiction of the case, are to be decided upon principles which have long been established in those courts. Prominent among these are, first, that the title or right of the complainant must be clear; and secondly, that the pretended title or right which is alleged to be a cloud upon it, must not only be clearly invalid or inequitable, but must be such as may, either at the present or at a future time, embarrass the real owner in controverting it. For it is held that when the complainant himself has no title, or a doubtful title, he cannot have this relief. "Those only," said Mr. Justice Grier, "who have a clear legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace, or dissipate a cloud on their title." *Orton v. Smith*, 18 How. 265; and see *Ward v. Chamberlain*, 2 Black 430, 444; *West v. Schembly*, 54 Ill. 523. *Huntington v. Allen*, 44 Miss. 654. *Stark v. Starrs*, 6 Wall. 402. And as to the defendant's title, if its validity is merely doubtful, it is more than a cloud, and he is entitled to have it tried by an action at law; and if it is invalid on its face, so that it can

never be successfully maintained, it does not amount to a cloud, but may always be repelled by an action at law. *Overing v. Foote*, 43 N. Y. 290. *Meloy v. Dougherty*, 16 Wis. 269. Justice Story says: "When the illegality of the agreement, deed, or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of courts of equity to direct it to be canceled or delivered up, would not seem to apply: For in such case there can be no danger that the lapse of time may deprive the party of his full means of defence; nor can it, in a just sense, be said that such a paper can throw a cloud over his right or title, or diminish its security; nor is it capable of being used as a means of vexatious litigation or serious injury." 2 Eq. Jur. Sec. 700, a. And the Supreme Court in that case cites with approbation from the opinion of the Supreme Court of Mississippi, in a case between the same parties, *Phelps v. Harris*, 51 Miss. 789, as follows:

"This jurisdiction of equity cannot properly be invoked to adjudicate upon the conflicting titles of parties to real estate. That would be to draw into a court of equity from the courts of law, the trial of ejectments. * * * The proper forum to try titles to land is a court of law, and this jurisdiction cannot be withdrawn at pleasure and transferred to a court of equity, under the pretence of removing clouds from title."

In the present case it appears from the bill itself that the complainant has not the legal title. The allegation is, that the patent purporting to have been obtained by the defendant from the United States, is void on its face *ab initio*, for want of authority on the part of the executive officers who have signed and issued it, and by virtue of a positive prohibition of an act of Congress. If so, it necessarily results that the legal title to the land in controversy never passed from the United States, and is still vested in it. It also and with equal certainty results, that there is no equitable estate in the land subsisting either in the defendant or the complainant; for the legislative declaration which makes the patent void is based upon a prohibition which takes away from the entry and survey, upon which the patent professes to be based, all legal effect, and restores the land to the public lands of the United States, precisely as if no entry, survey or patent had ever been made or issued. There is nothing left, therefore, to the complainant but a naked possession, which, as against the true owner, confers no right or title whatever, because time does not run against the sovereign; and to the defendant, a void patent, of no legal significance or weight whatever. The claims of the complainant, under his tax deed, and based on the presumption of a grant from the defendant of his equitable interest under the entry and survey, of course, cannot survive the extinguishment of the defendant's interest, both in equity and law. These claims of the complainant are derived from and through the previous title of the defendant, and being dependent upon it

must fall with it. The proposition, therefore, which sweeps away all title from the defendant, precisely as if none ever existed, as this proposition which avoids the patent does, necessarily leaves nothing in the complainant, but a naked possession, which however good it may be as a defence against any stranger without title, does not confer even the color of right as against the true owner.

It is true, that the bill claims, that an equitable title vested in Robert Marshall, by virtue of the entry and survey, that that equitable estate passed to and vested in the complainant by virtue of the tax deed, and the presumed grant thereof, and that only the patent is void. But a statement of the grounds on which it is claimed, and on which alone it can be claimed, that the patent is void, will show the impossibility of maintaining the existence of any such equitable estate, to vest in the complainant.

By the act of March 23d, 1804, entitled "An act to ascertain the bounhary of the lands reserved by the State of Virginia, northwest of the River Ohio, for the satisfaction of her officers and soldiers on continental establishment, and to limit the period for locating the said lands" (2 St. at large), in the second section thereof, it is enacted that all the officers and soldiers or their legal representatives who are entitled to bounty lands within the above mentioned reserved territory, shall complete their locations within three years after the passage of this act, and every such officer and soldier or his legal representative, whose bounty land has or shall have been located within that part of the said territory, to which the Indian title has been extinguished, "shall make return of his or their surveys to the Secretary of the Department of War, within five years after the passing of this act, and shall also exhibit and file with the said Secretary and within the same time, the original warrant, or warrants under which he claims, or a certified copy thereof, under the seal of the office where the said warrants are legally kept, which warrant or certified copy thereof shall "be sufficient evidence that the grantee therein named or the person under whom such grantee claims was originally entitled to such bounty land; and every person entitled to said lands and thus applying shall thereupon be entitled to receive a patent in the manner prescribed by law."

The 3d Section of the act is as follows:

"That such part of the above mentioned territory as shall not have been located, and those tracts of land within that part of the said territory to which the Indian title has been extinguished, the surveys whereof shall not have been returned to the Secretary of War, within the time and times prescribed by this act, shall thenceforth be released from any claim or claims for such bounty lands, and shall be disposed of in conformity with the provisions of the act entitled, 'an act in addition to, and modification of the proposition contained in the act entitled, an act to enable the people of the eastern division of the territory northwest of the River Ohio, to

form a Constitution and State Government, and for the admission of such State into the Union on an equal footing with the original States and for other purposes."

By these provisions of law, it will be perceived that to entitle any one to a patent for lands in the Virginia military reservation, as bounties for military services, it was necessary to locate them by an entry within three years after the passage of the act, and where, as in this case, the location had been made within that part of the territory to which the Indian title had been extinguished, to make return of the survey to the proper department, within five years from the passage of the act, and also within the same time make return of the original, or a certified copy of the original warrant; and it was only persons entitled to said lands and "thus applying" who were entitled to receive a patent.

This implied prohibition against the issue of a patent for such lands, to any other persons and under any other circumstances, is reinforced by the additional and unambiguous provisions of the 3d section. By the terms of that section, "all the lands within the reserved territory, that shall not have been located, and those tracts to which the Indian title has been extinguished, the surveys whereof shall not have been returned, within the time and times prescribed by the act, are thereby and thenceforth released from all claims for such bounty lands, and lapse to the United States as part of the public domain, free from that trust created by the grant from the State of Virginia, to be disposed of as otherwise required by law. Any patent therefore issued for any such, and based solely on the subsisting validity of the original entry and survey, not so returned within the limited time, is a patent issued by the officers of the government, not only without authority of law, but in express violation of law and against its positive provisions, and is consequently, null and void, and passes no title whatever.

It is further claimed that the times limited by the 2d section of the act of 1804, for making locations and returns of survey have been by several successive acts of Congress, renewed and extended. By the act of July 7th, 1838, (5 Stat. at large, 262), the time was extended to August 10th, 1840. That act provides that "all entries and surveys which may have heretofore been made within the said reservation, in satisfaction of any such warrants, on lands not previously entered or surveyed, or on lands not prohibited from entry and survey, shall be held good and valid, any omission heretofore to extend the time for the making of such entries and surveys to the contrary notwithstanding."

This act of 1838 was revived and continued in force, on August 19th, 1841, (5 Stat. at large, 449), until January 1st, 1844: in 1846 (9 Stat. at large, 41), until January 1st, 1848, on July 5th, 1848, (9 Stat. at large, 245), until January 1st, 1850, and on February 20th, 1850, (9 Stat. at large, 429), until January 1st, 1852. This is the last act by which the time was ex-

tended or authority given for making locations of Virginia military warrants on any lands within the reservation. The act of March 3d, 1855, (10 Stat. at large, 701), granted a further time of two years after the passage of that act, within which it should be lawful to make and return surveys and warrants or certified copies of warrants to the General Land Office, of lands which had, prior to January 1st, 1852, been entered within the Virginia military district; but this act does not affect lands which had been both entered and surveyed prior to January 1st, 1852. And the most recent enactment on the subject, the act of May 27th, 1880, provides (Sec. 2) that "all legal surveys returned to the land office on or before March 3d, 1857, on entries made on or before January 1, 1852, and founded on unsatisfied Virginia military continental warrants are hereby declared valid. "The result is that all lands in the Virginia military district, entered and surveyed prior to January 1, 1852," of which, however, at that date the surveys and warrants or copies thereof, have not been returned to the General Land Office, were and have ever since continued to be released from all claim by virtue of such entry, surveys and warrants; and that any patent issued therefore, purporting to be in pursuance of such extinguished claim, is without authority of law, in violation of its express provisions, and null and void. Such at least is the nature and necessary extent of the claim of the complainant, and this review of the legislation on the subject, on which that claim is based, has been made, not so much for the purpose of a decision as to its effect upon the validity of the defendant's patent, as to show, as it clearly does, that, if that effect is what the complainant claims, then it also takes from the complainant any right to insist that he has acquired and is now invested with any estate in the lands by virtue of his tax deed or any grant, actual or presumed, from the defendant, of his rights under the entry and survey. All such rights, on both parts, have equally come to naught by the same supposition.

"There is therefore no ground in equity for maintaining the present bill, as a bill to quiet the complainant's title.

It is argued, however, that this bill may be maintained upon the provisions of Section 5779 of the Revised Statutes of Ohio. It reads as follows:

"An action may be brought by a person in possession, by himself or tenant of real property against any person who claims an estate therein, adverse to him, for the purpose of determining such adverse estate or interest."

Prior to the adoption of this provision in the Code of Civil Procedure in this State, and under the provisions of a Statute regulating the practice in chancery, it was held by the Supreme Court of Ohio, that to maintain a bill *quia timet*, it was necessary that the complainant should have both the legal title and the actual possession of the real estate.

(Douglas v. Scott, 5 O. R. 194. Clark v. Hub-

bard, 8 O. R. 385. Thomas v. White, 2 O. St. 540). Although in Buchanan v. Ray's lessee, 2 O. S., 267, it was held that it might be maintained if the complainant had acquired a valid title merely by the length of his possession.

In the case of Ellsborough v. Buck, 17 O. St. 72, which arose upon the provision now in force, a bill was filed to establish a disputed boundary, and the objection was made that the defendant had been denied the right to a trial by jury. The objection was overruled on the ground that the plaintiff could not have obtained the relief sought by an action for the recovery of real property, and that the remedy provided by this provision, so far as applied to that case, was in harmony with the more ancient rules of equity jurisprudence, which gave relief, where recovery of possession is not asked, in cases where the controversy arises out of a confusion of boundaries.

[CONCLUDED NEXT WEEK.]

Digest of Decisions.

NEW YORK.

(Court of Appeals.)

BISHOP v. ALCOTT. Oct. 25, 1881.

Contract—Guaranty.—Plaintiff agreed to receive a certain interest in a ship in payment for his services as builder thereof, and defendant covenanted that such interest should pay to plaintiff a dividend to the amount of not less than twenty-five per cent. per annum for two years. Plaintiff conveyed his interest to other parties before the two years expired. *Held*, That he was only entitled to the dividends while he remained an owner, and that by his sales he conferred the right to receive the dividends upon his vendees.

MILLARD, v. THE MISSOURI, KAN. & T. R. R. Co., Oct. 25 1881.

Bar—Common Carrier.—Plaintiff was a passenger on defendant's train, and had with him besides his baggage, certain merchandise packed in boxes, for which he was obliged to pay an extra amount as freight. Both the baggage and merchandise were destroyed by fire in transit. In an action for the value of the baggage, the bill of particulars included the merchandise; but the complaint as to the merchandise was dismissed. In a subsequent action brought to recover the value of the merchandise, *Held*, that the former action was no bar.

THE TRENTON BANKING Co., v. DUNCAN. Oct. 4, 1881.

Estoppel—Laches.—A grantee is under no duty to record his deed; and in the absence of fraud or proof of circumstances tending to the conclusion of fraud, his failure to do so will not prevent him from asserting his legal title to the land as against creditors of his grantor.

Even if his grantors have held themselves out as owners of the property or been guilty of fraud, he is not chargeable with the consequences thereof, in the absence of knowledge on his part.

In an action by judgment creditors of a firm to estop a grantee of the firm from setting up a title to the property conveyed to him it appeared that at the commencement of their dealings with the firm they made no search of the records nor inquiry as to the title, and that an examination of the records would have shown that the firm did not own the property. *Held*, That the plaintiffs were guilty of laches and were not entitled to the relief sought.

Ohio Law Journal.

COLUMBUS, OHIO, : : : JAN. 19, 1882.

The *Pacific Coast Law Journal*, published at San Francisco, California, has found it necessary to advance its subscription to \$4.50 for six months, 1 vol., and \$9.00 a year. It was formerly \$3.50 for six months and \$6.50 for one year. Publishers of law journals find after short experience that the publication of journals of this kind is expensive; that they cannot be sustained at the nominal rates charged for a mere newspaper, upon which but comparatively little expense and labor is bestowed, deriving their support from the field of general advertising. Whoever undertakes to publish a *cheap* law journal either cheats himself or his patrons.—*Legal Adviser*, (Chicago, Ill.)

MAYORS OF CITIES PERFORMING MARRIAGE CEREMONY

The question as to the legality of Mayors performing marriages has recently been raised in this city. The present Mayor, Mr. Starkey, appears to be of the opinion that he has the right, and has performed the ceremony in at least two cases since he has been in the office. There are other persons who think that he has no authority for doing anything of the kind, and in this opinion the Attorney General of the State coincides. A party here recently wrote the latter officer, asking his opinion in the matter, and received the following reply:

COLUMBUS, O., Dec. 28, 1881.

DEAR SIR.—In answer to your favor of the 27th inst. I will say that I have heretofore given an opinion that Mayors are not authorized to solemnize marriages. My predecessor, Mr. Pillars, was also of this opinion. Very truly yours,

GEO. K. NASH,

Attorney General.

The law regulating the matter may be found in the Revised Statutes, section 6,385, which says:

"Any ordained minister of any religious society or denomination within the State duly licensed for that purpose; or any justice of the peace within his county; or the several religious societies, agreeable to the rules and regulations of their respective churches, may join together as husband and wife all persons not prohibited by law,"

This does not seem to include Mayors. Section 6,392 of the Revised Statutes says that if any person not legally authorized attempts to solemnize a marriage contract, he may be compelled to pay \$500 for the use of the county. The question arises, are those persons legally husband and wife who have been married by the Mayor?

In an interview with the Mayor this morning, he said that some of his predecessors had been in the habit of performing the marriage ceremony. He himself had done it in two cases, but as there was doubt about his authority he intended to give up that part of the business hereafter. He said he had consulted Judge Bradbury about it, who had informed him that the marriages he had performed would stand in law and could not be declared void.—*Gallipolis Exchange*.

INSURANCE BENEFITS.

COMMUNICATION BY SUPERINTENDENT MOORE ON THE SUBJECT—A MATTER OF INTEREST TO POLICY HOLDERS AND STOCK COMPANIES.

Colonel Charles H. Moore, State Superintendent of Insurance, is still engaged in the very commendable work of dealing out law and opinions to the managers of Mutual Aid Associations in different parts of the State. From the appended official letter it would seem that the Superintendent is about the only means of protection that the policy holders of Ohio have against fraudulent representations of certain companies. While by these communications and opinions, policy holders are put on their guard, the same information is of vast benefit to the honestly conducted companies and gives them also a chance so protect themselves. The principal point in this communication is in regard to policies being taken for the benefit of others than relatives or direct heirs of the one insured. The Commissioner decides that such a thing can not be done. The following explains itself and it is estimated that there are over five thousand similar policies to those referred to in the communication, held by parties in Ohio:

COLUMBUS, O., Dec. 24, 1881.

David Watson, Esq., President Ohio Mutual and Life Association, Bellefontaine, Ohio:

DEAR SIR—I have carefully examined the agreed statement of facts and papers submitted to me for my decision, in the matter of the claims of the heirs of James Brewer, deceased, against the Ohio Mutual Aid and Life Association, of Bellefontaine, on certificates Nos. 142 and 619, issued by said Association on the life of the said James Brewer, and payable to himself; and which certificates were each, on the respective days on which they were issued, assigned by the said Brewer to parties who were no relation to him.

In the agreed statement of facts it is set forth that the said James Brewer, in his application for certificate No. 142, answered question No. 10 falsely, by saying that he had never had any serious illness, and that in his second application, for certificate No. 619, which was made twenty-five days after the first one, he answered question No. 10 by saying that he had suffered a slight stroke of paralysis about two years before; and it is also set forth that the said Brewer

died about nine days after the taking of the second application.

I beg leave to submit the following decision, as requested by the parties:

The assignment of a certificate to a person not within the relationship to the insured named in the statutes, is unlawful, and the assignees of these certificates being no relation to the said Brewer, can claim no interest in the certificates. This is not quite clear from the terms of the statute itself, but any possible debate upon the subject has been closed by the decision of the Supreme Court in the case of the State *v. Mutual Relief Association*, 29 O. S. 399, the syllabus of which reads as follows: "Such associations are not authorized to provide for the payment of stipulated sums of money to persons other than the family, or heirs, of a deceased member."

Second—The question which still remains for consideration is, whether (assuming the invalidity of the claim of the assignees of the certificates) the family or heirs have any claims under these certificates.

The beneficiary named in the certificates is the insured himself; this is not a certificate in favor of his family or heirs. If the Association had the power to make such a contract of insurance, it would in this form inure to the benefit of the creditors of the insured, upon his death, in preference to the family or heirs; hence, it cannot be a certificate for the benefit of his heirs.

It was decided by the Supreme Court (29 O. S. 557) that the interest of a member of an Odd Fellows' Association did not pass by his will bequeathing *all* his property, but that the family took his interest under the rules of the Association.

This decision is directly in point. The certificates of Brewer being made in his own favor, and not for the benefit of his family, or heirs, are therefore void, and in my opinion the association can not be required to make assessments to pay the claims.

The above conclusion is reached irrespective of the question which arises upon the fact that the certificates were procured with intent to assign them, and that they were assigned upon the days of their issue respectively. This would render them void irrespective of other questions.

Third—Question ten having been answered falsely in the first application, the certificate issued in response to that application would be void by reason of the falsehood. I cannot say as a matter of law, that the fact that the Association received notice of the truth in the second application, would validate the first certificate, but this question is unimportant in view of the invalidity of the certificates upon other grounds. Yours very truly,

CHAS. H. MOORE, Supt.

It will be our endeavor to keep pace with the Legislature, as regards the passage of new Laws, amendments, &c. Nothing, as yet, has been done by that body.

SEPARATE ESTATE OF A MARRIED WOMAN—CHARGEABLE WITH HER OBLIGATIONS, EVEN AS SURETY FOR HER HUSBAND OR ANOTHER.

Having had occasion recently to give the subject above indicated, and collateral questions thereto pertaining, a thorough investigation, I arrived at the following result, as the law:

At common law, a married woman had no power, and has *now* no power, to contract so as to create a liability, either as against herself, or any interest which she might have in property.

Chancery, however, has long since furnished a different rule, and enlarged the powers and liabilities of married women as to their separate estate. 1 White and Tudor's Lead. Cases in Eq. 501 *et seq.*

We submit the following propositions as the correct doctrine, sustained both upon principle and abundance of authority.

I. That a married woman has the power to contract obligations so as to charge her separate estate in equity, with their payment. And this she may do whether it be for the benefit of her separate estate or not; and even to the extent of signing as security for her husband or another.

Vide, *Machier and Wife v. Burrough* 14 O. S. 519; *Phillips v. Graves*, 20 O. S. 317.

Levi v. Earl 60 O. S. 147.

Rice v. Railroad Co., 32 O. S. 380.

Avery v. Vansike, 35 O. S. 270, and *Williams v. Urmston*, 35 O. S. 296.

These are all of the decisions, by the Supreme Court of Ohio bearing directly on the foregoing proposition; and they are all fully sustained by authority in many of the other States and in England, which is cited in the several opinions. In *Phillips v. Graves*, 20 O. S. 371. *supra*, the first two points of the syllabus are:

"1. A married woman possessed of a separate estate in real or personal property, may charge the same with her debts, at least to the extent that such debts may be incurred for the benefit of her separate estate, or for her own benefit, upon the credit of her separate property.

2. Such power is incident to the absolute ownership of property, and is limited only by the terms of the instrument creating the separate estate, or by implication arising therefrom."

In this case, the question was thoroughly considered, and a very able opinion delivered by Judge McIlvaine.

The question also received most searching in-

vestigation in the last case above cited, (Williams v. Urmston, 35 O. S.) and the opinion prepared by Judge Boynton.

The first point in the syllabus is: "A married woman having a separate estate may charge the same in equity, by the execution of a promissory note as surety for her husband or another."

In the opinion the Judge says, on pages 300-1:

"The power of a married woman to bind her separate estate in equity, for the payment of a promissory note, on which she becomes a surety, although denied in Perkins v. Elliott, 23 N. J. Eq. 256, is sustained by a great weight of authority. It rests on the principle, now well settled in courts of equity, that as respects her separate estate, she is to be treated as a *feme sole* to the extent of her power of disposition over the same, and as fully capable of binding it by engagements entered into in respect to it, as if the common law disability of coverture were removed.

And, except in cases where she may bind herself at law, the principle applies to separate estates under the statutes, as well as to estates settled to her sole and separate use by deed or devise. Any engagement that she could enter into were she *sui juris*, and by which she could create a debt binding at law, she may in equity charge upon her separate estate, unless in so doing she exceed the limitation, if any there be, upon the *jus disponendi*; Pollock on Principles of Contracts, 73. Where this charge is made, her estate in equity becomes the debtor; and as courts of law deal only with the legal rights and liabilities of parties, and are therefore incapable to give relief where no legal liability has been incurred, courts of equity carry the intention into effect by subjecting the estate to the payment of the debt intended to be charged upon it."

II. That, where a married woman executes a promissory note, either as principal or surety, the presumption of the law is, that she *thereby intended to and did charge her separate estate with its payment*. And this intention to so charge her separate estate, she will *not be permitted to, and is estopped from denying*.

The 3d and 4th points in the syllabus in Phillips v. Graves, 20 O. S. are:

"3. Her intention to charge her separate property at the time the debt is incurred, may be either expressed or implied.

4. Such intention may be inferred from the fact that she executed a note or other obligation for the indebtedness."

In Levi v. Earl, 30 O. S. 147, and in Rice v. Railroad Co. 32 O. S. 380, the Supreme Court Commission held, that the intention to charge a married woman's separate property, will *not* be implied merely by her giving a note or other obligation.

But these decisions, upon this point, are directly overruled by the Supreme Court in that carefully considered case of Williams v. Urmston, (35 O. S. 296) before referred to.

The learned and able opinion of Judge Boynton, points out clearly wherein the Commission erred.

On page 301, the Judge says:

"In view of this power of a married woman having an estate to her sole and separate use, to bind it by her engagements, we think it justly follows, *that when she executes or joins her husband or a stranger, in executing a promissory note upon a valid consideration moving to her or him, an inference arises, where no fraud or imposition is shown, that she thereby intended to charge her separate estate with its payment*. That Levi v. Earl, 30 O. S. 147, is opposed to this view, is undoubtedly true; but a careful examination of that case has satisfied us that the conclusion reached, is not only against the weight of authority, but is founded on a misconception of the case of Johnson v. Gallagher, 3 De Gex. F. and J. 494."

And again the Judge says, on page 304:

"In this country, the authorities on the subject of the power of a married woman to create a charge against her separate estate as surety, seem to be divided into four classes:

1. Those that deny the power out and out.
2. Those that admit the power, but require the instrument, creating the debt to disclose the intent to charge, in express terms.
3. Those that hold the intent to bind the estate or to pay the debt out of it, will be presumed from the mere execution of a promissory note.
- And, 4th. Those that deny that such presumption or inference arises unaided by extrinsic proof.

The first of these classes has no bearing on the point under discussion, and the rule adopted in the second has never been recognized as the law of this State.

The question as between the other two, resolves itself into this: What inference is to be drawn from the act of a married woman, having an estate to her sole and separate use, in signing the promissory note of another, as surety, as respects her intention or purpose in so doing. In

view of the fact that in the act of signing, she incurs no legal liability, the question admits of but one rational answer, and that is, in the absence of proof showing fraud or imposition, *that she intended thereby to make the debt a charge upon her separate estate.*

Unless this inference is drawn, her act becomes wholly vain and frivolous, and entirely destitute of a purpose or a meaning."

That such is the natural implication from the act of signing, the learned Judge proceeds to show, has been distinctly affirmed in numerous cases.

See, *Bell v. Keller*, 13 B. Monroe, 381.

Cowles v. Morgan, 34 Ala. 585.

Burnett v. Harpes, Ex. 25 Gratt, 481.

Banks v. Taylor, 62 Mo. 338.

Deering v. Bogle, 8 Kan. 523.

Wicks v. Mitchell, 9 Kan. 80.

Story's Eq. Sec. 400, and 1 Bish. on married women, Sec. 873.

On page 306 of same case it is further observed:

"Her liability, or rather that of her estate, does not depend on whether or not the debt incurred on its account is beneficial to her or otherwise. If made, and no fraud or imposition is shown, the court cannot refuse relief from the mere fact that the engagement entered into proves unprofitable or injurious. It follows from this result, that *Levi v. Earl*, *supra*, and *Rice v. Railroad*, 32 O. S. 380, in so far as they are in conflict with the principle upon which the present case is determined, must be overruled."

Upon the proposition, that she cannot be permitted to deny this intention to charge her separate estate, when she contracts, in any manner, an obligation, the case of *Avery v. Van Sickle*, 35 O. S. 270, is directly in point.

In that case, suit was brought upon a promissory note for \$1,000 executed by Avery and wife, to subject the separate estate of the wife to the payment of the note.

Mrs. Avery testified on the trial of the case, that at the time the note was given, there was no agreement that her separate property should be charged with its payment; and that *she had no intention of so charging it*. It further appears that at the time the note was made, that a mortgage had been executed to secure it, on premises which had been exhausted upon the foreclosure of the mortgage.

In disposing of the case the Court use this language, Judge Boynton delivering the opinion:

"The statement of Mrs. Avery as a witness, that she had no intention to charge her separate estate, *was incompetent. Her engagement was in writing, and could not either in its term or its inferences, be contradicted or varied by parol.*

Her intentions must be gathered from the instrument executed, aided by the circumstance under which it was made. The remark in *Phillips v. Graves*, 20 O. S. 387, that if a writing is not necessary to evidence the intention to charge, it may be shown by parol, was not intended as an intimation that in this class of cases, parol evidence is competent to vary the terms or legal effect of a written instrument. But where the engagement is neither in writing, nor required to be, parol evidence is admissible to show what the intention was."

The 5th point in the syllabus of that case is:

"In such case, the wife will not be permitted to testify that she had no intention to charge her separate estate with the payment of such note."

The doctrine of estoppel also, would preclude a married woman from denying that she intended to charge her separate estate with the payment of a promissory note signed by her, where there was no fraud or deception in the making of the note.

The doctrine of estoppel by conduct, can be thus stated:

That a party will be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and which did so influence it when such denial will operate to the injury of the latter.

Estoppel is clearly discussed by Judge Scott in his opinion in *Morgan v. Spangler*, 14 O. S., page 119, and also in *Beardsly v. Foot*, 14 O. S. 416.

III. This obligation so contracted by a married woman, and which becomes a charge on her separate estate, can be enforced against her separate estate, alone in equity, and is more in the nature of a proceeding *in rem*, than *personam*.

This results from the fact, that at law she cannot contract a liability. It is her separate estate alone that enables her to contract an obligation; which obligation becomes a charge upon said separate estate. Where this charge results, her estate in equity, becomes the debtor, and the debt (if it can be so called), must be enforced in equity.

This position is sustained by all the cases in Ohio, before cited.

IV. As to what constitutes the *separate estate*

of a married woman in Ohio. the law may be stated thus:

That in addition to the *separate estate* arising from specific settlement, by the act concerning the rights of married women, passed April 3, 1861, (58 O. L. 54), as amended March 23, 1866, (63 O. L. 47), the *general estate* of a *feme covert*, belonging to her at marriage, and which may be acquired or come to her after coverture, whether legal or equitable, together with the rents and issues thereof, constitutes her *separate property*. See *Levi v. Earl*, 30 O. S. 147.

ISAIAH PILLARS,

Lima, Ohio.

CIRCUIT COURT, N. D., OHIO, W. D.

CHAMBERLAIN v. MARSHALL AND OTHERS.

[CONCLUDED.]

In *Collins v. Collins*, 19 Ohio St. 470, the court speaking, by Welch, J. said:

"As a general rule, the bill of peace could not be maintained unless the plaintiff had first established his right at law. One exception to this general rule was where the parties were so numerous or set up their several claims in such form as to render a trial of the right at law impracticable. Another exception contended for, but generally disallowed by the chancellor, was where the plaintiff was in possession and the defendant failed to bring any action, the plaintiff having therefore no opportunity to establish his right at law. As I understand the decision of this court in *Douglass v. McCoy*, 5 O. 522, it was to supply this precise omission that our several statutory provisions on the subject were enacted. These provisions are found in the acts of 1810, 1824 and 1831, (Chase's Stat. 687, 1278 and 1697), substantially as in the 557th section of the Code, with the difference that by the latter, possession alone, instead of legal title and possession, is declared to be a sufficient basis for the action. The only effect of this provision in the Code is to substitute the plaintiff's possession for the establishment of his right by trials at law. In all other essentials the remedy by bill of peace remains the same as under the old practice."

In the most recent case in the Ohio reports on the question (*Rhea v. Dick*, 34 O. S., 420,) it was decided that under an amendment which affected the original section, a person in possession might compel a litigation as to his title with an adversary, claiming only an estate in remainder or reversion, or contingent upon a future event, and not adverse to the plaintiff's right to *present possession*; and the court quotes with approval from the opinion of the Supreme Court of California, in the case of *Joyce v. McAvoy*, 31 Cal. 274, in construing a similar statute of that State, as follows:

"The statute giving this right of action to the

party in possession does not confine the remedy to the case of an adverse claimant setting up a legal title, or even an equitable title, but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damaged by the assertion of an outstanding title already held or to grow out of adverse possession. The plaintiff has the right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation, or a loss to him of the property."

In the same case from which this citation is taken (*Rhea v. Dick*), the Supreme Court of Ohio adds as follows:

"Cases may arise under our statute in which the parties may have a constitutional right to have the issues of fact tried by a jury. Should such cases arise, the court is competent to authorize such trial, either in the case or by requiring a separate action to be brought for the purpose before the rendition of the final decree."

The case of *Stark v. Starrs*, 6 Wall. 402, was a suit in equity, begun in the State Courts of Oregon, upon a similar statute, providing that "any person in possession of real property may maintain a *suit in equity* against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest." In commenting on and construing that enactment, Mr. Justice Field said: "This statute confers a jurisdiction beyond that ordinarily exercised by courts of equity, to afford relief in the quieting of title, and the possession of real property. By the ordinary jurisdiction of those courts a suit would not lie for that purpose, unless the possession of the plaintiff had been previously disturbed, by legal proceedings on the part of the defendant, and the right of the plaintiff had been sustained by successive judgments in his favor. *Shepley v. Rangeley*, Davis 242; *Proonshe v. Newenham* 2 Seh. and Lef. 208; *Curtis and Sutter*, 15 Cal. 257. * * * By the statute in question it is unnecessary, in order to obtain this interposition of equity, for the party in possession to delay his suit until his possession has been disturbed by legal proceedings, and judgment in those proceedings has passed in his favor. It is sufficient that a party out of possession claims an estate or interest in the property adverse to him. He can then at once commence a suit, and require the nature and character of such adverse estate or interest to be set forth and subjected to judicial investigation and determination, and that the right of possession, as between him and the claimant, shall be forever quieted.

"We do not, however, understand that the mere naked possession of the plaintiff is sufficient to authorize him to institute the suit, and require an exhibition of the estate of the adverse claimant, though the language of the statute is that 'any person in possession by himself or tenant may maintain' the suit. His possession

must be accompanied with a claim of right, that is, must be founded upon title, legal or equitable, and such claim of title must be exhibited by the proofs, and perhaps in the pleading also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest."

In that case the plaintiff's title consisted of a patent purporting to have been granted by the United States. From a consideration of the laws in force applicable to the case, the court determined that the patent was void, as having been issued without authority of law. Mr. Justice Field then proceeds as follows: "His position (the plaintiff's) is therefore reduced to that of a mere possessor without title. Such possession is entirely sufficient to justify the interposition of equity for the determination of the defendant's title, even under the very liberal act of Oregon. The plaintiff must first show in himself some right, legal or equitable, in the premises, before he can call in question the validity of the title of the defendant."

The complainant in this case, we have already seen, is in a similar category. His denial of the validity of the defendant's claim of title takes from himself all title, which otherwise he might claim, except that based upon mere naked possession.

The remedy given by the section of the Revised Statutes of Ohio, under present consideration, is "an action"—meaning the universal civil action of that code, which has taken the place of all common law actions, and the suit by bill in chancery. At the same time the distinction in the substance of common law, and equitable rights is still maintained. In *Dixon v. Caldwell*, 15 O. S. 413, it is said: "The distinction between legal and equitable rights exists in the subjects to which they relate, and is not affected by the form or mode of procedure that may be prescribed for their enforcement. The code abolished the distinction between actions at law and suits in equity, and substituted in their place one form of action; yet the rights and liabilities of parties, as distinguished from the mode of procedure remain the same since, as before, the adoption of the code." To the same effect is *Chinn v. Trustees, etc.*, 32 O. S. 236. In *Hager v. Reed*, 11 O. S. 635, the court held that the action of the code will be regarded and treated as a civil action at law or a civil action in chancery, according as the facts alleged, and the relief proper shall determine. While, therefore, there may be no reason why the remedies, although now given this statute, may not be enforced in the courts of the United States, there still remains in each case the question whether it shall be by action at law or suit in equity; for in these courts the formal distinction in procedure is maintained. Indeed, there are fundamental constitutional reasons which require that common law rights of action shall not be transferred to the jurisdiction of chancery process. While it may be true, therefore, that Section 5779 of the Revised Statutes of Ohio would authorize

the complainant, under the circumstances shown in this case, to commence an action for the purpose of determining the adverse estate or interest in the land in controversy, claimed by the defendant, the question whether that action shall be by a bill in chancery on the equity side of the court must depend on the other question, whether he has or has not a complete and adequate remedy at law. If the rights in controversy are legal rights as distinguished from equitable, and if there are no considerations of an equitable nature, applicable to the case, and which it is necessary to apply in order to prevent a failure of justice, then the conclusion seems to be required that the remedy must be sought by an action at law, and not by a suit in equity.

In the present case there seems to be no necessity for a resort to equity, and no special considerations to justify it. The defendant had already brought his action at law to try the very matters the complainant seeks to put in issue in this suit; so that there was no danger of injury to the plaintiff in apprehended loss of evidence, or otherwise, from any unreasonable or unconscientious delay on the part of the defendant. The questions to be decided are questions of law, and every consideration urged or that can be urged in this form of proceeding, will be equally available in the defence of the pending action at law.

If by reason of the acts of Congress which have been cited, and the facts admitted in respect to the entry and survey of Robert Marshall, the patent issued to his heir-at-law in 1878 is null and void, as claimed, then that patent on which alone the defendant's title at law rests, will be of no avail as a ground for the recovery of the possession of the land in the action brought for that purpose. In *Simmons v. Wagner*, 101 U. S. 260, the Supreme Court of the United States decided that a patent issued without authority of law was void, and could not be used as evidence in ejectment even against one in possession without title. The Chief Justice said in that case:

"The sale to Mecke and patent thereon to Simmons, more than thirty years afterward, were null and void, and conveyed no title as against Russell and his assigns. It is of no consequence whether the assignees of Russell could get a patent in their own name or not. After the certificate issued the lands were no longer a part of the public domain, and the authority of the officers of the government to grant them otherwise than to him or some person holding his rights was gone. The question is not whether Wagner, if he was out of possession, could recover in ejectment upon the certificate, but whether Simmons can recover as against him. He is in a situation to avail himself of the weakness of the title of his adversary, and need not assert his own." In *Polk's lessee v. Wendall*, 9 Cranch, 99, Chief Justice Marshall said: "But there are cases in which a grant is absolutely void, as when the State has a title to the things granted, or where the

officers had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law." This doctrine was re-affirmed in the case between the same parties in 5 Wheat. 303.

The decision in *Hoffnagle v. Anderson*, 7 Wheat. 212, is not inconsistent with this doctrine, for in that case the patent was not void for want of power to issue it, but voidable only for irregularities in the exercise of the power.

In *Ladegray v. Roland*, 2 Howard, 590, the court said: "The President could give no such power, or authorize the officers of the land office to issue patents on such sales. They are as void as the sales, by reason of their collision with the treaty."

In *United States v. Stone*, 2 Wall. 535, Mr. Justice Grier said: "Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or when another party has a higher equity, and should have received the patent. In such cases, courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. On the other hand, if the patent is valid at law, but voidable in equity, it must be by reason of some superior equity on the part of the complainant that entitles him to charge it with a trust in his favor, or to restrain the defendant from an inequitable use of it to his injury: but the complainant asserts none such now in this proceeding, and insists on treating it as utterly without any legal force whatever. If the complainant should admit that the effect of the patent was to put the legal title in the defendant, and allege equitable grounds, whereby it would inure to his benefit, or grounds on which it should be cancelled, as having been obtained in fraud of his equitable rights, there would be place for the exercise of equitable jurisdiction; but the controversy as he makes it, on the bill and proof, is a contest between adverse claims of a purely legal nature. Such a controversy is only to be settled in a court of law according to the principles and methods, and under the guarantees of the common law.

It follows that the bill must be dismissed, but of course without prejudice to the rights of either, capable of being enforced in the pending action at law, and also without prejudice to the complainant's right to file a bill in equity hereafter, in the event it should be decided in the action at law that the defendant's patent is valid to pass to him the legal title, to charge him as trustee, and compel a conveyance on any equitable ground the complainant may be able to establish.

MATTHEWS, Circuit Justice.

EMPLOYMENT--TERM.

SUPREME COURT OF OHIO

SILAS H. BASCOM

v.

JOHN SHILLITO.

January 10, 1882.

Where one rendering service for another under a monthly employment, says to his employer that he desires to have his employment made more permanent, and thereupon a specified amount per year is agreed upon, payable in semi-monthly instalments, a hiring for a year may be inferred. Express words that the employment should continue for a year are not essential.

Error to the Superior Court of Cincinnati.

Silas H. Bascom brought suit in the Superior Court of Cincinnati, against John Shillito & Co., upon an alleged contract of employment of the plaintiff, as a clerk for one year, and his discharge without cause before the end of the year. The defendants admitted in their answer the employment and discharge, but insisted that the hiring was by the month and not by the year, and that the plaintiff was paid, in semi-monthly instalments, in full for five months, at the expiration of which time he was discharged. The jury found for the defendants, judgment was rendered on the verdict, and the court in general term rendered a judgment of affirmance. The record contains the pleadings, testimony, charge requested and refused, and charge given. This petition in error was filed to reverse the judgments.

Moulton, Johnson & Levy, for plaintiff in error.

Smith's Mas. & Ser. * 41; Addison on Con. (7th ed.) 684; Story on Con. (4th ed.) § 962 c.; 1 Parsons on Con. 518; Smith's Mer. L. (by H. & G.) 532; Bleeker v. Johnson, 51 Howard, 380; Franklin Mining Co. v. Harris, 24 Mich. 115; Patterson v. Suffolk Man. Co., 106 Mass. 56; Farwell v. Cash, 5 B. & Ald. 904. Wood on Mas. & Ser. Sec. 134, commented on

Matthews, Ramsey & Matthews, for defendants in error.

Frazer on Mas. & Ser. 28; Chitty on Con. 841; Leake's Dig. Con. 673; Smith's Mas. & Ser. 46, 48; 4 Wait's Act. & Def. 396; 2 Parsons on Con. 32; Butterfield v. Marlen, 3 Car. & K. 163; Williams v. Byrne, 7 A. & E. 177; Baxter v. Nurse, 6 M. & G. 935; Fairman v. Oakford, 5 H. & N. 635; Coffin v. Landis, 46 Pa. St. 426; Peacock v. Cummings, Ib. 434; Beach v. Mullen, 34 N. J. L. 343; De Brair v. Miniurn, 1 Cal. 450; Kansas P. R'y Co. v. Roberson, 3 Col. 142; Stark v. Palmer, 2 Pick. 267; Olmstead v. Beale, 19 Pick 528; Prentiss v. Ledyard, 28 Wis. 131.

OKEY, C. J.

From the record it appears that the plaintiff was employed as entry clerk for the defendants, merchants in Cincinnati, in the fall of 1873, and remained in such employment for six months, when he voluntarily left it. He was again em-

ployed by them in the fall of 1874, at a salary of seventy-five dollars a month. In February, 1875, his compensation was, on his application, increased by the defendants, acting through Mr. Colclesser, their superintendent, to eleven hundred dollars a year, such new service to commence March 1, 1875. Under this new arrangement, he remained in the service of the defendants until July 31, 1875, when he was discharged. During all the time he was in the defendants' employ, he received payment for his services semi-monthly as rendered, and the amount paid to him on July 31, 1875, was in full for such services to that time. This suit was brought October 1, 1875, and, of course, if there was a valid contract for a year, the plaintiff was entitled to recover. (7 Am. L. Reg. N. S. 148.)

The plaintiff testified that when he applied for such increase of salary, he stated that he wanted his situation made more permanent; but Mr. Colclesser testified that he had no recollection that such statement was made. There was no other conflict in the testimony, and the above statement contains the substance of all the evidence.

The court properly charged the jury, "that the issue presented was purely one of fact; that it was for the jury to say whether that which took place between the parties, as detailed by the evidence, constituted a hiring for a year; that it was a question, to be determined with reference to all the circumstances and facts of the case; that the jury should consider the previous relationship of the parties, all that was said between Colclesser and plaintiff at each interview, and determine from these and all the circumstances whether it was the intention of the parties that there should be a yearly hiring." But the court further charged the jury that "a contract for a year will not be implied unless it was definitely agreed upon between the parties;" and "if the jury find that nothing was said as to the duration of the service, the defendants were entitled to dissolve the relationship between the plaintiff and defendants at the end of any month." Furthermore, the court refused to charge, as requested by the plaintiff, that "if the jury believe from the testimony that the plaintiff stated to Mr. Colclesser that he desired his employment to be made more permanent, and that upon this statement an agreement was made to pay the plaintiff eleven hundred dollars a year, then the jury have a right to infer that this constituted a contract for a year."

The rule that from the mere fact that a servant has been hired, the law will presume an employment for a year, is by no means inflexible even in England, and perhaps a hiring for a shorter period will be more readily inferred in this country than in England. There, as well as here, proof of the periods at which payments were to be made, the character of the employment, custom, the course of dealing between the parties, or other fact which may throw light upon the question, is admissible. But in this case the facts recited in the request to charge

were in harmony with the presumption, and we entertain no doubt that the plaintiff was entitled to such charge.

The alleged verbal contract was made in February, and was to continue for one year from the 1st of March, but payments were to be made semi-monthly. If this was an agreement within the statute of frauds (as to which see *Abbott v. Inskip*, 29 Ohio St. 59; *Cawthorne v. Cordney*, 13 C. B. N. S. 406; *Banks v. Crossland*, L. R. 10 Q. B. 97; *Evans v. Roe*, L. R. 7 C. P. 138), the objection was not made in the pleadings nor on the trial, and will not be determined here (*Townley v. Moore*, 30 Ohio St. 184); and whether the defendants desire, or should be permitted, to make the objection hereafter, are questions not before us for decision.

Judgment reversed.

[This case will appear in 37 O. S.]

Digest of Decisions.

WISCONSIN.

(Supreme Court.)

KAVANAGH AND ANOTHER v. O'NEILL, Oct. 18, 1881.

1. *Accommodation Note by a Married Woman.*—A note for the debt of another, signed by a married woman merely as surety or accommodation maker, cannot be enforced against her in an action at law.

2. Whether, in a suit in equity, the court may infer an interest to charge her separate estate from the mere fact of her having executed such contract, *quære*.

3. It is error to allow an amendment of the complaint, changing the action from one at law to one in equity, against the defendant's objection.

KLUENDER AND ANOTHER v. FENSKE AND ANOTHER, Oct. 18, 1881.

Agent buys land and takes deed in his own name.—1. Where A., occupying a confidential relation to B., is entrusted by B., with money to buy lands, and on making such purchase, and paying the consideration from the money so furnished, takes the deed to himself, but in the assumed surname of B., it must be presumed that he took such conveyance to himself by mistake or inadvertence, and without B.'s knowledge and consent, or in fraud or violation of the trust so imposed.

2. One who claims that the money so furnished was in fact a loan, a gift, or advancement, has the burden of proving it.

3. One claiming title as devisee of A., in such a case, is not entitled to the protection of a *bona fide* purchaser for a valuable consideration, especially where, at the times of the making of the devise and of A.'s death, B. was occupying the premises with his family as a homestead.

BUTLER v. KIRBY, Oct. 18, 1881.

Contract—Wages.—1. In an action for a balance due on a contract for wages, where there is no dispute about the amounts or times of the payments actually made, but only as to the amount of wages which plaintiff was to receive, there is no error in excluding defendant's books containing entries of the payments, the evidence being immaterial.

2. Services, part of which were rendered to a firm of which defendant is the surviving partner and the other part, under the same contract, to defendant alone, may be sued upon as a single cause of action.

3. Where one employed by the month, and entitled to his wages at the end of each month, fails to collect

them, and continues in such employment by the month for more than six years, that part of the wages which accrued more than six years before suit, is barred by the statute.

4. In such a case, the monthly balances being readily ascertainable by computation, plaintiff is entitled to interest on each balance from the time when it accrued.

ENOS v. COLE. Nov. 3, 1881.

Bailee.—1. A bailee cannot acquire title to the property adverse to that of his bailor through a tortious seizure and sale of the property by a third person.

2. Money paid by the bailee at such a sale, without authority from the bailor, cannot be recovered from the latter.

3. The property having returned to the bailee in such a case, while the bailor might perhaps maintain an action of *trespass* against the person who seized and sold it, and recover therein at least nominal damages, he cannot, without proof of actual damage, maintain an action against such third person as for a *conversion*, and recover even nominal damages therein.

4. It seems that, while in general a refusal to award nominal damages to a party entitled thereto is no ground for a reversal of the judgment, (*Hubbard v. W. U. Tel. Co.* 33 Wis. 558, and other cases in this court there cited,) this rule would not obtain where such judgment would carry costs.

PHOENIX INS. CO. v. BADGER. Nov. 3, 1881.

Evidence—Fire Insurance.—1. It is only when the admission of improper evidence may have prejudiced the appellant that it is ground of reversal.

2. A witness cannot be asked whether he had made an appointment to meet other persons at a certain time for the purpose of corroborating his testimony that he had not agreed to meet defendant's agent at that time; but he may be asked that question to *rebut* the agent's testimony that the agreement to meet other persons was for a different time.

3. The fire insurance policy in suit provides that "if differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such damage, but shall not decide the liability of the company under the policy. It is furthermore mutually agreed that no action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court until an award shall have been obtained fixing the amount of such claim in the manner also provided."

Held—

(1) That this provides for an award only in case of a difference as to the amount of a loss.

(2) That, as an arbitration might have been and was not demanded by the insurer, the assured may maintain an action on the policy without alleging an arbitration.

4. Such agreement as to arbitration, being collateral to the agreement to pay the loss, does not oust the courts of jurisdiction to enforce the latter agreement.

COOK ET AL. v. McCABE. Nov. 3, 1881.

Contract—Damages.—1. When there was not an absolute and indivisible contract to build a complete house for a specified sum, but only a contract to do a part of the work and furnish a part of the materials, the remainder to be otherwise provided for, from time to time, by the land-owner, (although the price was a fixed aggregate sum, and no payment was to be made until after the house was completed,) and the part built was destroyed by fire before completion of the whole, and was not restored by the land-owner, *held*, that the contractor might recover for work and materials actually done and furnished by him, especially where the land-owner had treated the house as his own by procuring insurance thereon and receiving the insurance money.

2. The measure of the contractor's damages in such a case is *prima facie* a *pro rata* share of the contract price.

3. Under an agreement to pay a certain sum on the completion of work, and the remainder of the price within 60 days thereafter, without interest, a further provision that if such remainder is not paid within six months after the work is completed, a specified rate of

interest shall be paid thereon, does not prevent the debt from falling due at the end of the 60 days.

4. Where the trial court, upon the undisputed evidence, might have directed a verdict for the respondent for the full amount awarded him by the judgment, the fact that a reference for trial was improperly ordered without appellant's consent, is not ground of reversal.

NEW YORK.

(Court of Appeals.)

HOFFMAN v. N. Y. C. & H. R. R. Co. Nov. 22, 1881.

Railroad Companies—Negligence—Practice.—The removal of trespassers from the cars is within the implied authority of the company's servants on the train, and the fact that they acted illegally in removing a party while the train was in motion does not exonerate the company.

A question on cross-examination of a witness for defendant as to his relationship with an officer of defendant is admissible in the discretion of the judge.

A statement by the judge in his charge that plaintiff was "a very intelligent and, I think, truthful youth—I mean so far as a desire to tell the truth is concerned," is not erroneous; that he did not thereby take the question of plaintiff's credibility from the jury.

WENZLICK v. McCOTTER. Nov. 22, 1881

Nuisance.—A conductor designed to carry water from a roof to the ground, when constructed with due care and proper precaution, is not in itself unlawful so that it can be deemed a nuisance, even if its mouth is towards the sidewalk and it discharges upon it.

When the water is upon the sidewalk and is frozen, and is permitted to remain, it may subject the municipality to an action for omission of duty.

Plaintiff's grantor built two houses with a leader from the roof of a piazza over both. Plaintiff purchased one house and altered the piazza so that no water ran from it to the leader, but was led through another pipe. In an action to recover for injuries received from falling on ice collected on the sidewalk, *held*, That the most that could be said is that defendant did not tear up or remove the leader, and that he would not be liable for its continuance unless requested to abate it.

PARROTT v. SAWYER. Nov. 22, 1881.

Corporations—Stockholders—Limitations.—The corporation of which defendant was a stockholder became indebted to plaintiff in 1867. Plaintiff took part of his claim in cash and the balance in a note dated Jan. 1, 1868, payable in twelve months. A suit on the note was commenced in July, 1869. *Held*, That defendant was discharged from liability because plaintiff did not sue the corporation within one year from the time the original indebtedness became due, and that his liability was not extended by the note given for a portion thereof.

BEYER, v. THE PEOPLE. Oct. 11, 1881.

Abduction.—The Statute against taking a woman with intent to compel her to be defiled, embraces a case where the woman has not consented to be taken for that purpose, but where, without knowledge of the purpose contemplated, she is induced to go with another for a lawful object, and is afterward, in accordance with the original intent, by force, menace or duress, defiled.

The indictment alleged that the prisoner, with one S., made an assault and took the complainant, &c. *Held*, That it was not absolutely essential to prove a conspiracy in order to convict the prisoner of the offence charged.

CAPRON ET AL. v. THOMPSON, IMPL' D. Oct. 18, 1881.

Brokers—Practice.—Plaintiffs, who were brokers, bought certain stock for defendant but afterwards pledged it for a loan to themselves and it was sold by the pledgee. The stock was never tendered to defendant. *Held*, that the pledge of the stock was a failure to perform a subsequent duty and no condition precedent was broken which would prevent plaintiffs from charging defendant for the purchase of the stock.

Where the court at the trial has committed an error the judgment should not be affirmed unless it appears be-

yond any question that the appellant cannot succeed upon a new trial.

NEW JERSEY

(Supreme Court.)

ERNEST DREHER v. HENRY Y. YATES ET AL.

Pleading—Trespass—Removal of Flagstaff.—Held. 1. A plea in trespass justifying the removal of a flagstaff from a public street by city officers under a city ordinance need not show how such flagstaff obstructs such street, it being sufficient to allege that it was placed in such street and obstructs it. 2. If the city ordinance authorized the removal of street obstructions in case the same were not removed by the owner within "two hours" after notice, a plea justifying the removal of the same by the city officers, which alleged that such removal took place "after due notice in writing to the said plaintiff to remove the same, and after the time limited in said notice," is sufficient when objected to by general demurrer.

LASELLE v. HOBOKEN FIRE INS. CO.

*Fire Insurance—Condition—Vacancy of Premises.—*This was a suit on a fire insurance policy. *Held.* One of the conditions of a policy of insurance being that the policy should become void "if the dwelling house should become vacant or unoccupied and so remain." *Held:* That a temporary cessation to occupy the dwelling which did not continue until it was destroyed by the fire, did not avoid the contract. *Held further,* That the absence of the tenant, who was then occupying the building as a dwelling house, on the night of the fire, did not leave the building vacant or unoccupied within the sense of the contract.

WANSER v. ATKINSON.

Trial by Jury—On Appeal from Justice's Court.—Held. 1. There is in this State no constitutional right to trial by jury on appeal from the courts for the trial of small causes, in cases where no jury was demanded below. 2. If a party goes to trial before a justice without demanding a jury, under statutes which provide that, on appeal from the decision of the justice, the cause shall be heard and determined by the appellate court without a jury, he thereby waives any right to a jury trial on appeal. 3. No person has a vested right in any particular mode of procedure in actions at law; and, except when the Constitution expressly guarantees some certain mode, the procedure may be modified by the Legislature at will.

IOWA.

(Supreme Court.)

MCDONALD v. JACKSON. Oct. 19, 1881.

*Promissory Note.—*It is an established rule that recovery cannot be had upon a promissory note that has been destroyed, unless it is clearly established that it was destroyed through ignorance or mistake.

A party will not be allowed to recover upon a promissory note that he has destroyed in pursuance of a fraudulent scheme.

Before a recovery can be had upon a note destroyed by the holder, the evidence as to the amount, terms, and identity must be reasonably clear and specific.

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

Tuesday, January 17, 1882.

GENERAL DOCKET.

No. 11. John G. Smith v. Steamer Young Reindeer. Error to the District Court of Sandusky County. Judg-

ment affirmed. The case is determined from Revised Statutes U. S. § 711, and not the act of Congress of 1845, relied upon by plaintiff in error. There will be no further report.

26. James B. Carruthers v. William Dinamore. Error to the District Court of Putnam County. Judgment affirmed. There will be no further report.

41. Edward A. Bratton v. Edward D. Dodge. Error to the District Court of Vinton County. Passed until February 12, 1882, for brief of defendant in error.

42. Elizabeth Lafferty et al. v. William Shinn, a minor, by his next friend. Error to the District Court of Adams County. Passed until February 9, 1882, for brief of defendant in error.

52. Joseph Davidson et al. v. William A. Campbell et al. Error to the District Court of Greene County. Judgment affirmed. The original action was in replevin, and the court did not err in refusing to allow the plaintiff, by amendment, to substitute an action in equity to enforce a trust.

58. Louisa Rust v. Samuel Baker. Error to the District Court of Clarke County. Dismissed for want of preparation.

55. Baltimore and Ohio Railroad Co. v. John M. Burkey. Error to the District Court of Perry County. Dismissed for want of briefs under Rule 4.

56. Baltimore and Ohio Railroad Co. v. Isaac J. Clark. Error to the District Court of Perry County. Passed to February 12, 1882, for defendant's brief.

57. A. T. Johnson et al. v. Trustees of Geneva Township. Error to the District Court of Ashtabula County. Passed to February 1, 1882, for brief of defendant in error.

58. George F. Greenlease v. Warner Taylor et al. Error to the District Court of Madison County. Dismissed for want of preparation.

596. The State of Ohio on relation of W. J. Clark v. Joseph Falkenbach. Quo warranto.—Reserved in the District Court of Franklin County. Dismissed for want of preparation.

726. The State of Ohio ex rel. v. Hazelton & Letonia Company. Error to the District Court of Mahoning County. Dismissed for want of preparation.

MOTION DOCKET.

No. 10. Otis B. Little v. Eureka Insurance Company. Motion to dispense with printing in No. 33 on the General Docket. Motion granted.

11. Levi N. Yearly et al. v. Joseph P. Long et al. Motion to dismiss the petition in error in No. 244 on the General Docket for want of printing. Motion sustained. Motion to dismiss the cross-petition in error filed by Emeline Carver, for want of service of summons in error overruled and cause retained for hearing of said cross-petition in error.

SUPREME COURT ASSIGNMENT.

The following cases have been assigned for oral argument:

January 25th—No. 18. Marietta & Cincinnati Railroad Company v. Western Union Telegraph Company.

January 26th—No. 54. Detroit Fire & Marine Insurance Company v. Commercial Mutual Insurance Company.

February 1st—No. 8. Union Central Life Insurance Company v. Cheever.

February 1st—No. 25. Cross v. Winalow.

February 1st—Bloom v. United Railroad Stock Company. Motion to vacate Injunction of Hamilton County Court of Common Pleas.

February 2d—No. 386. Ohio ex rel., Brackney et al. v. Commissioners of Fayette County. Mandamus.

Ohio Law Journal.

COLUMBUS, OHIO, : : : JAN. 26, 1882.

THE Grand Jury of Franklin County, last week, reported fifty-two indictments against Fred Newberg, the late employe of the State Board of Public works, classified under the following different offenses; Forgery, seventeen; obtaining money under false pretenses, seventeen; presenting false evidence of indebtedness to the Auditor of State, eighteen. The aggregate amount of money obtained by young Newberg through his criminal acts, footed up, at the last count \$22,000. If convicted on all of the above indictments and the full penalty of the law imposed on him, the young man would have the stupendous term of over 500 years imprisonment recorded against him.

THE first bill passed at the present session of the Legislature, was rushed through last week. It was a bill to authorize the city of Cleveland to make use of a portion of its sinking fund to extend water works and improve streets. It seems that the bill was brought down here by certain city officials of Cleveland, and the Cuyahoga delegation were persuaded that it must needs be passed at once for the public good. After the bill had become a law, the other side are heard from, in the shape of the Sinking Fund Commissioners, of the Forest city and prominent citizens, who are strongly opposed to the bill and say it should never have been passed. Some of the members from Cuyahoga, it is said, are highly indignant at themselves for their undue haste.

THE Clerk of the Supreme Court of this State is justified in asking the Legislature to adopt measures that will furnish him with the necessary room and accommodations to conduct the affairs of his office. The business of the Supreme Court has attained such proportions that the clerk cannot be expected to properly administer the duties incumbent upon him, without additional space. The condition of the documents and papers of this court is certainly anything but creditable to the State. In many instances, the most valuable papers are stowed away in the corner of a dingy room, beneath the dome of the Capitol, like waste paper, simply because the Legislature in the past has utterly ignored the pleas made by the present and for-

mer clerks, for a few pigeon holes, for the reception of legal papers and a safe room to put them in. The office of the Clerk of the Supreme Court has never been a fit place in size and location, becoming the office and its requirements. It is the most ill-appointed room for its use in the Capitol building.

We feel sure that if the members of the present Legislature will but acquaint themselves with the needs of this important office, they will waste very little time in providing protection for the valuable legal papers of the court, with sufficient room for the clerk to care for them, and fully respond to the demands made upon him.

SUPREME COURT EXAMINING COMMITTEE.

The committee appointed by the Supreme Court to examine applicants for admission to the bar during the year 1882, held a meeting in the Supreme Court room on January 4th, and, at the suggestion of the Court, divided the work of the committee as follows:

EXAMINERS FOR THE FEBRUARY AND MAY CLASSES.

E. L. Taylor, Columbus; H. J. Booth, Columbus; Milton L. Clark, Chillicothe; T. Q. Ashburn, Batavia; W. C. McFarland, Cleveland.

EXAMINERS FOR THE MARCH AND JUNE CLASSES.

M. A. Daugherty, Columbus; S. D. Horton, Pomeroy; G. H. Wald, Cincinnati; W. M. Koons, Mt. Vernon; A. W. Krumm, Columbus.

EXAMINERS FOR THE APRIL AND JULY CLASSES.

O. W. Aldrich, Columbus; J. K. Mower, Springfield; George Metcalf, Elyria; J. B. Brannon, Cincinnati; R. C. Hoffman, Columbus.

This order will be preserved throughout the year. It is expected that each member of the committee will punctually observe these appointments.

The actual expenses of those members of the committee who reside out of Columbus, will be paid from a fund provided by the Court.

In order that the committee may be prepared to do its work properly and fairly, it has been determined that each member thereof shall prepare a list of questions on the subject set opposite his name, and send the same to M. A. Daugherty, Columbus, Ohio. In preparing said questions, care should be taken to select such as will best elicit the knowledge of the students as to the general principles of the subject. The following assignment of subjects has been made:

Milton L. Clark, Evidence.

T. Q. Ashburn, Pleadings.

W. C. McFarland, Partnership.

S. D. Horton, Bailment.

G. H. Wald, Contracts.

W. M. Koons, Negotiable Instruments.

J. K. Mower, Principal and Agent.

George Metcalf, Principal and Surety.
 J. B. Brannon, Personal Rights.
 R. C. Hoffman, Domestic Relations.
 A. W. Krumm, Corporations.
 M. A. Daugherty, Real and Personal Property.
 H. J. Booth, Criminal Law.
 O. W. Aldrich, Equity Jurisprudence.
 E. L. Taylor, Wills.

A special list of questions will also be prepared by M. A. Daugherty on the principles of the Constitution of the State and of the United States.

Each member of the committee will also please prepare four (4) cases under the subject assigned to him, suitable to be put to the class on examination.

The rule now in force requires the examination to be extended over the above named subjects, and the purpose is to secure a list of well considered questions from which the sub-committee may select such as they desire for any examination. The necessity of prompt compliance on the part of each member of the committee is apparent.

M. A. DAUGHERTY, *Temporary Chairman.*

E. L. TAYLOR, *Secretary.*

RULES ON ADMISSION TO PRACTICE.

The following addition to the rules of the Supreme Court, relating to applicants for admission to practice in this State, was adopted, January 5th, 1882:

11. Each applicant, before examination, shall pay to the Clerk the sum of five dollars; provided, that in case any applicant shall fail to receive a certificate of qualification, he shall not be required to pay any further sum upon a renewal of his application.

12. The Clerk shall enter all sums so received in a cash book, showing date and name of applicant, and shall pay the same out upon the order of the Chief Justice, in payment of the expenses of such examinations, and for no other purpose, that is to say: The cost of necessary printing and stationery; to the Clerk, for each certificate of admission issued to an applicant, one dollar; to each member of the Standing Committee, his necessary traveling expenses, and for personal expenses while actually engaged in such examinations, not exceeding five dollars per day.

RIGHT OF COUNSEL TO REPRESENT PROSECUTING WITNESS IN CRIMINAL CASES.

EDITORS OHIO LAW JOURNAL, COLUMBUS, O:

Judge James Tripp, of Jackson, made a strange ruling in the Court of Common pleas of Vinton County the other day. One George Henry Gilman was indicted for cutting with intent to kill, &c. The person injured employed an attorney-at-law, residing in an adjoining county, to

appear on the trial before the jury to prosecute the case. He did so, with the knowledge and consent of the Prosecuting Attorney, who corresponded with the attorney in regard to the case. On the day set for the trial the attorney appeared, and, a few minutes before the case was called, the Court, on motion of the Prosecuting Attorney, and, without objection from anybody, appointed a resident attorney of Vinton County, under the statute, to assist the Prosecuting Attorney in the trial of the case.

There appeared for the defendant four lawyers, three, at least, being old and distinguished practitioners at the bar.

The lawyer hired by the prosecuting witness appeared in the case at the beginning. The fact of his employment had been known for several weeks to the defendant and his counsel. During the impaneling of the jury, he made some suggestions in regard to questions that arose, and, after the jury was sworn, sat by and took notes of the testimony, objected to certain matters of evidence, and argued at least one question to the Court, growing out of an objection to certain questions asked by the defense.

At the conclusion of the examination in chief of the second witness called by the State, and, after he had been cross-examined by counsel for the defendant, at the suggestion of the Prosecuting Attorney, the employed counsel attempted to re-examine the witness. One of the attorneys for the defendant, sitting in his chair, not rising to his feet nor addressing the Court, shouted to the lawyer from the adjoining county: "I object to your appearing in this case. There is one lawyer employed by the State now." At this point, an adjournment of about an hour for supper was had. On returning into court, the outside lawyer stated briefly his position to the Court, and admitted that he had been employed and paid by the prosecuting witness, but stated it had been done with the knowledge and at the request of the Prosecuting Attorney, and that he had entered upon the trial of the case, and appeared before the jury in that capacity with the full knowledge of counsel for the defendant, which was not denied, and was endorsed by the Prosecuting Attorney. No argument was made by counsel for the defendant in support of the objection, and Judge Tripp proceeded to deliver a long, fully prepared and manifestly pre-arranged decision, in which he held that the attorney was improperly in the case, and had no right to appear under the circumstances, and, over the

protest of the Prosecuting Attorney, ordered him to withdraw from the prosecution of the case. All that took place in the presence of the jury, and was done in a most peremptory and, in some respects, most offensive manner.

Did Judge Tripp decide rightly in thus excluding the outside attorney?

Just now it is rather an important question. Murder, robbery, rape, arson and felonious assaults of every description are the order of the day. The whole country is being swept over by a tidal wave of crime. This decision holds that, no matter how great the wrong, how fearful the crime, how terrible the public excitement, no man, however greatly outraged, shall be permitted to employ the lawyer of his choice to assist in securing the punishment of the man who has burned his property, raped his daughter, or committed other crimes against him. It holds that the uniform practice in Ohio, from a time "whereof the memory of man runneth not to the contrary," has been against public policy and illegal; that the trial and conviction of Mrs. Creighton at Lancaster, was illegal. It holds that the conviction and sentence to the Penitentiary for life of Terrell at Logan, was done in violation of law; that the recent conviction of Dresbach, at Lancaster, was accomplished by trampling under foot, the statutes of the State; that the trial, conviction, sentence and execution of Price in Cincinnati, was judicial murder, notwithstanding that Judge Longworth, now of the Supreme Court, ruled in that case upon exactly the same question, in principal, made here, and that the Supreme Court did not understand the law when they refused to set aside the finding. *Price v. the State*, 35 O. S. R. It holds that the trial, conviction and sentence to the Penitentiary for life of Welsh at Fremont, was an outrage upon public justice, and that nearly all the prominent criminal trials and convictions had in the State for all these years have been carried on with a failure of knowledge on the part of counsel for the defendant and counsel for the State, and that the courts of the State are in utter ignorance of the law.

In reply to the argument of counsel for the State that the defense had waived the presence of this attorney by allowing him to participate in the trial, the learned Judge held that, in a criminal case, the defendant could not waive anything. This, notwithstanding the Supreme Court has held a party might waive his right to a struck jury by standing by until it was too late; that

he might waive the fact that a juryman was under age, or an alien, or had formed and expressed an opinion; that he might waive the copy of the indictment provided by statute, and all by mere silence, and by acquiescing in the progress of the case without objection.

The decision was an arbitrary opinion of this Judge, unsupported by law, precedent or common sense.

The statute, Sec. 7196, is as follows:

"The Court of Common Pleas, or District Court, may, whenever it is of the opinion that the public interest requires it, appoint an attorney to assist the Prosecuting Attorney in the trial of any case pending in such court, and the County Commissioners shall pay such assistant such compensation for his services as the court approves, and to them seems just and proper."

This section of the statute fixes and limits the power of the court to appoint an assistant prosecuting attorney, and charge his salary or pay upon the county treasury. But Sec. 7245, of the Revised Statutes as plainly decides the question the other way from the view taken by Judge Tripp, as it is possible for legislative enactment to do it. That section provides "after a copy of the indictment has been served * * * and no partner of the attorney having charge of a prosecution shall be employed by or conduct the defense of any person prosecuted as aforesaid, nor shall the partner of the Prosecuting Attorney assist in the prosecution of a criminal act, unless assigned to such prosecution by the Court before which the same is being or is to be tried."

Now, according to Judge Tripp, that statute never ought to have been passed. There never was any occasion for that statute, because, according to Judge Tripp, no attorney can appear in the prosecution of a criminal case, unless assigned to such prosecution by the Court. That is the decision of the learned Judge in this case. The statute had simply limited the right of attorneys to appear in criminal cases without assignment from the Court to such attorneys as were not partners of the Prosecuting Attorney. In other words, the statute says that a Prosecuting Attorney shall not be assisted by his partner, merely upon the motion of the Prosecuting Attorney.

No lawyer can read this section of the statute without concluding that that section contains the only limitation upon the right of outside counsel to appear in cases, and that hereafter, as heretofore, proper counsel may be employed, by

parties who have been wronged, to appear, with the consent of the Prosecuting Attorney, at the expense of the party who employs them, to aid the prosecution of a criminal case. The principle decided by the Supreme Court in *Price v. State*, 35 O. S., is on all fours with the principle here claimed. There, there was a Prosecuting Attorney—Drew—and an assistant Prosecuting Attorney—Outcalt—taking the place of “an attorney to be appointed by the Court.” And yet the Supreme Court say that it was not unlawful for Charles H. Blackburn to appear, and prosecute the case on behalf of the State. G.

Vinton County, January 20, 1882.

P. S. The jury of course after this suggestive episode promptly acquitted the defendant.

THE HONOR OF A VOCATION.

The following is an extract from the address of Hon. Charles P. James, our newly-appointed Justice of the Supreme Court, delivered before the graduating class of the Law Department of the Georgetown University:

“To vocational men this world turns chiefly the aspects of their vocations—the matter on which they work. To the physician it is a world of disease or of health; to the builder and engineer it is a world of forces; to the merchant it is a world of gain and loss; to the man of science it is a world of facts, of investigation, and theory; to the artist a world of beauty, and to the poet a world of wonder, of interior life and ideal possibility. But to the lawyer it is a world of conflict of human, worldly interests. It is in itself all of these many worlds and many more; but to him, *in his vocation*, it is just that. It is a world of harmonies, of bounding life, of industry, of progress; but its harmonies and its life, and its industry, and its progress are forever jarring. Look upon it in panorama. On every highway, in every city and town and hamlet the merchant is plying his trade—in every valley and by every stream the busy mill is toiling from sunrise to sunrise in the weaving and forging and shaping of every possible fabric and implement and ware; from the depth of every mountain the miner is dragging the fuel of our hearths, the iron of our ships and railways, the gold of our commerce; on the surface of the earth the farmer is sowing and reaping the bread of our daily life; the engineer is building his highways, and the carrier is bearing us to and fro, through summer and winter, through sunshine and storm, through darkness of midnight, the breaking of the morning, and heat of noon; the rivers which once gave back no shadow but of trees, no sounds but the song of birds or the bark of the wolf, are echoing the clang of the stream, and the shout of the boatmen; the blue solitude of the ocean is white with the moving tents of men and the harbors of all lands are humming

with the voices of all other lands; and in the midst of all this labor and coming and going, the churches, with lighted altars, undying music and perennial flowers, are celebrating always somewhere the marriage sacrament; the minister of God watches and prays somewhere always by the bed of the dying; and somewhere the cry of the new-born is heard at every moment of the quick-succeeding days. Wonderful and thrilling is the vision of such life. But life and the conflict of life go always on together. Not a bargain is made by the merchant, not a yard of cloth is woven nor a spike is forged by the mill, not a ton of mineral is drawn from the mountain, not a measure of grain is gathered from the field, not a mile is sped by the swift-engine on those countless miles of rail, not a ship sails out of her harbor—nay, not a promise is made in marriage, not a life goes out to darken, not a life comes in to gladden a household, which may not become, by some unhappy chance, the subject of a conflict of interests—the subject of misunderstanding, of anger, and finally of litigation. I will not tell you, gentlemen, that your profession is of itself a dignity and a badge of honor, and that you may be proud simply to belong to it; for there is no glory, no honor, no dignity in simply belonging to any profession or vocation whatsoever. To be either a physician, a merchant, a lawyer a mechanic, an artist, an editor, a politician, is neither an honor nor a dishonor. If in any of these walks of life any man does his work faithfully and nobly, and achieves great things, to him and not to his class, belong the glory and the honor thereof. There is no imputation of one man's worthiness to another, and the humble bystanders of his class are still as humble as if he had not been great. To be such a lawyer as Romilly, breathing mercy into a criminal code; as John Marshall, with a brain that was law and a heart that was justice, is to have attained a glory and honor beyond which honest ambition sees nothing to reach for. To be a counsellor who never consciously advised a wrong, an attorney who never forgot a duty nor betrayed a trust, is to have attained, however obscure may be his life, a dignity which honest ambition should accept with gratitude. To be simply a member of the guild of lawyers, is to have no share in the question of dignity and honor.”—*Washington Law Reporter*.

JUDGE DAVIS ON INSANITY.

In the Coleman case, recently tried in New York, where a woman who killed her paramour because she discovered that her husband had found her out, the defense set up insanity. Judge Davis in his charge to the jury, laid down the law of responsibility as follows:

“The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, when the offender has the ability to discover his legal and moral duty in respect to

it, has no place in the law; and there is no form of insanity known to the law as a shield for an act otherwise criminal, in which the faculties are so disordered or deranged that a man, although he perceives the moral quality of his acts as wrong, is unable to control them and is urged by some mysterious pressure to the commission of the act, the consequences of which he anticipates and knows. If he has knowledge enough to know that he is firing a pistol—that he is shooting a person, and thereby doing an act injurious, or likely to be injurious to that person, and also has sufficient sense to know that that act is a wrongful one—he cannot assert an irresistible impulse arising from any cause whatever as a defense or excuse. Whatever the views of scientists or of theorists on the subject of insanity may be, and however great a variety of classifications they may adopt, the law in a criminal case brings the whole to this single test: Did the person doing the act at that time have sufficient sense to know what he was doing, and that it was wrong to do it? If that be his condition, it is of no consequence that he acts under an irresistible influence or a supposed inspiration in committing the wrong, or a belief that the wrong will produce some greater good. Emotional insanity, impulsive insanity, insanity of the will or of the moral sense, all vanish into thin air whenever it appears that the accused party knew the difference between right and wrong at the time and in respect to the act he committed. No imaginary inspiration to do a personal wrong to another under a delusion or belief that some great public or private benefit will flow from it, where the nature of the act done, and its probable consequences to the injured party, and that it is in itself wrong, are known to the actor, can amount to that insanity which in law disarms the act of criminality. Under such notions of legal insanity, life, property and rights, both public and private, would be altogether insecure; and every man who by brooding over his wrongs, real or imaginary, shall work himself up to an 'irresistible impulse,' to avenge himself, can with impunity become a self-elected judge, jury and executioner in his own case for the redress of his own injuries or of the wrongs of his friends, his party, or his country."

POWER OF APPELLATE COURT TO MODIFY JUDGMENT.

SUPREME COURT OF OHIO.

THE CLEVELAND & MAHONING R. R. Co.

v.

HIMROD FURNACE Co.

January 10, 1881.

1. On error to reverse a judgment in damages, for a breach of contract, where a motion for a new trial based on the ground of an erroneous charge, and because the verdict is unsupported by the law and the evidence, is overruled, and the evidence is made part of the record, and where it appears that the verdict is too large,

by reason of error of the court in its rulings, or of the jury, and there is nothing necessarily implying passion or prejudice in the jury, the court may, where it can be done, ascertain from the evidence the amount of such excess, and may, on a remittitur of the same being entered, affirm the judgment as modified.

Motion to modify judgment.

JOHNSON, J.

The decision to which this motion relates will be found reported in the present vol. ante p. 321.

For a statement of the pleadings reference is made to the same case reported in vol. 22, O. St. 451.

It appears, that the action below, was to recover \$75,000 damages for an alleged breach of contract, by which the plaintiff in error, was to receive and dock at Cleveland, and to carry on its railroad from thence to Youngstown, Lake Superior ore, at an agreed rate per ton for a term of years.

The specific breach alleged as a basis for damages, is, that after performing the contract for part of the term, the defendant refused longer to do so, and thereafter exacted, and plaintiff was compelled to pay, large sums in excess of the agreed rate, to the plaintiff's damages, \$75,000. This suit was brought in 1868, nearly two years before the term, the contract had to run, had expired. Issue was joined and a final judgment thereon, was before this court and was reversed in *Himrod Furnace Co. v. C. & M. R. R. Co.*, 22 O. St. 451. The case was remanded for a new trial. This resulted in a verdict for the plaintiff, assessing his damages at \$59,024.22.

A motion for a new trial, based on the following grounds, was filed:

1. The court erred in admitting evidence offered by plaintiff, to which defendant objected and excepted.

2. In excluding and ruling out evidence offered by the defendant.

3. In the charge and instructions given to the jury, and in refusing to charge and instruct the jury as requested by defendant.

4. The damages assessed are unreasonable and excessive.

5. The verdict is against and contrary to law.

6. The verdict is not sustained by sufficient evidence.

7. The verdict should have been for defendant instead of the plaintiff."

The motion was overruled and a bill of exceptions taken, setting out the evidence, and excepting to the charges of the court, and to its refusal to charge.

To reverse the judgment on this verdict the case was reserved for decision in this court.

Numerous errors were assigned for such reversal. After full argument and patient consideration, none of them was found to be well taken, except, that part of said verdict as here, was unsupported by the law. See case ante page 321.

Thereupon the court on an examination of the evidence, computed the amount of this erroneous part of the verdict, put the defendant in error to

his election, either to have the whole judgment reversed, or to remit the amount so found to be erroneous. The remittitur of this amount being filed, the judgment so modified was then affirmed. The journal entry, however, only shows the remittitur and the affirmance of the judgment as modified.

The record shows that the damages proved were limited to overcharges actually paid for the services provided for in the contract, before the commencement of the action, and that all evidence touching damages for the remainder of the term was excluded.

These items of overcharge may be classified as follows: 1st. Amount paid for *transportation* in excess of the agreed rate; 2nd, Amounts paid to plaintiff in error for *dockage*, of the ore at Cleveland; and 3d, Amounts paid to *third persons* at Cleveland for dockage &c.

This 3d item, as ascertained by this court, including interest from date of the payment to the date of the verdict, was \$9,192.60, and is the sum remitted as of the date of the judgment.

From an examination of the evidence it satisfactorily appears, that the verdict was the aggregated amount of all the overcharges proved, belonging to each of the foregoing classes, together with interest from dates of payment to the date of the verdict. This finding was in strict accord with the charge, which was to the effect, that if the plaintiff was entitled to recover, the rule of damages was, the amounts paid for transportation, *including dockage*, with interest from the time of payment.

In the opinion of the court, the petition did not make a cause of action, to recover damages for *dockage* &c. paid to *third persons*, and hence the court erred in permitting proof of such payments as well as dockage paid defendant, and in charging the jury that such payments, with interest, could be included as part of the verdict.

This court, having found that said verdict was erroneous to the amount stated, instead of formally reversing the whole judgment and then proceeding to render a new judgment for the correct amount, simply affirmed the balance of the judgment after deducting the amount remitted. While the former mode of proceeding would, perhaps, been in conformity to the usual mode, yet in legal effect, and in substance the result is the same; and as the plaintiff in error recovered his costs, as upon a formal reversal, he is not prejudiced.

It is now claimed, that the court having found error in the amount of the judgment, it was its duty to reverse and remand for a new trial, that as a court of errors, it had no authority to look into the evidence, for the purpose of ascertaining the amount of such error, and modifying the judgment accordingly.

It is conceded, the court may so modify, by reversing in part, and affirming in part, or by a remittitur, when by the pleadings, or by a special verdict, or by an agreement of the parties, the amount of such error is ascertained, but it is denied that the appellate court cannot, on error,

look into the bill of exceptions and ascertain for itself the amount of such error.

The power of the court on error, to review the evidence, is conferred by the Act of April 12, 1858. (2. S. & C. 1155, Revised Stat. Sec. 5301.) Under this statute, the court has power, on error, when the motion for a new trial is overruled, and all the evidence is made part of the record, to look into the evidence and from it determine whether the verdict is erroneous in whole or in part. In determining the powers of the court as defined in Sec. 6726 of the Revised Statutes, reference must be had to this act of 1858. Both should be construed together.

In the case at bar, the error of the jury arose from an error of the court, in not excluding from consideration the payments made by third persons for dockage at Cleveland. The amount of such error is readily ascertainable.

If, as is conceded, the court may look into and weigh the evidence as well as the charge of the court, for the purpose of determining whether the verdict is too great and therefore erroneous in part, we think it logically follows, it may also determine from the same evidence, when the error is ascertainable, the extent to which it is too great.

If, as is conceded, the court may, on error, examine and weigh the evidence, for the purpose of determining whether the judgment is too great, or contrary to law in whole or in part, for the purpose of reversing the same, it may for equally cogent reasons, when it can be done, ascertain the amount of such excess, and make its remission a condition of the affirmance of the residue.

The distinction which it is sought to draw, between the power of the trial court, and the appellate court, in this respect, in our opinion does not exist, in view of the provisions of the act of 1858.

The charge of the court to include these erroneous items, was "error of law occurring at the trial," which lead to "error in the assessment of the amount of recovery," and being in an action "upon a contract," and the damages being too large as a consequence of such error and the amount being ascertainable, this court has the same power to correct the error, that the trial court had, on the motion for a new trial.

It is not claimed that the verdict was excessive under the influence of passion or prejudice, therefore the power of the court, on error, when the action of the jury is thus tainted is not in question.

Neither was the amount of this verdict, a matter of opinion merely, as in actions of libel, slander, and the like, hence the power to order a remittitur in such a case is not involved.

The amount of the verdict was a matter of computation from the evidence.

It was strictly limited to actual payments made to plaintiff in error; and to others, in excess of the contract rates.

This being so, and the error being that of the court in admitting evidence of payments to others, and charging the jury to include such

payments, the court may, on error, examine the bill of exceptions, and determine the amount the evidence tended to prove, and may, on remittitur being entered, modify the judgment accordingly.

In thus correcting the verdict of the jury its province is not usurped.

The parties have had a fair and impartial jury, uninfluenced by passion or prejudice. The verdict is erroneous in part, from a cause not affecting their action as to the other part. The error is easily ascertainable by looking into the evidence.

By affirming the judgment, as modified by the remittitur, it is reduced to the proper amount legally found by the jury.

That the court has the power to do this, in cases like the present, is too firmly settled to be now disturbed.

Marietta Iron Works v. Lorrimer, 25 O. St. 621.

Smith v. Exchange Bank, 26 O. St. 141.

Douglas v. Day, 28 O. St. 175.

Lear v. McCullough, 17 O. St. 464.

Libilla v. Bahney, 34 O. St. 399.

Averill v. Verner, 22 O. St. 372.

Doolittle v. McCullough, 7 O. St. 299.

Durrell v. Boyd, 9 O. St. 72.

Pendleton St. R. R., 22 O. St. 446.

Saymen v. Phillips, 15 O. St. 218.

2. Objection is also made to this form of proceeding, by reason of its supposed effect on the judgment *lien*, and on the liability of *sureties* on the supersedeas bond. This question is not now before us, and we need express no opinion until the question properly arises. A like objection is made because the judgment as modified bears *interest* from the date of its rendition, and thus it is said interest is compounded. Such is always the case, when the judgment is reversed in part and affirmed in part, the part affirmed bears interest from the day it was rendered.

3. Finally it is insisted that there are a number of questions assigned as error, that were left undisposed of.

This makes it necessary to repeat what has already been stated in the published opinion, before referred to, that after a careful consideration of all these questions, no error was found except as stated.

Some of these were questions of fact, some were controlled by reported cases, and some were of minor importance, hence the opinion was limited to the single point reported.

Motion overruled.

[This case will appear in 37 O. S.]

August Arndt, the trial for threatening the life of Judge Dundy, of the United States District Court, was, on Friday last, at Lincoln, Nebraska, found guilty and sentenced to three years in prison and a fine of one thousand dollars.

Digest of Decisions.

PENNSYLVANIA.

(Supreme Court.)

THE PITTSBURGH NAT. BANK OF COMMERCE v. GEO. W. McMURRAY AND WILLIAM McMURRAY. Oct. 24, 1881.

Attorney—Agreement.—Plaintiff placed money in a lawyer's hands for investment with an understanding or agreement that until he could find a satisfactory mortgage he should pay interest thereon. Held, that plaintiff could not hold him as a trustee, nor follow his deposit in the bank as trust money.

ZUCK & HENRY v. RAFFERTY ET AL. Nov. 7, 1881.

Performance.—The notice of an intention not to perform the contract, if not accepted by the other party as a present breach, remains only a matter of intention, and may be withdrawn at any time before the performance is in fact due; but if not in fact withdrawn it is evidence of a continued intention to refuse performance down to and inclusive of the time appointed for performance.

WIRERACH, EX'R & C. v. THE FIRST NAT. BANK OF EASTON. May 2, 1881.

Contract by Lunatic.—When a lunatic has received the full consideration for his contract, and it has been entered into by the other party without knowledge of his infirmity, he is liable. So long as the contract remains executory, as respects the consideration, it cannot be enforced; and, in a suit upon it, it is immaterial whether the plaintiff had notice of the insanity.

Commercial paper, made by a lunatic, is not valid, even in the hands of a *bona fide* holder, beyond the amount actually received by the maker; the holder of such a note being in no better position than the payee. If the note is made or endorsed purely for accommodation, there can be no recovery at all.

The decision of the court, acting by agreement of the parties, in the place of trials, to determine the questions of fact raised by a juror being challenged to the favor, is not reviewable.

CALIFORNIA.

(Supreme Court.)

PIEBCE v. SCHADEN. Nov. 18, 1881.

Evidence—Cross-Examination—Witness.—A witness cannot be cross-examined as to any fact which is collateral or irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony.

HELM, ADM'R v. MARTIN. Nov. 29, 1881.

Jury—Credibility of Witnesses.—Where witnesses for a party contradict each other, the jury is the sole judge of the weight to be given to their entire testimony, and to every part thereof. The appellate Court cannot pass upon the credibility of witnesses, nor upon the preponderance of evidence.

Evidence—Cross-Examination.—The plaintiff was sworn in her own behalf, and on her cross-examination stated that her intestate "owned a horse named Sam Purdy," which was sold after her husband's death, at auction. Thereupon defendant's counsel asked, "What was the price he brought?" The question was objected to by defendant's counsel as not being proper cross-examination, and as being irrelevant and immaterial. And in reply to a remark made by the Court, plaintiff's counsel said that if the defendant wished to make the witness his own, he, plaintiff's counsel, had no objection, although he could not see the relevancy of the testimony. Defendant's counsel then explained the object he had in asking the question, and the Court said that it might be

answered. Plaintiff excepted. The horse was frequently mentioned by the witness without objection, save in this one instance. *Held*: While it did not appear that the price the horse sold for was material, the judgment should not be reversed because the witness was asked and permitted to state after she had stated that the horse was sold at auction what price he brought.

BIGGINS v. CHAMPLIN. Nov. 29, 1881.

Division Fence—Long Acquiescence.—Defendant acquired title to his tract of land in 1856. It having been proposed to build a division fence between defendant's tract and the tract since acquired by plaintiff, Munday, the grantor of plaintiff and defendant, in 1859 went upon the ground for the purpose of locating the dividing line with a view to building the fence. Munday pointed out a line to the defendant as the correct line. Defendant thereupon built the part of the fence he was required to build, on the lines so pointed out—Munday building the other portion.

The line thus practically located had been recognized and acquiesced in as the true dividing line between the two tracts by the defendant, and by Munday while he owned the Munday tract, and afterward by the plaintiff until the year 1877, for a period of about eighteen years. *Held*: Under such circumstances it makes no difference that the parties, in making the location, acted under a mistake as to the true line. Acquiescence for so long a time in the line as located, is conclusive evidence of its correctness.

NEW YORK.

(Court of Appeals.)

MORTON v. THURBER ET AL. Oct. 4, 1881.

Usury—Negligence.—Defendant T. agreed with plaintiff to advance the money necessary to purchase on foreclosure the property which plaintiff occupied under a lease, take the title in his own name, and also a bill of sale of the machinery, to lease the whole to plaintiff at a rent equal to the interest on his advances, and to convey it all to him on payment within five years of the amount advanced, and a balance due on another account, with interest. In the lease the amount to be paid by plaintiff to redeem, was fixed at \$1,000 more than the advances and the true balance of account, plaintiff assenting to the allowance thereof under the belief that it was an expense incurred by T. on his representation that he had to pay it to procure a loan to carry out the agreement, when, in fact, he never paid it. In an action to declare the deed to T. a mortgage and void for usury, *Held*: That there was no such mutual agreement between the parties as made it usury.

A claim that an agreement is usurious cannot be raised for the first time in an appellate court.

T. sold the premises, under a provision in the lease, to one S., who leased it to plaintiff, and afterwards, on defendant's request, contracted with certain parties to build on the vacant lots and to raise the building already built. The contract was carried out, free from the control of defendants. The work was negligently done, and plaintiff's goods and business were injured. The referee found that these injuries were against the wishes and advice of defendants, and also found that defendants employed a man to superintend the work, and personally interfered and gave instructions to the workmen. *Held*: That, under these circumstances, and as the nature of such instructions did not appear, or that they had any connection with the injuries, the rule that the owner of premises is liable for the negligence of a contractor is not applicable.

THE CITY NATIONAL BANK OF Poughkeepsie v. PHELPS. Oct. 25, 1881.

Guaranty—Limitation.—Defendant's firm executed and delivered plaintiff in 1861 a guaranty that they held themselves responsible for the payment of any sum, not exceeding \$5,000, that one W. might receive of plaintiff for legitimate business purposes. In 1863 the firm dissolved and in 1875 notice was given to plaintiff. *Held*: That the guaranty was not void as not expressing a consideration; that it was a continuing guaranty, and every

authorized renewal of an advance kept alive the indebtedness created thereby; that it was absolute and it was not necessary to notify the maker of its acceptance; that plaintiff was not bound to see to the use made of the money by W. and that the dissolution of the firm determined plaintiff's right to make further loans to W. on the faith of the guaranty, or to make further renewals, but that the renewals were not payments and did not extinguish the original debt.

This action was commenced in 1877. In 1875 defendant wrote to plaintiff acknowledging the existence of the obligation. *Held*: That the claim against defendant was not barred by the statute.

One of several co-partners or joint debtors may continue alive or renew a joint liability so far as to affect himself, though those at first bound with him have been relieved by the statute of limitations.

MINNESOTA.

(Supreme Court.)

OSWALD v. MINNEAPOLIS & NORTHWESTERN R. Co. Dec. 28, 1881.

Jurors.—A communication by the successful party to the jurors pending the trial, if casually made, without intent to influence the verdict, and if the court can clearly see that it could not have had any effect on the minds of the jurors, is not ground for a new trial.

WEAVER v. MISSISSIPPI & RUM RIVER BOOM Co. Dec. 23, 1881.

Practice—Damages.—A complaint which alleges a trespass upon real estate, and that the plaintiff was thereby deprived of the use of the property, and that such use was reasonably worth a certain sum, is sufficient, although it does not in terms, allege that plaintiff was damaged.

Upon the trial the plaintiff, for the purpose of showing the value of the use of the premises of which he was thus deprived, introduced in evidence a lease, wherein the defendant had agreed to pay plaintiff \$700 a year for a like use and occupation of the same premises for a term immediately preceding the alleged trespass.

In rebuttal the defendant offered to show that it executed this lease when an injunction against it and in favor of plaintiff was pending, and that it had no alternative but to accept plaintiff's terms, or turn its logs over St. Anthony Falls and lose them. This offer was excluded.

Held, error. That the lease being thus used against defendant as an admission that the use of the premises was worth what it agreed to pay, it had a right to explain the circumstances under which it was made.

WEAVER v. MISSISSIPPI & RUM RIVER BOOM Co. Dec. 24, 1881.

Riparian Rights.—The defendant, by the construction and maintenance of its boom across the Mississippi river, invaded the land of plaintiff—a riparian owner—by superinduced additions of water, earth, logs, and other material, so as to effectually destroy or impair its usefulness. *Held*, that this was not a more consequential injury, but amounted to a taking of the property within the meaning of section 13, art. 1. of the constitution of the state; that defendant had no right to thus use or take plaintiff's property without his consent, without first paying compensation therefor; that, not having paid plaintiff compensation, the fact that defendant had constructed and maintained its boom with proper care and skill, and in the manner prescribed by its charter, would be no defence to an action by the land-owner for the injury to his property.

The evidence tended to show that the trespass of defendant deprived plaintiff of the use of his property for a certain period of time; hence the value of such use became material in determining the amount of damage which plaintiff had sustained. *Held*, that it was competent to show what defendant had agreed to pay plaintiff for the use of the same property for a term immediately preceding the trespass, the same being in the nature of an admission as to value, although subject to explanation.

KARSON v. MILWAUKEE & ST. PAUL RY. Co. Dec. 30, 1881.

Railroad—Damage by Fire.—The evidence tended to show that a fire started in the grass, near and to the leeward of a railroad track, a few minutes after an engine had passed, and that no person, or other fire than that of the engine, was in the vicinity at the time. *Held*, that this was sufficient to justify the jury in finding that the fire was scattered or thrown from the passing engine. *Also*, that this fact being established, a presumption of negligence on the part of the railroad company arose, and, under Gen. St. 1878, c. 34 § 60, the burden of proof rested upon it to show affirmatively that it was not guilty of any negligence, either as to the construction, condition, or manner of operating its engine.

The fact that plaintiff had not plowed around stacks so as to prevent fire from reaching them, was not negligence *per se*. Whether it amounted to negligence was a question of fact to be determined by the circumstances of the case.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Jan. 25, 1882.]

1023. Samuel J. Jones et al. v. Pouch & Sullivan. Error to the District Court of Clinton County. Baldwin & Jones for plaintiffs; A. N. Williams and Slone & Walker for defendants.

1024. Daniel Bills et al. v. Myron Bills. Error to the District Court of Huron County. G. R. Walker for plaintiffs; T. R. Strong for defendant.

1025. Samuel Burgner v. Julius Humphrey et al. Error—Reserved in the District Court of Summit County. J. H. Kohler, A. C. Voris and A. G. Myers for plaintiff.

1026. Commissioners of Hardin County v. Henry W. Seney. Error to the District Court of Hardin County. J. H. Smick and F. C. & J. W. Daugherty for plaintiffs.

1027. Commissioners of Hardin County v. Henry W. Seney. Error to the District Court of Hardin County. J. H. Smick and F. C. & J. W. Daugherty for plaintiffs.

1028. Conrad Bridenbaugh et al. v. Thomas Cottrill. Error to the District Court of Hardin County. W. H. West and Stillings & Allen for plaintiffs.

SUPREME COURT ASSIGNMENT

FOR ORAL ARGUMENT.

February 1st—No. 8. Union Central Life Insurance Company v. Cheever.

February 1st—No. 25. Cross v. Winslow.

February 1st—Bloom v. United Railroad Stock Company. Motion to vacate Injunction of Hamilton County Court of Common Pleas.

February 2d—No. 386. Ohio ex rel. Brackney et al. v. Commissioners of Fayette County. Mandamus.

February 3d—No. 60. Sidener v. Ilwaco, adm'r, etc.

February 16th—No. 959. J. H. Devereux et al. v. Hugh J. Jewett, Trustee, &c., et al. No. 958. Ohio ex rel. Attorney General v. William H. Vanderbilt et al. Quo Warranto.

February 23d—No. 6. Shorten v. Drake et al. No. 80. Pitts, Graham & Co. v. Eaglesong.

February 24th—No. 23. Pittsburgh, Cincinnati & St. Louis R'y Co. v. Anderson. No. 24. Same v. Shues. No. 78. Same v. McMillan.

March 1st—No. 83. Little v. Eureka Fire and Marine Insurance Co. No. 84. Roland v. Meader Furniture Company.

March 2d—No. 18. Marietta & Cincinnati Railroad Company v. Western Union Telegraph Company.

March 3d—No. 87. Phoenix Insurance Company v. Priest, adm'r, etc. No. 89. Morris et al. v. Williams.

March 8th—No. 40. Crabill, ex'r v. Marsh. No. 50. City of Ironton v. Kelley and wife.

March 9th—No. 7. Dawson v. Ohio and J. B. Koch. No. 74. Ohio ex rel. Dawson et al. v. Board of Education of Wooster.

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

Tuesday, January 24, 1882.

GENERAL DOCKET.

No. 16. Herman Nolte et al. v. William P. Hulbert, Trustee of Julia Harbeson. Error to the Superior Court of Cincinnati.

LONGWORTH, J.

S. brought suit against N. and others to obtain a sale of land to satisfy a judgment lien thereon. To this suit H. was made a party defendant, who, upon receipt of summons, gave to C., his regular attorney, certain notes endorsed by him in blank, together with a mortgage upon the land to secure the same, for collection.

C. caused a cross-petition to be filed on behalf of H., setting up his mortgage lien. The court, upon trial, ordered the land to be sold to satisfy the liens of S. and H. Pending the suit, H. agreed with N. to extend the note for a year from the time when it fell due. Before the time so extended had expired, N., fearing that the land would be sacrificed, employed a broker who applied to C. to find a purchaser at private sale. C. went to J. S. and offered him the land for \$3500.00, telling him of the mortgage and saying that he had in his possession all the papers necessary to make a clear title. J. S. paid him the money and directed him to pay off all the claims upon the land, including the mortgage of H. and to obtain H.'s cancellation of the mortgage upon his return, he being then absent. C. paid the costs and the claim of S. but embezzled the remainder of the money.

Held: That under this state of facts, C. acted as the agent of J. S., to make payment to H., and not as the agent of H. to receive payment from J. S.; and that, as between the two innocent parties, the loss must be borne by J. S.

Judgment affirmed.

36. Frederick W. Pelton, Treasurer of Cuyahoga County, v. The Northern Transportation Company. Error to the Court of Common Pleas of Cuyahoga County. Reserved in the district court.

McILVAINE J., *Held*.

1. A certificate of incorporation which, under the statute, specifies the place where the principal office of the company is to be located, is conclusive as to the location of such office.

2. Such office is to be regarded as the residence of the corporation within the meaning of the 4th section of the tax law of April 5, 1859, as amended April 8, 1865 (S. & S. 756), which provides that certain personal property "shall be entered for taxation in the township or town in which the person to be charged with taxes thereon resides at the time of listing the same by the assessor."

3. A corporation whose principal office is located in a specified township and without the limits of a city, may, if the city limits be so extended as to include the site of the office, remove the same to some other part of the township and thus avoid municipal taxation.

4. Steamboats and articles of furniture are not enumerated in the seventh section of the tax law of April 5, 1859 (S. & C. 1422), within the meaning of section 4 of said act as amended April 8, 1865.

5. Personal property other than merchants' and manufacturers' stock, or articles enumerated in the 7th section of said act of April 5, 1859, or personal property upon farms and real property not in towns, subject to taxation in the county where the owner or person chargeable with taxes thereon resides, must be returned and taxed in the town or township where the owner resides.

6. Steamboats, whose home port is in the county where the owner resides, are subject to taxation in the township where the owner resides whether such owner be a natural person or a corporation.

Judgment affirmed.

20½. William B. Millikin, Administrator of Elizabeth Smith, et al., v. P. J. B. Welliver, Administrator of John D. Smith, et al.

20%. Enoch D. Cracraft et al. v. Joseph Smith et al. Error to the District Court of Butler County.

JOHNSON, J.

A testator, after directing that his debts and funeral expenses be paid, gave all the residue of his estate, both real and personal, to his wife during her life, she to have full possession, management and control of the same, with the privilege of disposing of all or any of the personal property for her use, together with the proceeds of the real estate.

The estate consisted of lands, farming utensils, household goods, live stock and money. The residuary clause is as follows: "The residue of my estate is to be distributed to the heirs on my side of the house in such proportions as she may direct by will or otherwise."

No personal representative was appointed until after the death of the widow. She took possession of the personal property, paid the debts and funeral expenses, and deposited the balance of the money in bank in her own name, and died within five months after her husband's death, without making her election as required by statute to take under the will and without having disposed of any of the personal property or money, and without distributing any of said estate by will or otherwise.

Neither the testator nor his wife left any children or their legal representatives. Each left brothers and sisters of the whole blood, and their legal representatives.

Held: 1. The right of a widow to elect to take the provision made for her in the will of her husband, is a right to be exercised by her in person. If she dies without having made her election, those who claim under her, can only claim so much of her husband's personal estate as she was entitled to under the law.

2. In order to bar a widow of her right to dower and to such share of the personal estate of her husband as if he had died intestate leaving children, her election must be made, either by matter of record in the proper court as required by statute, or actually and in fact under such circumstances as would create against her an estoppel of her right to claim under the law.

3. Where it does not appear that a widow has acted with a full knowledge of the condition of her husband's estate and of her rights under the will and under the law, her acts in paying the debts of the husband out of his money, receiving and holding the balance, and having possession and control of the real and personal estate for five months after her husband's death, do not constitute such an election, in fact, to take under the will, as estops her from claiming, under the law, within the time allowed.

4. If the husband devise his real estate to his wife for life, with remainder to his heirs, and the wife elects to take her dower, or fails to make her election, the remainder vests in fee in the heirs, subject to the dower estate of the wife.

5. Where the residue of an estate is, by will, directed to be distributed among testator's heirs, in such portions as his wife may direct by will or otherwise, and she dies without having exercised the power conferred upon her, each of the heirs of the testator, or his legal representative, takes an equal share under the will.

In No. 20½ the judgments below are reversed.

In No. 20¾ the judgment below is affirmed.

44. Tod v. Stambaugh. Error to the District Court of Mahoning County.

WHITE, J.

1. It is error to reverse or modify a judgment without having the parties before the court affected by such reversal or modification.

2. Where several defendants are sought to be charged upon the same demand, and the defense set up by one operates for the benefit of all, it is error to reverse the judgment as to the answering defendant and leave it standing in full force against the others.

3. The lessee in a coal lease, by its terms, purchased all the coal on the demised premises, and agreed, with all reasonable dispatch, to mine and remove the coal, and on the first days of January and July of every year to pay a specified sum per ton for all the coal that may have been mined and removed; also, that if coal was found sufficient to render the same practicable, to mine not less than thirteen thousand tons annually, or on default thereof to pay for said quantity. It was further stipulated that in the event that the payments thus required to be made should be more than sufficient to

pay for the coal mined in any year, the "surplus payments" were to apply on any future year's mining that might be in excess of said quantity. Held:

1. That the quantity of coal was to be ascertained and paid for in the mode prescribed by the lease.

2. That in an action to recover an annual payment for thirteen thousand tons, an averment in the answer that the "surplus payments" made in pursuance of the lease were more than sufficient to pay for the unmined coal remaining on the premises, constitutes no defense.

Judgment of the district court reversed and that of the common pleas affirmed.

60. Henry Diehl v. Carl F. Friester. Error to the District Court of Monroe County.

OKEY, C. J.

1. Where a probate judge allowed an injunction in a cause pending in the court of common pleas, but an undertaking therefor was never given, a fine, with imprisonment for its non-payment, imposed upon the party enjoined, for an alleged contempt in disregarding such injunction, is not authorized by law; and where the person so imprisoned brings an action for such injury against the party causing the imprisonment, it is not necessary to allege malice and want of probable cause.

2. A motion that one judgment be set off against another is an appeal to the equitable power of the court, to be granted or refused upon consideration of all the facts; and in granting such motion, the claim of the attorneys for fees will be respected, wherever it appears to be right, in view of the facts, that this should be done.

Judgment affirmed.

13. Cincinnati, Sandusky and Cleveland Railroad Company v. Benjamin F. Lee. Error to the District Court of Erie County.

OKEY, C. J.

Where a prosecuting attorney appears before a magistrate, at the request of a citizen, and prosecutes one charged with the commission of a felony, preparing the papers necessary for such purpose, there is no implied contract that such citizen will pay him for such services.

Judgment reversed and cause remanded for further proceedings.

263. The State ex rel. the Attorney General v. Portsmouth and Columbus Turnpike Company. Quo Warranto.

BY THE COURT:

The acts of March 27th, 1875 (72 O. L. 85), and of June 12th, 1879 (76 O. L. 155), amendatory of the act of March 16th, 1875 (S. & S. 147), dividing all turnpike companies, within the State into separate and distinct classes, have a uniform operation upon all the members of each class and are not in conflict with Article 2, section 26 of the Constitution of the State.

Demurrer to amended answer sustained, and judgment of ouster as to the power of collecting tolls in the manner complained of in the writ.

12. G. M. Drake v. John Meek. Error to the District Court of Brown County. Judgment affirmed. There will be no further report.

265. Myer Shonfield v. John T. Shankey. Error to the Court of Common Pleas of Franklin County. Dismissed on motion of plaintiff in error.

MOTION DOCKET.

No. 13. Lake Shore and Michigan Southern Railway Co. v. Joshua M. Nettleson et al. Motion to take cause No. 474, on the General Docket out of its order for hearing. Motion granted.

14. Ohio ex rel. H. M. Harrell v. The State Mutual Aid Association. Application for a writ of mandamus. Writ refused under the rule laid down in State v. Williams, 25 Ohio St. 170. Application should be made to the common pleas or district court.

15. Adin G. Hibbs, administrator, v. The Union Central Life Insurance Co. Motion to extend the time for filing printed record in cause No. 783, on the General Docket. Motion granted and printed record filed.

16. Henry T. Brown v. Charles E. M. Jennings. Motion to re-instate cause No. 108, on the General Docket of last term. Motion overruled.

Ohio Law Journal.

COLUMBUS, OHIO, : : : FEB. 2, 1882.

APPLICANTS for admission to the Bar, will be examined next Tuesday.

THE Supreme Court, will, under the rule, call seventy-five new cases on the General Docket, (from 76 to 150 inclusive), on Tuesday next.

NEW BOOKS.

A Manual of the Law of Corporations: Including General Rules of Law peculiar to Banks, Railroads, Religious Societies, Musical Bodies and Voluntary Associations, as determined by the leading Courts of England and the United States. By Charles T. Boone, Johnstown, New York.

Pp. XVII, 552. San Francisco, Cal. Sumner, Whitney & Co. 1882.

This book contains, probably, more case and statute law, upon the subject treated of, than any other, of like size yet published. No single instance of the right or liabilities of corporations seems to have been overlooked by the author. Every contingency conceivable, upon which a right might be predicated, or a liability imposed appears to have been the subject of some law or lawsuit, and all have been most thoroughly canvassed and cited in this little work. Officers, stockholders, employes and attorneys of corporations, can, with this book in their hands, know their rights and duties as fully as need be for any ordinary guidance or protection.

We hope the publishers will publish a larger volume; the work certainly merits a larger page and type and will prove a great favorite when once properly introduced.

THE AMERICAN DECISIONS: VOL. XXXI.

The principal cases decided in all the States organized in 1836, '37 and '38, are reported in full in this volume, and cover the usual range of important legal questions.

It will not be forgotten by the reader that only those cases are reported in full, wherein the rulings have become undoubted precedents; or where there is a decided conflict of authorities. The great value, therefore, of this series, is in this light the more apparent. The value is very much greater indeed than would be that of all the reports, from which the cases are collected.

The student or practitioner may lay his finger upon any case reported in the American Decis-

ions, and confidently assert it to be the law. And he can point to the cases cited in the notes appended to nearly every case and say: "In these cases the ruling of the principal case has been followed."

It would seem that as the subsequent volumes appear, the questions involved would become exhausted, and the notes and comments mere iterations. Such, however, is not the case. The new and novel complications which must exist, in fact, produce new questions in the law, and nothing grows old. We see in this volume very valuable notes upon the following topics:

Patents— <i>Davis v. Bell</i> , (8 N. H. 500).....	202
Apportionment of Contracts and Dividends— <i>Cuthbert v. Kuhn</i> , (3 Wharton 357).....	513
Contracts whose Consideration is an agreement to compound or stifle Criminal Prosecution— <i>Town of Hinesburg v. Sumner</i> , (9 Vt. 23)	600
Attorneys Liens for Fees and Costs— <i>Andrews v. Morse</i> , (12 Conn. 444).....	752

RIGHT OF COUNSEL TO REPRESENT PROSECUTING WITNESS IN CRIMINAL CASES.

MESSENGERS EDITORS:

I do not propose to go into a lengthy discussion of the question presented by your correspondent, "G," in regard to the right of an attorney, other than the Prosecuting Attorney, who has not been appointed by the court for that purpose, to assist in the prosecution of a person charged with the commission of a felony, but to say that the question is not by any means a new one, and that G. probably permitted his "indignation to get the better of his judgment."

The theory of our criminal practice has always been that public prosecutions for criminal acts shall be conducted in the name of the State and by an officer provided for that purpose. Hence, the provisions for the election of a Prosecuting Attorney in each county, who is charged with the duty of prosecuting, in the name and on behalf of the State, all persons who have been indicted for criminal acts committed within his county. He is the prosecutor, and he only has the *legal right* to appear in that capacity, and he must be responsible for the result.

It is true that the statute confers upon the court power to "appoint an attorney to assist the Prosecuting Attorney in the trial of any case pending in such court," and in such case the assistant acts by authority, duly conferred, and is under the direction and control of the Prosecuting Attorney in all things connected with the

trial; and there is no doubt that for improper conduct in the trial, the court of its own motion, or at the request of the Prosecuting Attorney, can remove him before the trial has terminated.

There is no authority conferred by statute upon a Prosecuting Attorney which will authorize him to call into a criminal case any attorney as an assistant, except by the appointment of the court in which the case is pending, and I think that G. wholly mistakes the purpose of Sec. 7245. It is well known to the profession that Prosecuting Attorneys who had partners were in the habit of permitting and inviting their partners to assist in the trial of criminal cases, without an appointment by the court, and this evil had grown to such an extent that the General Assembly felt called upon to stop it by enactment, which it did by the section referred to. The purpose of this section, so far as it relates to the subject under discussion, is to prevent *any* attorney from prosecuting in whole, or in part, a criminal case, without having been elected, or appointed for that purpose. All others who undertake to prosecute are intruders, and the court has the right to protect itself and the party on trial by the removal of the intruder.

I do not know what the facts are in the cases referred to by G. except that of *Price v. The State*, 35 O. S. 601. In that case the record clearly shows that after the trial had commenced in the court of common pleas, C. H. Blackburn was appointed by Judge Longworth, before whom the case was tried, to assist the prosecution in the trial of the case, and the only question upon this subject, decided by the Supreme Court, was that Judge Longworth had authority to make the appointment, and in doing so his act was legal. To the appointment of Blackburn by the court *Price* excepted.

It is true that the Supreme Court in the opinion in this case say: "We are unwilling to say that the Prosecuting Attorney, the injured person or his friends, may require the court to make such appointment. On the contrary, the appointment should not be made in any case unless the due administration of justice requires it. But where the record is silent upon the subject, we will presume that such appointment was properly made." * * *

It is then the *appointment* by the court which gives an attorney the *right* to assist the Prosecuting Attorney in the trial of a criminal case.

A. H. B.

STUBENVILLE, O., Jan. 28, 1882.

THE INCREASE OF DIVORCE.

The *Century* for January contains a very carefully prepared paper by Washington Gladden, on the increase of divorce, in this country. The writer refers frequently to a lecture delivered by the Rev. Samuel W. Dike, of Royalton, Vermont, and an essay by Theodore Woolsey, D. D. LL. D., of New York, on Divorce and Divorce Legislation. After reciting statistics relating to the Eastern States, Mr. Gladden says:

It has been the common belief that certain Western States, notably Indiana and Illinois, were sinners above all the others in this matter; but, so far as the facts have been collected, this does not appear to be true. Chicago has had the reputation of dealing in divorces more extensively than any other city in the Union; but the ratio of divorces to marriages in Chicago appears to be only one in twelve—less than New Haven or Bangor.

The most startling figures are reported from the Western Reserve of Ohio—a region inhabited by a population almost wholly sprung from New England stock. In these counties, Mr. Dike tells us, "the ratio of divorces to marriages was 1 to 11.8 for the two years 1878 and 1879, while for the rest of the State it is 1 to 19.9. Nor is the worst of the Reserve in the cities. The ratio in Ashtabula County, among a farming people originally from New England, is 1 to 8.5. And in Lake County the proportion of divorce suits begun to marriages is 1 to 6.2, and of divorce granted, 1 to 7.4. Unless there be like counties in Maine, this is the worst county in divorces in the United States—except Tolland County, Connecticut, as that was for a few years."

This picture is dark enough, but another shade must be added. In at least four of the New England States, more than one-fourth of the marriages reported are those of Roman Catholics. Among these there are no divorces to speak of. The number granted should be compared, therefore, only with the number of *Protestant* marriages, and this would make the ratio much higher,—one to fifteen in Massachusetts; one to thirteen in Vermont; one to nine in Rhode Island, and one to less than eight in Connecticut.

THE following suggestions are made, by Mr. Gladden, looking toward an improvement of the laws and a lessening of the evils connected with divorces:

1. The distinction formerly recognized in most of the States, and now abolished in most of them, between absolute divorce and legal separation, should be restored. For the crime of adultery, for desertion (after a long term of years), and perhaps in the case of the imprisonment for life of one of the parties, absolute divorce might be granted; in some of the other cases for which divorces are now granted,—such as drunkenness, cruelty, and neglect,—separation from bed and

board might be allowed, giving to neither party the right of marrying again, and leaving the way open for the reunion of the separated parties.

2. Where adultery is a crime, the granting of a divorce for adultery should be followed at once by the arrest and imprisonment of the criminal. "Provision should be made," says Dr. Woolsey, "that the penalty should follow the sentence of divorce without any other trial." This is the simplest common sense. Our laws are brought into contempt when the courts permit men whom they have judicially pronounced to be criminals to escape the consequences of their crimes.

3. If absolute divorce be allowed for other causes than adultery, the law should prescribe a limit of at least three years within which the guilty party should be forbidden to marry.

4. No indeterminate causes of divorce, such as those included in the famous "omnibus clause" of Connecticut, and in the statutes of other States, should be recognized. To recognize incompatibility of temper, general misconduct, and other vague and impalpable grounds of action, is mischievous in the extreme. It is through such clauses that the worst abuses of divorce creep in.

5. The state's attorney ought to appear in every uncontested divorce suit, to protect the interest not only of the absent party, but of the public. The public has an interest in every such case. It is not simply a question between the two parties, any more than theft, or the uttering of counterfeit money, or traffic in diseased meat, is merely a question between the two parties to the transaction. The state is as much interested to maintain the sacredness and permanency of the family as it is to maintain an honest currency. And the people ought not to sit by and let the institution of the family be undermined by scores of fraudulent and collusive divorces.

A few such changes in the laws would interpose a wholesome check to the present tendencies. Reforms like these would make it plainer than it now is that our States do not wish to encourage divorce; that they mean rather to do what they can to preserve the integrity of the family.

Something may also be done by law to prevent hasty and ill-assorted marriages. Easy divorce gives rise to rash marriages—since it can be so easily done for, no matter what it is begun for; rash marriages, on the other hand, furnish the soil from which many divorces spring. Stricter divorce laws would tend to keep people from rushing into wedlock; but something can be done directly by law to secure this result.

1. It is a question whether the old rule, requiring the publication of the intentions of matrimony a week or two before the marriage, ought not to be restored. The publication, if made, should now be made, of course, in the newspapers, and not in the churches.

2. Whether this is done or not, the law should require the parties contemplating matri-

mony to procure a license at least two weeks before the solemnization of marriage; and to place the license thus procured in the hands of the clergyman or magistrate before whom the marriage is to be solemnized, also at least two weeks before the celebration of the rite. An opportunity would thus be given the clergyman or magistrate to investigate cases with which he might not be familiar, and to assure himself that he was proceeding in accordance with the requirements of divine and human law.

3. The license should state on its face whether either of the parties has been previously divorced, and if so, where, when, and for what cause.

Such provisions should not seem irksome to well-meaning persons; and they would not only serve to prevent foolish people from rushing into a relation for which they are wholly unfitted, but would also assist clergymen in the intelligent performance of a difficult and delicate duty.

TURNPIKE COMPANIES.

SUPREME COURT OF OHIO.

STATE OF OHIO EX REL THE ATTORNEY GENERAL.

v.
PORTSMOUTH AND COLUMBUS TURNPIKE COMPANY,
SOUTH.

JANUARY 24, 1882.

The acts of March 27th, 1875 (72 O. L. 85), and of June 12th, 1879 (76 O. L. 153), amendatory of the act of March 16th, 1875 (S. & S. 147), dividing all turnpike companies, within the State into separate and distinct classes, have a uniform operation upon all the members of each class and are not in conflict with Article 2, section 26 of the Constitution of the State.

Application for the writ of Quo Warranto.

The petition recites that the defendant is a corporation under the laws of this State, owning and operating a turnpike road running from Chillicothe through Ross, Pike and Scioto counties, to the village of Portsmouth. It further alleges that for more than four years it has misused its franchise to collect tolls by charging a higher rate than is allowed by law.

The defendant, by an amended answer, avers that it was incorporated under a special act of the General Assembly of Ohio, passed February 7th, 1834, (29 O. L. 34); and subsequently accepted the provisions of the act of March 16th, 1865, entitled, "an act to fix the rates of toll on turnpike and plank road companies." (S. & S. 147); and has ever since collected and charged the tolls, in this last act allowed and specified, and no more.

The amendments to this act, passed March 27th, 1875, (72 O. L. 85) and June 27th, 1875, (76 O. L. 153), defendant declares violate the organic law of the State, and are unconstitutional and void. To this answer a general demurrer is interposed.

By these amendments the rates of toll which turnpike companies are authorized to collect, are

reduced. The first, however, contains a proviso that its terms shall not apply "to companies which are in debt for the original construction of said turnpike until five years from the passage of this act." The second excepts from its operation "turnpike roads constructed of and kept in repair with two-thirds broken limestone," which are permitted to charge the same rates as formerly.

It is claimed by the defendant that these statutes do not operate uniformly upon all incorporated turnpikes, and are therefore in conflict with Article 1, Section 26, of the constitution which provides that "all laws of a general nature, shall have a uniform operation throughout the State.

Converse, Booth & Keating, for plaintiff.

M. A. Daugherty, Huston James and Okey & Throckmorton, for defendant.

BY THE COURT.

The classifications of all turnpike companies, adopted by the amendments of the act of March 16th, 1865, are not unreasonable or arbitrary; and inasmuch as their provisions have a uniform operation upon all the individuals comprised in each class, they do not fall within the inhibition of Article II, Section 26, of the constitution.

[This case will appear in 37 O. S.]

ATTORNEY'S FEES.

SUPREME COURT OF OHIO.

CINCINNATI, SANDUSKY & CLEVELAND RAILROAD COMPANY,

v.

BENJAMIN F. LEE.

JANUARY 24, 1882.

Where a prosecuting attorney appears before a magistrate, at the request of a citizen, and prosecutes one charged with the commission of a felony, preparing the papers necessary for such purpose, there is no implied contract that such citizen will pay him for such services.

Error to the District Court of Erie county.

On May 22, 1875, Benjamin F. Lee brought suit in the Court of Common Pleas of Erie county against the Cincinnati, Sandusky and Cleveland Railroad Company, to recover for services rendered as an attorney at law, for and at the request of the company. The services, it is alleged, rendered in February, 1874, were the prosecution of suits, drawing and copying papers, and giving advice to the company's agents in its business.

The answer is as follows: "Between the 10th and 20th days of February, 1874, the plaintiff was the duly elected and qualified, and acting prosecuting attorney of Erie county, Ohio, which said office was held by the plaintiff from the first day of January, 1873, to the first day of January, 1875, and the certain suits in said petition referred to were criminal suits for felonies against a citizen of said Erie county, instituted before the mayor of the city of Sandusky, in said Erie

county, and that the services referred to and mentioned in said petition, were services rendered in counseling and advising and prosecuting said criminal suits before the mayor, and writing and copying papers necessary thereto. And this defendant admits that its officers did consult the plaintiff in regard to said criminal prosecutions, and state the facts relating to the same to the said plaintiff, and ask his advice and direction therein, and that the said plaintiff did advise the prosecution of said criminal suits, and aid in the preparation of papers for the same and appear before the said mayor in the prosecution of the same, at the request of the officers of this defendant; but this defendant denies that the plaintiff was offered or promised any compensation therefor, or that he is entitled to any."

A demurrer was interposed to this answer and the same was sustained; and no further answer having been filed, the cause was, by consent of parties, submitted to the court on the petition and evidence, and judgment was rendered in favor of Lee for three hundred dollars and costs, which judgment was affirmed in the district court. This petition in error is filed to reverse both judgments.

S. A. Bowman, for plaintiff in error.

Gilmore v. Lewis, 12 Ohio, 281; Goulden v. The State, 11 Georgia, 47. And see Rea v. Smith, 2 Handy, 193.

T. P. Finefrock, for defendant in error, and B. F. Lee, in person.

Smith v. Portage County, 9 Ohio, 25. And see Sharp v. Kirkendall, 2 J. J. Marsh, 150; Davis v. Munson, 43 Vt., 676

Okey, C. J.:

Lee having performed services as an attorney, in pursuance of the request of the railroad company, the agreement of the company to compensate him would be implied, in the absence of any other fact. But the law does not imply such promise in all cases where one performs service at the request of another. Take the familiar example of a son who continues, after arriving at age, to live with his father, and perform service at his request. The son may have expected to be paid wages, but from the mere fact that he acted under direction of his father in the same way as during his minority, a contract to pay wages will not be implied. To constitute an agreement to pay wages in such a case, it is not essential that any price should be fixed, but words must be employed showing that both parties understand that wages are to be paid.

It is the duty of the prosecuting attorney to conduct the prosecution of offenders in the court of common pleas; but in *Smith v. Portage County*, 9 Ohio, 25, it is said that he is not bound to appear before a justice of the peace or mayor, in a criminal case. The law remains the same to the present day. But in fact that officer, in many cases, appears voluntarily in the examining court, and conducts the prosecution there. He does the same thing sometimes at the request of a citizen, without any expectation on his part to

receive, or on the part of the citizen to pay compensation for the services.

We cannot say, looking to the facts stated in this answer, that there was an implied contract on the part of the company to pay Lee compensation for his services. The further proposition is urged by the counsel for the company, that even an express agreement to pay would have been void as contrary to public policy. But upon that question we express no opinion. We hold the answer to be sufficient, and hence that it was error to sustain a demurrer thereto. The judgment will be reversed and the cause remanded for further proceedings.

Judgment reversed.

[This case will appear in 37 O. S.]

INJUNCTION—CONTEMPT—JUDGMENT—
ATTORNEYS' FEES.

SUPREME COURT OF OHIO.

HENRY DIEHL

v.

C. F. FRIESTER.

January 24, 1882.

1. Where a probate judge allowed an injunction in a cause pending in the court of common pleas, but an undertaking therefor was never given, a fine, with imprisonment for its non-payment, imposed upon the party enjoined, for an alleged contempt in disregarding such injunction, is not authorized by law; and where the person so imprisoned brings an action for such injury against the party causing the imprisonment, it is not necessary to allege malice and want of probable cause.

2. A motion that one judgment be set off against another is an appeal to the equitable power of the court, to be granted or refused upon consideration of all the facts; and in granting such motion, the claim of the attorneys for fees will be respected, wherever it appears to be right, in view of the facts, that this should be done.

Error to the District Court of Monroe County.

Spriggs & Driggs, for plaintiff in error.

Hunter & Mallory, for defendant in error.

OKEY, C. J.

Diehl brought suit against Friester in the Court of Common Pleas of Monroe County. The action was prosecuted on promissory notes and a real estate mortgage to secure their payment, executed by Friester to Diehl; the prayer was for a judgment and a sale of the land to satisfy the same; and at the December term, 1877, judgment was rendered for \$1,442.50 and costs, and such order of sale was made. On November 17, 1877, while the suit was pending, Diehl obtained from the probate court of that county an injunction in the action, to restrain Friester from doing certain acts with respect to the property, and Friester was served with a copy of such order of the probate court; but no undertaking for such injunction was ever executed. On November 22, 1877, upon affidavit of Diehl that Friester was violating the injunction, the probate court caused the latter to be arrested, assessed against him a fine of ten dollars and costs as for a contempt for disobeying the injunction, and

in default of the payment of such fine and costs, he was, by order of such probate court, committed to the county jail, where he was confined for thirty days. Thereupon, Friester brought suit against Diehl in the Court of Common Pleas of Monroe County, for false imprisonment, based on the above facts, and at the June term, 1878, of that court, obtained a verdict and judgment for \$245, and costs. At the same term Diehl showed to the court that the mortgaged premises had been sold in pursuance of the order of the court, and the proceeds applied in part satisfaction of the mortgage debt, leaving a balance of \$1,092.18, on his aforesaid judgment; and thereupon he moved the court that so much of his judgment as would equal the judgment of Friester should be set off against the same in satisfaction thereof. This motion was sustained as to the sum of \$145.00, and no objection has been made to the order in this respect, but the court denied the motion as to the remaining sum of \$100.00, which portion of the Friester judgment the court by its order allowed to Hunter & Mallory, who prosecuted, as attorneys for Friester, the suit for false imprisonment; and the judgment and orders were affirmed in the District Court. This petition in error was filed by Diehl to reverse the judgment in favor of Friester, and to reverse so much of the order as denied to Diehl a set off with respect to said sum of \$100.00.

1. As to the sufficiency of the petition. It contains in detail the facts as to the suit of Diehl against Friester, the application of Diehl for an injunction, the allowance of the injunction, the application for and issuing of an attachment, and the arrest, assessment of fine, and imprisonment of Friester; and it contains, furthermore, an allegation that no undertaking was ever given for the injunction, but none that such prosecution for contempt was malicious and without probable cause.

In trespass for false imprisonment the *gravamen* is the *unlawful* act of the defendant. Case for malicious prosecution may be maintained where a proceeding is carried on maliciously and without probable cause. While an action for malicious prosecution may be maintained, notwithstanding the plaintiff was imprisoned upon a perfectly valid judgment or order, an action for false imprisonment cannot be maintained, where the wrong complained of is imprisonment in accordance with the judgment or order of a court, unless it appear that such judgment or order is void. And this distinction is as important now as under the former practice. *Spice v. Steinruck*, 14 Ohio St. 218.

This is an action for false imprisonment. If Friester was imprisoned in pursuance of a valid judgment and order, the petition does not contain facts sufficient to constitute a cause of action, and the judgment must be reversed. But in our opinion the judgment and order for imprisonment were void, for the reason that Diehl never gave the undertaking for the injunction required by the statute, (Civil Code §§ 242, 245,

247; Rev. Stats. §§ 5576, 5579, 5581), and hence that the petition is sufficient.

This is not a case where a party, upon being informed that an injunction has been allowed to restrain him from doing a particular act, does the act before there is time to give such undertaking. What if any power the probate court has in a case of that sort to punish for contempt, is a question which we need not determine.

2. Did the court err in holding that Hunter & Mallory should be preferred to Diehl as to \$100.00, of the Friester judgment, and that as to this amount the set off should be refused?

The provisions of the statute relating to set off do not in terms apply to the set off of one judgment against another on motion (Civil Code, §§ 26, 93, 97-99, 119; Rev. Stats. §§ 4993, 5071, 5075-5077, 5089), though doubtless those provisions will be applied whenever they are in their nature applicable to such motions. As the court say in *Holmes v. Robinson*, 4 Ohio, 90, "the practice of setting off one judgment against another, between the same parties, and in the same right, is ancient and well established." Even the fact that the judgments are in different courts, one for a tort and the other on contract, and some of the parties in one case were not parties in the other, does not necessarily afford an insuperable objection to such set off. But as Gibson, C. J. observes (*Ramsey's Appeal*, 2 Watts. 230), there is a fallacy in supposing that such set off is a legal right. "Judgments are set off against each other," said he, "not by force of the statute, but by the inherent power of the court immemorially exercised. * * * An equitable right of setting off judgments, therefore, is permitted only where it will infringe on no other right of equal grade." And see *Love v. Freer*, Wright, 412. "Such power," said Devens, J., in *Ames v. Bates*, 119 Mass. 397, "is only to be exercised upon careful consideration of all the circumstances of the transaction out of which the judgments arise, and in order to protect the just rights of parties." "The privilege of setting off judgments," said Coleridge, J., in *Simpson v. Lamb*, 40 Eng. L. & Eq. 59, 7 E. & B. 84, "is not an inherent incident of the suit, but is given by permission of the court, with reference to all the circumstances of the transaction." And it has been recently held that where the set off is sought by motion, the matter so far rests in the discretion of the court that the refusal of an order for such set off will not be reviewed on error. *Chipman v. Fowle*, 130 Mass. 352.

Guided by this view of the law, courts have refused to order such set off where by granting it the just rights of assignees would be disturbed. *Ramsey's Appeal*, supra. So, it has been repeatedly held that where a debtor is entitled to hold a judgment as property exempt from execution, the object of the law being, not to exonerate the debtor from the payment of his debts, but "to protect his family" (*Sears v. Hanks*, 14 Ohio St. 298, 301), a set off as to such judgment will not be ordered. *Curlee v. Thomas*, 74 North Car. 51;

Duft v. Wells, 7 Heiskell, 17; *Wilson v. McElroy*, 32 Penn. St. 82; *Beckman v. Manlove*, 18 California, 388. And see *Comer v. Dodson*, 22 Ohio St. 622; *McConville v. Lee*, 31 Ohio St. 447; Rev. Stats. §§ 5433, 5441; *Thompson on Exemp.* § 893. And it has likewise been held in many cases, that a judgment will not be set off against another judgment, to the prejudice of an attorney who contributed by his skill and services in obtaining it. *Simpson v. Lamb*, supra; *Johnson v. Taylor*, 1 Disney, 169; *Ames v. Bates*, supra; *Carpenter v. Sixth Av. Ry.* 1 Am. L. Reg. N. S. 410, 424; *Perry v. Chester*, 53 N. Y. 240; *Zogbaum v. Parker*, 55 N. Y. 399.

Although an attorney may contribute his skill and services in obtaining a judgment for his client, he has, in this State, no lien on such judgment for his fees, where there is no agreement for such lien known to the judgment debtor, in the sense that such judgment debtor may not effectually satisfy such judgment by payment of the amount thereof to the judgment creditor; nor do we doubt the right of parties to compromise any pending suit, in opposition to the wish of their attorneys. But on the other hand, an attorney may have a claim upon the fruits of a judgment or decree which he has assisted in obtaining, or upon a sum of money which he has collected, and under some circumstances courts will aid him in securing or maintaining such claim. Thus he will be protected in retaining his fee out of money which he has collected for his client. (*Longworth v. Handy*, 2 Handy, 75.) He will be protected in his claim as attorney on a fund in the hands of a receiver (*Olds v. Tucker*, 35 Ohio St. 581), or in court. (*Ingham v. Lindemann*, ante, 218.) This protection, it will be seen from the cases cited, will be afforded in many other cases. And why should not Hunter & Mallory be protected to the same extent as if Diehl had paid the money into court? The motion for set off was, as we have seen, an appeal to the equitable power of the court, and where such appeal is made, the court looks not merely to the form the transaction is made to assume, but to its substance. The attorneys contributed, undoubtedly, in obtaining the judgment. The court may have properly charged, under authority of *Finney v. Smith*, 31 Ohio St. 529; *Stevenson v. Morris*, ante, 10, that if the jury found that Diehl was actuated by malice in causing Friester's arrest and imprisonment, they might, in estimating compensatory damages, allow to the plaintiff reasonable counsel fees in the prosecution of his action. If such was the fact, and attorney's fees were thus included in the verdict and judgment, upon what principal could Diehl be entitled to them to the exclusion of the attorneys, who had not been paid?

Finally, it is said that the attorneys did not claim an allowance by the court of such fee, and that the fee was allowed without evidence. But we do not think this view is warranted. The record does not contain the evidence, nor does it, in terms, show any application for such allow-

ance. But error will not be presumed. The cases were both tried in the same court, and doubtless before the same judge. The record shows that nothing could be collected from Friester by process, and it may properly be assumed that when the motion for set off was presented, Hunter & Mallory suggested to the court that they had not been paid their fees, and that the only way they could secure compensation was by an allowance out of the Friester judgment. While the record does not show what evidence was offered as to the value of their services, the proof was no doubt satisfactory to the court; and, besides, as held in *Ingham v. Lindemann*, supra, the amount was in some degree to be determined by the judge before whom the services were rendered from his own knowledge of their value. Perhaps, indeed, there was an agreement between Friester and his attorneys as to the amount of the fee and its lien, and that this was shown to the court. However that may be, we hold that in any view there was no error in the courts below of which Diehl can complain.

Judgment affirmed.

[This case will appear in 37 O. S.]

AGENCY—INNOCENT PARTIES.

SUPREME COURT OF OHIO.

HERMAN NOLTE, ET AL.,

v.

WILLIAM P. HULBERT, TRUSTEE.

JANUARY 24, 1882.

S. brought suit against N. and others to obtain a sale of land to satisfy a judgment lien thereon. To this suit H. was made a party defendant, who, upon receipt of summons, gave to C., his regular attorney, certain notes endorsed by him in blank, together with a mortgage upon the land to secure the same, for collection.

C. caused a cross-petition to be filed on behalf of H., setting up his mortgage lien. The court, upon trial, ordered the land to be sold to satisfy the liens of S. and H. Pending the suit, H. agreed with N. to extend the note for a year from the time when it fell due. Before the time so extended had expired, N., fearing that the land would be sacrificed, employed a broker who applied to C. to find a purchaser at private sale. C. went to J. S. and offered him the land for \$3500.00, telling him of the mortgage and saying that he had in his possession all the papers necessary to make a clear title. J. S. paid him the money and directed him to pay off all the claims upon the land, including the mortgage of H. and to obtain H.'s cancellation of the mortgage upon his return, he being then absent. C. paid the costs and the claim of S. but embezzled the remainder of the money.

Held: That under this state of facts, C. acted as the agent of J. S., to make payment to H., and not as the agent of H. to receive payment from J. S.; and that, as between the two innocent parties, the loss must be borne by J. S.

Error to the Superior Court of Cincinnati.

The action in the Court below was brought by William P. Hulbert, trustee of Julia Harbeson, against Herman Nolte and others to foreclose a mortgage securing certain notes held by him against Nolte. The mortgaged property had been conveyed by Nolte to Seasongood and by him to Dallas. These latter were both made parties defendant to the suit.

The facts of the case, as disclosed by the record, were as follows:

On January 18th, 1872, Nolte delivered to Hulbert his note for \$2,500, to secure a loan of that amount, together with certain interest notes, the whole secured by mortgage upon city property. The principal note was due in two years after date.

In August, 1873, one Steineke, a judgment creditor of Nolte, brought suit against Nolte to obtain a sale of the mortgaged land to satisfy his judgment lien and for other relief. To this suit Hulbert was made a party defendant. On receipt of summons he sent for Charles Cist, his regular attorney in such matters, and handed to him the summons together with the notes endorsed in blank and the mortgage, and took his receipt therefor for collection. A cross-petition was filed on behalf of Hulbert asking that, if the land should be sold to satisfy Steineke's lien, his rights might be protected and his claim satisfied from the proceeds of sale.

While the suit was still pending the principal note became due and Hulbert then agreed with Nolte to extend it for another year. There is no evidence to show whether or no Cist had knowledge of this agreement.

In March, 1874, the case was heard and decided and the land was ordered to be sold. No entry, however, was made upon the minutes.

Nolte, thereupon, fearing that the land would be sacrificed engaged a broker to find a purchaser at private sale. This broker applied to Cist, who went to Seasongood, a capitalist, with whom he had had many dealings of a like character and between whom and himself existed relations of perfect confidence.

Cist offered the land to Seasongood for \$3,500, and told him of the incumbrances upon it. These he agreed to pay off out of the purchase money and to furnish a certificate that the title was clear. He said that he had in his possession all the papers necessary to make a clear title.

Thereupon Seasongood gave to Cist his check for \$3,500, the latter agreeing to pay off all the liens upon the property and to obtain from Hulbert a cancellation of the mortgage when he should return to the city.

The land was then conveyed by Nolte and wife to Seasongood.

Cist paid the costs and the Steineke claim but embezzled the remainder of the money and fled the city.

At the trial below in General Term, the case having been reserved, the court found that the facts did not show a payment of Hulbert's claim and that the loss caused by Cist's dishonesty ought to fall upon Seasongood rather than Hulbert and overruled a motion for a new trial.

The proceeding in error is to review this judgment.

Thomas McDougall and Jordan, Jordan & Williams for plaintiffs in error.

Headly, Johnson & Colston for defendant in error.

LONGWORTH, J.

The only question before us necessary to a determination of the case is whether, at the time the check was given by Seasongood to Cist, the latter acted as Hulbert's agent to receive payment, or as Seasongood's agent to make payment to Hulbert. This is a question of mixed law and fact.

The maxim that "no man shall serve two masters" does not prevent the same person from acting as agent, for certain purposes, of two or more parties to the same transaction when their interests do not conflict, and where loyalty to the one is not a breach of duty to another.

Thus the doings of Cist as Nolte's agent to procure a purchaser were not inconsistent with his duties to Hulbert as his agent to receive or to Seasongood as his agent to make payment.

The fact, if fact it be, that at the time Cist received the check he had full authority as Hulbert's agent to receive payment would not preclude Seasongood from choosing to deal with him in a different capacity. He might prefer to deal directly with the principal and to receive his receipt rather than that of his agent: and for this purpose to appoint Cist his agent to make payment. He had only Cist's statement that he was Hulbert's agent and was in possession of the notes and mortgage to evidence the fact of such agency. Suppose he had doubted the truth of these statements would it not have been competent for him to direct Cist to make payment to Hulbert and to bring him his (Hulbert's) receipt of satisfaction? Clearly so.

Seasongood testified, "I gave Mr. Cist the money at the time he gave me the deed, May 9th, 1874; the certificate I got after, and I then believed he had paid off the Hulbert mortgage," and further in cross-examination he said, "I took it for granted that he would take the money and pay off the mortgage, I trusted Mr. Cist to make the mortgage payment and get me a clear title."

It is also worthy of note that this was not the only transaction between Seasongood and Cist. They were in the habit of dealing together in matters of this kind. Seasongood in another place says, "I always gave my check to him (Cist) in similar transactions and trusted him to clear the title."

From this it is manifest that at no time did Seasongood understand that when he gave his check to Cist he was paying Hulbert's mortgage; on the contrary, he trusted and expected Cist to make the payment and to obtain for him Hulbert's cancellation.

This conclusion is perhaps strengthened by the circumstance that but one check was given to cover all the several claims, that Cist was Seasongood's agent to pay off the costs in the Steineke suit and the judgment in favor of Steineke is beyond doubt. If he was to act in any other capacity in respect to Hulbert's claim would it not be natural to suppose that separate checks would have been given?

These considerations make it unnecessary to inquire whether Cist actually had authority from Hulbert to receive payment or whether his pos-

session of the notes and mortgage would have authorized Seasongood to deal with him as such agent.

We are asked to hold that the mere fact of possession of a note by an attorney will protect the maker who pays to the attorney against the claim of the payee, and *Patton v. Fullerton*, 27 Maine, 58, is cited in support of the rule claimed. We should not be prepared to subscribe to this doctrine even in a case where the question necessarily arose; nor do we think that *Patton v. Fullerton* bears it out. In that case the additional and most important circumstance existed that prior partial payments had been made by the debtor to the unauthorized agent, which had been accepted by the creditor. We should long hesitate to hold that a maker of a note may safely pay it to one who has stolen it from the payee and who falsely pretends to hold it for collection in the absence of any other evidence of authority than the bare possession. Yet this is the result of the doctrine as claimed.

True, in the case at bar the notes had been endorsed in blank by Hulbert and had Seasongood relied on this and paid them he would have been safe: yet it appears that this fact was never known to him or communicated to him by Cist.

Upon the whole case we are clearly of opinion that Seasongood did not deal with Cist in any manner as the agent of Hulbert or at any time suppose that in delivering to him his check he was paying Hulbert's claim.

We find no error in the judgment of the court below.

Judgment affirmed.

[This case will appear in 37 O. S.]

Digest of Decisions.

IOWA.

(Supreme Court.)

BON v. RAILWAY PASSENGER ASSURANCE CO. Oct. 20, 1881.

Accident Insurance.—Plaintiff having an accidental insurance ticket or policy, containing a provision that the "insurance shall only extend to bodily injuries, fatal or non-fatal, as aforesaid, when accidentally received by the insured while actually riding on a public conveyance provided by common carriers for the transportation of passengers in the United States or dominion of Canada, and in compliance with all rules and regulations of such carriers, and not neglecting to use due diligence for self-protection," was riding upon a train of cars, and as the same approached the station, and while it was slowing up, went out on to the platform. While standing there, owing to a sudden jerk of the train, another passenger was precipitated against him, and he was by reason thereof thrown from the car and severely injured. It was a regulation of the railroad company that passengers should not stand on the platform, and plaintiff was aware of such rule. *Held*, in an action upon such accident policy, that upon such state of facts verdict should have been ordered for the defendant.

PENNSYLVANIA.

(Supreme Court.)

APPEL ET AL. v. BYERS ET AL. November 7, 1881.

Devise.—Testator gave all his real and personal estate after the death of his wife to "my nephew Philip Byers." The jury returned a special verdict, finding that the testator died leaving two nephews, one Philip, son of Martin, legitimate; another Philip, son of Louis, illegitimate; also that the nephew intended by the testator to inherit was Philip, the illegitimate nephew, the son of Louis, and this from evidence *outside* the will and not from the will itself. *Held*, that there being no ambiguity in the will, and there being only one legitimate nephew, evidence could not be admitted to show that the testator intended his illegitimate nephew, although the name in the will applied as fully to him as to the legitimate nephew.

NELLIE, GARNISHEE, v. COLEMAN, FOR USE. October 31, 1881.

Agreement.—Where two men agree that each will loan a third a sum of money, one keeps and the other breaks his promise, no legal principle will enable the lender to compel the other promisor, as garnishee in an execution attachment, to pay what he had promised to loan to said third person.

UNITED STATES COURTS.

CONNER v. LONG. (Supreme Court of the United States.) December, 1881.

Conversion—Sheriff—Attachment—Bankruptcy—Notice.—An action of conversion cannot be maintained against a sheriff of a foreign jurisdiction for proceeding under an attachment after an adjudication in bankruptcy of the debtor, where no notice had been served upon him of the bankruptcy proceedings until after the sale and payment of the money to the plaintiff in the attachment suit.

ROGERS v. LEE MINING CO. (Circuit Court, D. Colorado.) December, 1881.

1. *Attorney and Client—Purchase by Attorney pending Litigation.*—When there is a pending litigation threatening a client's title to property, his attorney cannot, while acting as such, purchase the property. It is contrary to public policy to permit the purchase.

2. *Ibid—Purchase by Attorney from Client—Duty of Attorney.*—To sustain a sale from client to attorney, the latter must show that he has done as much to protect the client's interest as would have been done by him in the case of his client's dealing with a stranger.

3. *Ibid—Ibid—Secret Trust—Bona Fide Purchasers.*—When an attorney purchases from his client in his own name, but in secret trust for strangers, the latter cannot be regarded as innocent purchasers or entitled to greater rights than the attorney himself.

BOYD v. CLARK. (Circuit Court, E. D. Michigan.) Oct. 1881.

Statutory Remedy—Of Foreign State—Statute of Limitations.—Where a statute gives a right of action not known to the common law, and therein limits the time within which an action shall be brought, such limitation is operative in any other jurisdiction wherein the action is brought.

FLAGG v. THE MANHATTAN RAILWAY CO. (Circuit Court, S. D. New York.) December 21, 1881.

Railroads—Lease of Road—Discretion of Directors to modify Rent.—Where two railway corporations have leased their property to third company at a certain rental, the directors of the three companies may afterwards modify the lease without the authority of the stockholders, reducing the amount to be paid by the lessee, and an injunction will not be granted at the suit of stockholders to prevent such modification.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Feb. 1, 1882.]

1029. The P. C. & St. L. R'y Co. v. Matthew M. Patton, adm'r. Error to the District Court of Harrison County. J. Dunbar for plaintiff; J. M. Estep for defendant.

1030. Wesley Cameron v. W. S. Capeller, Auditor and Luke A. Staly, Treasurer of Hamilton County. Error to the District Court of Hamilton County. Yaple, Moos & Pattison and C. D. Robertson for plaintiff; Charles Evans and Goss & Peck for defendants.

1031. Jacob Pfau et al. v. The Cincinnati Ice Co. Error to the District Court of Hamilton County. Long, Kramer & Kramer for plaintiffs; Ramsey, Matthews & Matthews for defendant.

1032. Jacob Pfau et al. v. Peter Andrew. Error to the District Court of Hamilton County. Long, Kramer & Kramer for plaintiffs; Coppock & Coppock for defendant.

1033. Jacob Pfau et al. v. Henry Adam. Error to the District Court of Hamilton County. Long, Kramer & Kramer for plaintiffs; Ramsey, Matthews & Matthews for defendant.

1034. Charles Theis v. Mary Ryan. Error to the District Court of Brown County. Loudon & King for plaintiff; White, McKnight & White for defendant.

SUPREME COURT ASSIGNMENT.

FOR ORAL ARGUMENT.

February 1st—No. 8. Union Central Life Insurance Company v. Cheever.

February 1st—No. 25. Cross v. Winslow.

February 1st—Bloom v. United Railroad Stock Company. Motion to vacate Injunction of Hamilton County Court of Common Pleas.

February 2d—No. 886. Ohio ex rel. Brackney et al. v. Commissioners of Fayette County. Mandamus.

February 3d—No. 66. Sidener v. Hawes, adm'r, etc.

February 3d—No. 31. P. C. & St. L. Railway Company v. Ranney.

February 16th—No. 969. J. H. Devereux et al. v. Hugh J. Jewett, Trustee, &c., et al. No. 963. Ohio ex rel. Attorney General v. William H. Vanderbilt et al. Quo Warranto.

February 23d—No. 6. Shorten v. Drake et al. No. 30. Pitts, Graham & Co. v. Fogleson.

February 23d—No. 794. Elias Sims et al. v. The Brooklyn Street Railroad et al.

February 24th—No. 23. Pittsburgh, Cincinnati & St. Louis R'y Co. v. Anderson. No. 24. Same v. Shuss. No. 73. Same v. McMillan.

March 1st—No. 33. Little v. Eureka Fire and Marine Insurance Co. No. 34. Roland v. Meader Furniture Company.

March 2d—No. 18. Marietta & Cincinnati Railroad Company v. Western Union Telegraph Company.

March 3d—No. 37. Phoenix Insurance Company v. Priest, adm'r, etc. No. 39. Morris et al. v. Williams.

March 8th—No. 40. Crabill, ex'r v. Marsh. No. 50. City of Ironton v. Kelley and wife.

March 9th—No. 7. Dawson v. Ohio and J. B. Koch. No. 74. Ohio ex rel. Dawson et al. v. Board of Education of Wooster.

March 15—No. 114. Coppin v. The Greenlees & Ransom Company.

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

Tuesday, January 31, 1882.

GENERAL DOCKET.

No. 62. Isaac T. McLain v. B. W. Simington. Error to the District Court of Morrow County.

LONGWORTH, J.

1. The undertaking for attachment provided by section 193 of the Code of Civil Procedure (2 S. & C. 1004), is not a *specialty*, and the want of a seal does not affect its validity.

2. Where the name of the surety to such undertaking does not appear in the body of the instrument, but the language used is, "We, A. B. and—hereby undertake &c," the omission of such name does not affect the validity of the undertaking or the obligation of the surety. Language of opinion in *Stephens v. Allmen et al.* 19 Ohio St. 485, qualified.

48. Mary Letitia Gifford v. David Morrison. Error to the District Court of Cuyahoga County.

McILVAINE, J., *Held*:

A court of equity will not decree a judgment lien to be invalid on the ground of the want of legal notice to the defendant, where the plaintiff has not been guilty of misconduct and the defendant had actual knowledge of the pendency of the action, unless a meritorious defense to the action be shown.

Judgment affirmed.

WHITE, J., concurred in the affirmance of the judgment without approving of the syllabus as applied to the case.

29. Alonzo Chesbrough v. The Commissioners of Putnam and Paulding Counties and others. Error to the District Court of Putnam County.

JOHNSON, J., *Held*:

1. It is within the scope of legislative power, to provide, as is done by Section 22 of the Act relating to Ditches (68 O. L. p. 60), that where a proposed ditch is in more than one county, a majority of the board of county commissioners of each county, may, in joint session, locate and establish the same.

2. Under said section, each board of county commissioners constitutes an integral part of the joint body, and it is essential to the validity of the proceedings in joint session, that a majority of each board should concur therein.

3. In a proceeding under said section, application for damages must be made to the commissioners of the county where the land is situated. The commissioners of such county, and not the joint body, are to determine the compensation and damages to be paid such applicant.

From such award an appeal lies under secs. 12 & 13 of said act as if said ditch was wholly within that county.

4. It is the public health, convenience or welfare of the community to be affected by the proposed ditch, and not that of the public at large, that is to be regarded in the construction of a ditch. Hence, if it appears that the proposed ditch will be "conducive to the public health, convenience and welfare of the neighborhood" through which it will pass, the commissioners are authorized to construct the same.

5. When the commissioners have apportioned the cost and expenses and amount of work to each land owner, and have on due notice heard exceptions thereto, and confirmed such apportionment, it will be presumed in the absence of proof to the contrary, that such apportionment is just and fair and was made with reference to benefits to be derived from the improvement.

Judgment affirmed.

82. Darling v. Younker. Error to the District Court of Coshocton County.

OKEY, C. J.

1. Where an action is brought against an agent who, having received money to be carried to his principal, claims that the money is lost, the burden is on the agent to show there was no breach of duty on his part; and this

is to be determined upon consideration of all the circumstances; and, ordinarily, the question is one of mixed law and fact and not merely of law.

2. Y. was employed by D. to carry a sum of money, consisting in part of four \$500 bank bills, to the town of C., there pay part of it to S. and carry and deliver the balance to him (D.), owner of the money. Y. went to C. by passenger train at night, riding in the same seat with F., an acquaintance, the car being half filled with passengers. While on the way Y., at the request of F., let the latter have one of the \$500 bills in exchange for smaller bills. On arriving at C. the package of money was taken by Y. to a store in charge of B., and handed to B., who at the request of Y. locked it in his safe, the safe being one in which D. usually deposited his money. In the morning when the money was taken from the safe and counted, another \$500 bill was missing. Y. paid S. as directed, and on the same day gave the receipt of S. and the balance of the money to D. and stated to him the above facts. D. accepted the receipt and money, but brought suit against Y. for \$500, basing his right to recover on the ground of negligence. *Held*, that on the facts stated, the court could not say as matter of law that Y. was liable.

Judgment affirmed.

4. Charles Merling v. Isabella Hamilton. Error to the District Court of Ashland County. Judgment reversed on the authority of *Baker v. Beckwith*, 29 Ohio St. 314. There will be no further report.

57. A. T. Johnson et al. v. The Trustees of Geneva Township et al. Error to the District Court of Ashtabula County. Judgment affirmed. There will be no further report.

MOTION DOCKET.

Nos. 21 and 26. Oshe v. The State. Cain v. The State. Motions for leave to file petitions in error to reverse the judgments of the District Court of Muskingum County.

WHITE, J., *Held*:

1. The Act to revise and consolidate the general statutes of the State, embodied in the Revised Statutes, is not void as being in conflict with Section 16, Article 2, of the constitution.

2. The offense defined in Section 6942, of the Revised Statutes, consists in the *keeping of a place*, where the business of the unlawful sale of liquor is carried on; and the section is not unconstitutional in not requiring such place to be one of public resort.

3. In an indictment under said section, it is a sufficient description of the unlawful sales to aver that they were made "in violation of Section sixty-nine hundred and forty-one, of the Revised Statutes of Ohio;" and the reference to the section must be understood as referring to the section then in force.

Motions overruled.

17. Orrin S. Farr v. Frank S. Torrey et al. Motion to dismiss cause No. 441, on the General Docket, for want of printed record. Motion granted.

18. Henry S. Uphregrave v. The State of Ohio. Motion to take cause No. 1021, on the General Docket, out of its order for hearing. Motion granted.

19. Charles Bennett v. The State of Ohio. Motion to take cause No. 1022, on the General Docket, out of its order for hearing. Motion granted and cause submitted.

20. John Hanes et al. v. E. H. Munger, Administrator, &c. Motion to dismiss cause No. 854 on the General Docket for want of printed record, and counter motion for leave to file printed record. Motion passed for further hearing as to reasons for extending time for filing a printed record.

22. Miles D. Carrington v. George Schuler. Motion for leave to docket a reserved case. Motion granted.

23. Charles King v. Julia King. Motion to advance causes Nos. 123 and 551 on the General Docket, to be heard with cause No. 104 on the same docket. Motion granted.

24. Wm. H. Beaumont et al. v. Lyman Little et al. Motion to re-instate cause No. 19 on the General Docket. Motion granted on good cause shown.

25. Board of Education of Riley Township v. Albert Wilkins et al. Motion to take cause No. 833 on the General Docket out of its order for hearing. Motion granted.

27. Simon V. Harris v. The State of Ohio. Motion for leave to file a petition in error to the District Court of Muskingum County. Motion granted.

Ohio Law Journal.

COLUMBUS, OHIO, : : : FEB. 9, 1882.

NEW BOOKS.

Revised Statutes of Ohio. Second Edition Revised and Corrected. 2 Vols. H. W. Derby & Co., Columbus, Ohio 1882.

We have received from the publishers, H. W. Derby & Co., of this city, the Revised Edition of the Revised Statutes of Ohio. It will be remembered that the work of the Codifying Commission was hurried forward by the peculiar phraseology of the law creating the Commission, to such a degree that perfect accuracy in the verification of references and citations was impossible. The inaccuracy resulting therefrom has proven so annoying that Messrs. Derby & Co. have been induced to revise the work, to correct typographical and other errors, and to make certain improvements absolutely essential in a book so constantly used by all lawyers and business men.

Over *five thousand* new references have been added to this edition. Many errors, which reversed the true meaning of the law—contained in the old edition have been noted in the new.

The references to the session laws have been corrected and references also added, opposite each section, to the corresponding laws contained in Swan & Critchfield and Swan & Saylor.

These corrections and additions together with notations, references, &c., to amendments, repeals and supplemental sections in the session laws of 1880 and 1881, with revised and corrected Index and cross references will save public officers and the legal profession much vexatious labor, and so facilitate their inquiries, whether a section of the Revised Statutes is a new law, an old law already construed, a modified or revised law, or has been repealed or amended since the first edition of the Revised Statutes was published.

Considering the errors in the first, and these great improvements and amendments in the second, it is certain that the old will speedily and generally give place to the new.

In addition to this we are assured that hereafter all amendments, repeals, changes, modifications and interpretations, will follow the second edition in a uniform series, referring constantly thereto and making a complete encyclopedia of the statute laws of the State. This will, render

the second edition, indispensable to the library of every public officer, business man and lawyer in the State.

THE REORGANIZATION OF THE SUPREME COURT OF THE UNITED STATES.

We have heretofore studiously avoided any editorial mention of, or comment upon the various measures proposed for the relief of the over-burdened Supreme Court of the United States. We presume the discussion is within the province we might assume to be ours as a law journal, but we are modest, and, although we "have views," we do not take a mean advantage and foist such views upon our readers simply because we can. Our columns are open to our patrons, and they are all lawyers and good lawyers—and by far too well supplied with knowledge and good sense to derive any benefit from the private opinions or the editors. If we possessed the egotism of the Albany Law Journal we might advertise ourselves as an oracle and discuss things as flip-pantly as that paper. But we have too high regard for the dignity of the profession, and too much mercy upon law journal readers.

The fact that two bills have been offered in Congress having in view the reorganization of the Supreme Court of the United States, and that a meeting of distinguished lawyers and representatives of State Bar Associations, is to be held in New York, to help along the work of reform, is probably well known to all our readers. What is to be accomplished by all this effort, however, is not known and can hardly be conjectured. That the court is buried under an accumulation of cases from which it can never extricate itself without aid, is well known also; and the question arises, "What can be done?"

We are face to face with a dilemma of most uncompromising boldness. The accumulated business awaiting the action of the Supreme Court of the U. S., cannot be disposed of by that court. And the business so accumulated cannot be transferred from that to any other forum without a palpable violation of the constitutional rights of the litigants. Until the Constitution is amended there can be no division of the supreme court. The framers of the Constitution were determined to make the highest judicial power of the country resident in *one court*. The pertinacity with which they clung to the declaration that there should be but one Supreme Court—through all changes and discussion—

amply proves the intention of the old law makers. Every measure of relief yet proposed violates this principle.

The comparative merits of the Davis Bill and Manning Bill, we need not discuss. The first so widens the field of appellate jurisdiction that its increase of judicial force will be speedily absorbed and the dockets again be overcharged with business.

The Manning Bill is open to the objection that it is unconstitutional, for reasons mentioned above; and while it contemplates relief to the Supreme Court alone, can not be considered the measure needful.

An increase of judicial force will not do. The highest court—the court of last resort, in a great nation, does not necessarily require to be composed of a great number of judges. Indeed the greater the number the greater certainty of being compelled to fill the bench partly, at least, with inferior material. Nations, even as great as ours, do not produce great jurists in large numbers. There may be three, possibly five in the United States, to-day, who are fitted to sit in the highest tribunal of the land. But there can be no more; and the voice and vote of a weakling who may be placed in office by politicians, is as potent in deciding cases as that of a giant in intellect and juridical ability. The greater number of judges the greater absolute certainty that a part of them will be of mediocre talent. (We may be misunderstood in this matter. An appellate system of administering justice presupposes a grading upward of judicial ability, otherwise wherein would the rulings of a Supreme Court be superior to those of a justice of the peace?

There are 191 Supreme Court judges of the various States of the United States. They are practically of equal ability. If the Supreme Court of the United States is not to be far superior to the average ability of these one hundred and ninety-one, what a farce is played in the maintenance of a tribunal to which appeals may lie from the State Supreme Courts; and would not the rulings of the eight judges in the Massachusetts, Maine or Maryland Supreme Courts be as wise as those of any eight judges of the U. S. Supreme Court? And as but seven judges are usually on the bench in the latter court, in what respect is their wisdom better than the wisdom of the Supreme Courts of California, Illinois, New Hampshire, Pennsylvania or New York—each of which has seven judges—if the U. S. judges are no wiser than the State Supreme

judges. And if numbers alone prevail, how can the U. S. Supreme Court with nine judges, induce New Jersey with ten members of her highest tribunal to bow in meek submission to the wisdom of the former. The ability of the U. S. supreme judges must be rare indeed; and rare ability does not grow in profusion.)

Then, again, five judges—good judges—will hear and determine more cases than can fifteen, and a greater percentage of those will be correctly decided. Five can confer and deliberate. Fifteen would discuss, debate, make speeches and procrastinate.

The court of last resort must be a *Supreme Court*; or we must change the Constitution. A Supreme Court cannot be divided, else where will the supremacy reside? And if perchance the same question, raised in different cases, were decided differently in the various divisions, which would be the law? Which would be followed by the lower courts, and which division would yield?

These objections to the plans proposed we are sure will defeat them. For we are sure the lawyers in Congress will also urge them. We have great hopes, however, of seeing a plan proposed by the coming convention in New York. Hon. Rufus King, of Cincinnati and Hon. Rufus P. Ranney, of Cleveland, will be there and if they are not attacked and their usefulness obstructed by some ungodly reference—by some jealous New Yorker—to the agonizing plethora in the Ohio Supreme Court, which all our legal doctors cannot cure—we know theirs will be valuable aid to the convention.

—Since the foregoing remarks were written, we have received from Hon. Lorenzo Sawyer, of San Francisco, Cal., the draft of "A Bill to Reorganize the Courts of the United States, and provide for additional Appellate Courts." We cannot now go into review of the plan therein proposed, but will do so at some future time. The remarks of the author of the "bill" or plan, indicate an appreciation of the difficulties, but the relief proposed is open to the objection, that, like the other plans, a large additional force of judges is contemplated therein, and this we cannot believe will ever cure the defects of the present system or inaugurate a better one. The Sawyer bill and the remarks of the author is neatly printed and bound by A. L. Bancroft & Co., San Francisco, Cal.

RIGHT OF COUNSEL TO REPRESENT PROSECUTING WITNESS IN CRIMINAL CASES.

WAVERLY, O. Feb. 4, 1882.

EDITORS OHIO LAW JOURNAL, COLUMBUS, OHIO:

An article under the head, "Right of Counsel to represent Prosecuting Witness in Criminal Cases," appeared in the LAW JOURNAL of the date of January 26, 1882, signed "G."

The article contains several false statements and some malicious and unjust insinuations. I write this not to correct such false statements and expose in their proper light the unjust insinuations, nor to make a complaint against the writer, but to say, such an article should not be published in a law journal—surely not without giving the name of the writer. It must be remembered your paper is read by most of the members of the bench and Bar in this State, who not knowing the writer, have a right to presume your reporter was a fair and impartial person, unprejudiced and unbiased and that he sustained a good character and reputation for truth and veracity as well.

But if it had appeared from the article or the journal, that "G." stands for Grosvenor of Athens, and that he was the "attorney-at-law" residing in an adjoining county," the presumption above stated could not arise to that degree; at least that any possible harm could have resulted from its publication, in the judicial district where he is well known and where it evidently was intended to injure. Had it been signed by the writer it would have been passed, by me at least, in silent contempt.

JAMES TRIPP.

We publish the foregoing simply as a matter of justice to Judge Tripp. Having been named in "G.'s" communication, and writing now over his full signature we could do no less than publish his letter. We regret, however, that the language of both articles is so emphatic and inclines so strongly to the personal.

The question discussed is an open one and the *pro* and *con* as urged by both parties will doubtless lead to a better understanding of the principles involved and possibly to legislation settling the matter, if not to the satisfaction of all, at least beyond its present state of uncertainty. Should the ruling of Judge Tripp be sustained by the Supreme Court; or should the law be amended so as to be clearly understood, one happy result would be secured at least. And people would then elect lawyers instead of pettifoggers to the office of Prosecuting Attorney as is now sometimes done.

It has come to be a recognized fact in some counties we could name, that persons who have been grievously injured—cut, beaten and wounded—

living in constant fear of a repetition of the wrong, and in constant danger of losing life—and naturally desirous of punishing the offender and of protecting life and property, are compelled to employ private counsel to prosecute. And even then it not infrequently happens that the Prosecuting Attorney working in the interests of the law breaker, goes before the grand jury and by false statements as to the law, prevents an indictment. Dishonest and incompetent prosecuting attorneys have forced upon the people the custom of employing private counsel. Their incompetency forces upon the court the necessity of selecting an attorney to prosecute, to guard the interest of justice and the supremacy of law. Counties which pay thousands of dollars annually to attorneys appointed to do the work of the officer elected and paid for that purpose, can testify to the extent of the evil and its very annoying results.

This we admit has no bearing upon the law under discussion except that it explains the reason of the growth of the custom.

Judge Tripp is strongly supported in another communication published below which is from the pen of one of our best lawyers.

We might add in allusion to the remark by Judge Tripp, "that such articles should not appear in a law journal," that when eminent gentlemen discuss questions of grave public import though our columns, and in so doing use strong language, we are impelled to the belief that the good resulting to the public therefrom by way of correcting abuses or misconceptions of law, will more than countervail the wounds upon the dignity of their innocent medium—the LAW JOURNAL.

It is well known, also, that great statesmen, great lawyers, and sometimes great judges do not habitually make use of honeyed phrases in expressing themselves.

EDITORS OHIO LAW JOURNAL:

I have been considerably interested in two communications which have recently appeared in your columns as to the right of prosecuting witness to be represented by counsel in criminal cases.

The first article is written as a criticism not only of the ruling of the judge in the case, but the manner of the judge in making the same and some of the reasons given for making it. Upon these points I do not propose to express any opinion as of course I have no means of knowing the precise state of affairs, but will merely call

attention to the following language, "the decision was an arbitrary opinion of this judge, unsupported by law, precedent or common sense."

That the right of the government to employ special counsel to represent it either as assistants to the law officers of the crown or to conduct the cases in their absence, has been recognized at common law from time immemorial, no one at all familiar with the criminal trials of England will for a moment dispute, and there is probably no doubt but that even in the absence of any statute on that subject, the court *might* permit the Prosecuting Attorney to have assistance where it was deemed necessary, and section 7196 of the Revised Statutes, would only be declaratory of the common law so far as the appointment of assistant counsel is concerned.

The statute does not expressly permit a Prosecuting Attorney to call any person into the case without the permission of the court, and the only thing in the Code which would warrant this practice would be, that as section 7245 expressly prohibits a partner of the prosecutor from assisting in the case, unless assigned by the court, the implication arises from the maxim *Expressio unius, exclusio alterius*, that none are excluded, except those embodied in the prohibition.

The writer does not cite any authorities either under the common law or from any other State, to show that the courts have admitted the right claimed, and but one in this State, which, upon examination, certainly does not uphold the position taken by him. That case, *Price v. The State*, 35 O. S. 601, only holds that *one judge*, holding court in Hamilton County, notwithstanding the fact that there was a regular assistant prosecutor in that county, could assign assistant counsel, but expressly denies that even the Prosecuting Attorney, the injured party or his friends, can require that to be done, and that the appointment should not be made unless the due administration of justice requires it. This would seem to warrant the conclusion that if the court is not *required* to appoint an assistant, it is not *required* to permit a person not so appointed to come into the case, and then the question presents itself, does the principle of the criminal law require it, or even allow it.

The doctrine of the law is, that every person charged with crime is innocent until proven guilty.

Another idea at the basis of the criminal law is that the offence is not against the individual, but against the peace and dignity of the State.

There is in the criminal law no injured party but the State. The same act which is a crime against the State, may also be a tort for which the injured party may have a civil remedy, but this gives him no greater right to have the accused punished, criminally, than any other citizen. The people are represented by their officer chosen for the *double purpose* of convicting the guilty, and *preventing* the conviction of a party who is innocent, and it is a part of his sworn duty to seek the conviction of those whom he believes guilty, and the prosecutor who obtains the conviction of an innocent man, by misstatement of facts to the jury or by any improper influence, violates his oath of office.

The law so abhors the conviction of an innocent man, that it is said, it is better that a thousand guilty should go unpunished than one innocent man be punished. And while there may be danger of the acquittal of the guilty, there may also be danger that even with an unprejudiced prosecutor, who does his duty under his oath, that an innocent man may be convicted. But if an injured party is allowed to employ and pay counsel, in a criminal case, what is the purpose of such employment?

To secure the *conviction* of the *accused*, is certainly the sole purpose of the retainer. The lawyer works not to uphold the majesty of the law; he works to accomplish the purpose of his client. He goes into the case, not to see that justice is done, but if possible, by his eloquence, to drive from the minds of the jury the doubts they may have of the guilt of the party, and he does this not because the law should be upheld, but because *his client desires* that the accused should be punished.

With this view of what is the design of the criminal law, we think the view of the judge in refusing to allow outside lawyers hired by the prosecuting witness to assist in the case, is not without "common sense" and that it is upheld by the principles which underlie the criminal law.

As the Supreme Court say, an appointment of a lawyer to assist the Prosecuting Attorney should not be made unless the due administration of justice requires it, it would seem to follow that the judge ought not to permit a man, not appointed for that purpose by the court, to take part in the trial.

O. W. A.

COLUMBUS, O., Feb. 6, 1882.

MARION, O., Feb. 6, 1882.

EDITORS OHIO LAW JOURNAL:

In the discussion of the question—"Right of Counsel to represent Prosecuting Witness," &c., the writers seem to have overlooked the fact that Sec. 7245 was repealed by 77 O. L. 59, March 11, 1880.

Please call the attention of the parties interested to the change.

Very Truly,

A SUBSCRIBER.

A NEW METHOD OF ADVANCING CASES ON THE DOCKET.

The Clerk of the Supreme Court of Ohio, a few weeks ago, received a letter from a suffering litigant in an adjoining county which we give below *verbatim et literatim*, as it displays some fine points of diplomacy, and shows how highly some members of the profession are held by their neighbors. The writer is neither a party or attorney in the case mentioned.

KNOX COUNTY, O., Dec. 27, 1881.

Dwight Crowl Clerk of Supreme court I understand that you are making out a new Docket of new cases of Supreme court and arrangement of cases now in your arrangement of cases if you can arrange the Docket so as to place the case of A D Shopley Versus Lewis Crichfield in such a shaps so that it can be reached before next September 1882 this a county case in which the Public ar not safe to travel a damaged and impassable road annother reason that you should put the case where it can be reached Soon the people and Commissioners of Knox Co will petition the Supreme Court for immediate action as Important an urgent now I will say and am not going to nor think you doing more than your duty I will give you Five Dollars by mail if you will save me the trouble of petitioning your court fer a Soon hearing of case and we have the most Devlish man in the state an inveiglier and Bulldozer now you seen the trouble we had to make Lewis Crichfield to make out his briefs now he has not nor will commence his reprint his arguments till forced in to the matter I tell you or court gives him and threatones him I mean this if you can arrange your Docket so that we can can have the Docket and case through by next Autumn and send Crechfield & Graham Attorneys at law of Mt Vernon a note giving them so many days to Complete their arguments into writing I will present you with Five Dollars as soon as you arrange your Docket force them to proceed this nothing mork than the law requires also this communication will never re-veiled to no person in the world you may write to Crechfield & Graham Attorneys fer Lewis Crichfield Our Attorneys are Devin & Culberton

of Mt Vernon O I do not wish to put you to so much trouble as I work to the Handle

Yours in Haste Write Soon
as convenient

JOHN SMITH

JUDGMENT — MODIFICATION — LEASE — SEPARATE DEFENSE.

SUPREME COURT OF OHIO.

DAVID TOD

v.

ELIZABETH STAMBAUGH.

January 24, 1882.

1. It is error to reverse or modify a judgment without having the parties before the court affected by such reversal or modification.

2. Where several defendants are sought to be charged upon the same demand, and the defense set up by one operates for the benefit of all, it is error to reverse the judgment as to the answering defendant and leave it standing in full force against the others.

3. The lessee in a coal lease, by its terms, purchased all the coal on the demised premises, and agreed, with all reasonable dispatch, to mine and remove the coal, and on the first days of January and July of every year to pay a specified sum per ton for all the coal that may have been mined and removed; also, that if coal was found sufficient to render the same practicable, to mine not less than thirteen thousand tons annually, or on default thereof to pay for said quantity. It was further stipulated that in the event that the payments thus required to be made should be more than sufficient to pay for the coal mined in any year, the "surplus payments" were to apply on any future year's mining that might be in excess of said quantity. *Held:*

1. That the quantity of coal was to be ascertained and paid for in the mode prescribed by the lease.

2. That in an action to recover an annual payment for thirteen thousand tons, an averment in the answer that the "surplus payments" made in pursuance of the lease were more than sufficient to pay for the *unmined* coal remaining on the premises, constitutes no defense.

Error to the District Court of Mahoning County.

The original action was brought in behalf of the heirs of Jacob Wise, Elizabeth Stambaugh et al; on an agreement described as a lease, entered into between them and David Tod on the 1st day of October, 1861, to collect two installments of rent of \$1,625.00 each, one due on the 1st of January, 1874, and the other on the 1st of July, of the same year.

By the terms of the lease the lessors granted, leased and sold to Tod, his heirs and assigns, all the mineral coal in and under a certain tract of land in the lease described, and the right to enter upon the premises to freely mine and remove the same. On the part of Tod, the lease contained the following stipulation:

"And as a further consideration for said grant the said Tod agrees to go forward with all reasonable dispatch to mine and remove said stone coal and keep an accurate account thereof, and at the end of each six months, to wit: on the first days of January and July of every year to pay to each of the said parties one-thirteenth part of the sum of twenty-five cents per ton of 2,100 pounds, for all the coal that may have been mined and removed therefrom; and if

found in quality and quantity sufficient to render the same practicable, after the year 1862, to mine not less than thirteen thousand tons annually, or on default thereof pay for said quantity; in which event the surplus payments are to apply on any future years mining that may be in excess of said quantity."

This lease was assigned by Tod to the Girard Iron Company by whom, in September 1869, it was assigned to Morris, Ward & Brown.

The said assignees respectively assumed to perform all the terms and agreements of the lease and save their assignors harmless on account thereof.

Tod's executors as well as the said assignees were made defendants to the petition; and Tod's executors by way of cross-petition prayed that the said indemnity be enforced against said assignees respectively and that they be required to discharge his liability to the plaintiffs.

The answer of Morris, Ward & Brown admits their liability under the lease, but avers payment of all installments due prior to January 1, 1874, and as to the installments sued for, the answer sets up the following matter as their defense:

"These defendants admit that said two payments of \$1,625 each, to recover which this suit has been brought, have not been paid, but they deny that they are due and payable under said lease, or that any sum is or ever can be due plaintiffs from any of the defendants, under said lease, because they say that there has been paid by said Tod, said Girard Iron Company and these defendants under said lease, about the sum of \$15,000 above paying for all coal mined at the rate of twenty-five cents per ton, that there is not sufficient minable coal on said premises to repay these defendants at the price stipulated, said sum which was paid as payment in advance for coal to be mined, and so they aver that they have in fact paid for all coal mined and that can be mined from said premises and say that their said lessees have the right to continue the proper and diligent mining of what coal remains to be mined without further payment."

To this defense the plaintiffs and Tod's executors respectively demurred. The demurrer was sustained, and judgment rendered in favor of the plaintiffs, against all of the defendants which was to be satisfied by execution first against Morris, Ward & Brown, and on failure to obtain satisfaction from them, by execution against the Girard Iron Company, and on failure to obtain satisfaction by the execution last named, the executors of Tod were required to pay said judgment from the assets in their hands. In case Tod's executors should pay the judgment they were subrogated to the rights of the plaintiffs in the judgment against the other defendants.

On petition in error filed in the district court by Morris, Ward & Brown to which the original plaintiffs alone were made parties defendant, the

judgment as to the said plaintiffs in error was reversed.

And on a subsequent petition in error filed in the same court, by the same plaintiffs in error to which all the other parties interested were made defendants, a similar judgment of reversal was rendered, the court refusing to reverse said judgment except as it affected the said plaintiffs in error.

The present petition in error is prosecuted by Tod's executors to which all the other parties in interest are made defendants, to obtain the reversal or modification of the judgment of the district court.

The errors assigned are in substance that the district court reversed the judgment of the court of common pleas instead of affirming the same; also that the district court reversed the judgment as to Morris, Ward & Brown leaving it in force as against Tod's executors and the Girard Iron Company.

Geo. M. Tuttle, B. F. Hoffman and T. W. Sanderson for plaintiff in error.

D. M. Wilson for defendant in error.

WHITE, J.

The judgment of the district court is manifestly erroneous. In the first place it was error to reserve or modify the judgment of the court of common pleas without having before the court the parties affected by such reversal or modification. In the next place, after the filing of the second petition in error and all the parties interested were before the court, it was error to reverse the judgment as to Morris, Ward & Brown, and leave it standing in full force against Tod's executors, and the Girard Iron Company.

If the answer of Morris, Ward & Brown constituted a defense to the action for them it operated equally as a defense for their co-defendants.

The cause was in equity and the same liability was sought to be enforced against all the defendants, but, *inter se*, they were chargeable in the inverse order in which they became assignees of the lease and assumed to perform its stipulations. On the cross-petition of Tod's executors and the undisputed facts, Morris, Ward & Brown were bound to fulfill the terms of the lease and save the executors harmless on account thereof. By the judgment of the district court, Morris, Ward & Brown were relieved from this liability and the performance of the terms of lease charged upon Tod's executors and the Girard Iron Company.

If the court of common pleas was right in sustaining the demurrer to the answer, the judgment of that court ought not to have been disturbed. The only remaining question therefore is, whether the answer constituted a defense. We think it did not.

By the terms of the lease the lessee purchased all the coal on the demised premises. The quantity of coal was to be ascertained and paid for in the mode prescribed in the lease. It is

stipulated in the lease that Tod is to go forward, with all reasonable dispatch to mine and remove the coal, and on the first days of January and July of every year to pay twenty-five cents per ton for all the coal that may have been mined and removed; and if found in quality and quantity sufficient to render the same practicable, after the year 1862, to mine not less than thirteen thousand tons annually, or on default thereof pay for said quantity. It is further stipulated that in the event that the payment thus required to be made should be more than sufficient to pay for the coal mined in any year, the "surplus payments" are to apply on any future year's mining that may be in excess of said quantity. By this stipulation the *surplus payments* are to be applied in payment of the excess of coal mined annually over and above the thirteen thousand tons. The claim set up in the answer is that such payments are to be applied to pay for the *unmined* coal, without reference to when mined, if mined at all.

This claim is not in accordance with the agreement and cannot be supported. The demurrers to the answer were properly sustained by the court of common pleas, and the district court erred in holding otherwise. The judgment of the court last named is therefore reversed and that of the common pleas affirmed.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

DARLING v. YOUNKER.

JANUARY 31, 1882.

1. Where an action is brought against an agent who, having received money to be carried to his principal, claims that the money is lost, the burden is on the agent to show there was no breach of duty on his part; and this is to be determined upon consideration of all the circumstances; and, ordinarily, the question is one of mixed law and fact and not merely of law.

2. Y. was employed by D. to carry a sum of money, consisting in part of four \$500 bank bills, to the town of C., there pay part of it to S. and carry and deliver the balance to him (D.), owner of the money. Y. went to C. by passenger train at night, riding in the same seat with F., an acquaintance, the car being half filled with passengers. While on the way Y., at the request of F., let the latter have one of the \$500 bills in exchange for smaller bills. On arriving at C. the package of money was taken by Y. to a store in charge of B., and handed to B., who at the request of Y. locked it in his safe, the safe being one in which D. usually deposited his money. In the morning when the money was taken from the safe and counted, another \$500 bill was missing. Y. paid S. as directed, and on the same day gave the receipt of S. and the balance of the money to D. and stated to him the above facts. D. accepted the receipt and money, but brought suit against Y. for \$500, basing his right to recover on the ground of negligence: *Held*, that on the facts stated, the court could not say as matter of law that Y. was liable.

Error to the District Court of Coshocton County.

Spangler & Pomerene, for plaintiff in error.

Edwards on Bailments, 91, 114, 287, 304, 321, 327; Story on Bailments, §§ 15, 186, 188, 232, 413; 1 Parsons on Con. 606*; Shear. & Red. on Neg. §§ 12, 23; Angell on Car. §§ 48, 52, 62; Smith v. Stewart, 5 Ind. 220; Wheelock v.

Wheelwright, 5 Mass. 104; Canah v. Hall, 23 Wend. 462; Raynolds v. Shuer, 5 Cowen, 323; Lichtenheim v. Railroad Co., 11 Cush. 70; Garnett v. Williams, 5 Barn. & Al. 53.

Nicholas & James, for defendant in error.

20 Ohio, 69; Shear & Red. on Neg. §§ 8, 11, 13, 20; 24 Ohio St. 639; 1 Parsons on Con. 606,* 634; 19 Conn. 566; 40 Mo. 151; 59 Pa. St. 259; 48 Ill. 415; 105 Mass. 342; 32 Wis. 531; 38 N. Y. 455; Story's Agency, § 236; 3 Phil. Ev. 539, 541; Angell on Car. §§ 12, 431, 433; 1 Smith's Lead. Cas. 333; 6 Hill (N. Y.) 588; 3 Ad. & El. 106; 20 Eng. L. & Eq. 452; 2 Green Ev. § 642; Story on Bail. §§ 188; 410, 413, 454; 11 Cush. 70; 99 Mass. 605; 6 Barr. 417; 5 Serg. & R. 179; 10 Watts. 335.

OKEY, C. J.

The plaintiff (Darling) and the defendant (Yunker) were neighbors living in Coshocton county, about fourteen miles from the town of Coshocton. They had known each other from boyhood, and both were dealers in live stock. The plaintiff had, in the hands of a firm engaged in selling live stock at Pittsburgh, the proceeds of the sale of a lot of hogs which he had shipped to that city for sale; and he also had a lot of hogs at Warsaw, in Coshocton county, which he wanted to send to Pittsburgh for sale by the same firm. Being unable to leave home by reason of sickness in his family, he employed the defendant to drive the hogs from Warsaw to Coshocton, take them from Coshocton to Pittsburgh by car, deliver them to the firm referred to for sale, receive from the firm the proceeds of the sale of both lots, bring such proceeds to Coshocton, there pay Stewart \$1200, and then carry and deliver to him, the plaintiff, the balance.

The hogs were shipped in a car at Coshocton, on December 53, 1874, the defendant taking passage in the caboose. Finkbone, of Fairfield county, also a dealer in live stock, had a lot of hogs in cars of the same train, which he was taking to Pittsburgh for sale, and he and the defendant became acquainted in the caboose and stopped at the same hotel at Pittsburgh. The hogs taken by Finkbone, as well as those taken by the defendant, were sold the next day (December 24.) In the afternoon of the same day, a member of the firm which sold the stock went with the defendant to one of the Pittsburgh banks, where the sum of \$3,100.54, being the whole amount due to the plaintiff, was paid to the defendant. The money consisted of four bank bills, each of \$500, and other bills of smaller denomination, and fifty-four cents in change. The defendant folded the bills in a piece of newspaper, and placed the roll in a pocket in the inside of his vest, and left the bank. Soon afterward, the amount due to Finkbone for his hogs, being about \$3,000, was paid to him at the same bank, but he was unable to obtain at the bank any bill of a larger denomination than \$50.

The defendant and Finkbone took passage on that evening at Pittsburgh, in the same passen-

ger car, and came together as far as Coshocton, arriving there about ten o'clock at night. The defendant stopped at Coshocton, and Finkbone remained in the car until he reached Kirkeville, which is near his residence. On the way from Pittsburgh to Coshocton, the defendant and Finkbone sat together, conversing about the live stock business. Finkbone informed the defendant that he had tried to get larger bills, but failed. The defendant asked him if it would be an accommodation if he would let him have one \$500 bill, and Finkbone said it would. About half the seats in the car were occupied, chiefly the middle seats. Finkbone took out his money, but at the suggestion of the defendant, they went to the front part of the car, to get as far as possible from the other passengers, and have the benefit of the light, and sat down together in one of the front seats. Finkbone then took from his package ten \$50 notes, and handed them to the defendant, who took from the package in his possession one of the \$500 notes, handed it to Finkbone, put the ten bills in the place of the bill he had given to Finkbone, and restored the package to his inside vest pocket, taking care that there should be no mistake in making the exchange, and that none of the bills should be lost. This was about an hour before the train arrived at Coshocton.

The defendant arriving at Coshocton, as already stated, in the night, it became necessary for him to remain at a hotel till morning. The banks were closed of course, and it does not appear whether there was or was not a safe in the hotel where he stopped. There was, however, a hardware store in Coshocton, owned by a firm in which a brother of the plaintiff was a partner, and the defendant was then aware of the fact that the plaintiff was in the habit of depositing considerable sums of money in the safe of that firm, which they kept in the store. The defendant went directly from the depot to the store, which he found still open, Bonnett, a nephew of the plaintiff, and employee of the firm, being there alone. The defendant turned and was about to leave the store, when Bonnett inquired what was wanted, and the defendant informed him that he had a package of money belonging to the plaintiff, stating the amount, which he desired to have placed in the safe. Bonnett said he could attend to it, and took the package and locked it in the safe, and the defendant then went to his hotel, leaving Bonnett in the store. From the time the defendant received the money at the bank until he handed it to Bonnett in the store, it had not been out of his pocket, except when he exchanged the bills, as already explained, on the train.

The next morning (December 25), the defendant went to the hardware store, and Bonnett, at his request, opened the safe and took therefrom the package of money and handed it to him. On counting the money, in the presence of Bonnett and the plaintiff's brother, it was ascertained that one of the \$500 bills was missing; the balance of the money, including two \$500 bills, be-

ing there. The defendant paid to Stewart \$1200, in accordance with the instruction already mentioned, and on the same day (December 25), delivered to the plaintiff Stewart's receipt and \$1,400.54, in money, and informed the plaintiff of all the facts here stated, including the exchange of bills, the deposit in the safe, and the loss of the \$500 note.

Such, in substance, is the testimony of Younker as delivered in the Court of Common Pleas of Coshocton County, on the trial of an action brought by Darling against him to recover the sum of five hundred dollars. His evidence was corroborated by the testimony of Finkbone, and the jury, believing the defendant's story, found a verdict in his favor; the court, after overruling a motion for a new trial, rendered a judgment on the verdict; the district court affirmed the judgment, and this petition in error was filed to reverse both judgments.

During the trial, evidence was also offered to show that the defendant was confused at the time the money was counted in the store; that he then stated that in the money paid to him at the bank there were *three* \$500 bills; and that he also stated that he did not have the money out of his pocket from the time he placed it there in the bank until he took it out in the hardware store. But an explanation as to these statements was furnished, showing that they, as well as the confusion, were caused by the defendant's excitement on discovering the loss, and the statements were corrected by him on the same day. Furthermore, it was shown that he had said that he would pay the amount so lost to the plaintiff, but that he must have the matter investigated; and when the plaintiff brought suit, the defendant withdrew all proposals looking to a settlement. There was also evidence tending to show that the exchange of money on the cars was not an unusual occurrence.

The foregoing embraces all the evidence, except with respect to two or three matters which seem to be wholly unimportant. What the facts in relation to the missing bill really are, may never be known. Whether the note was dropped in the cars, or whether somebody was dishonest, are matters of conjecture. The defendant is quite certain no mistake was made at the bank. In giving to the testimony a construction consistent with that honesty of the defendant which the plaintiff, with an acquaintance of forty years, believed he really possessed, we are not prepared to say the jury erred.

If, on learning that the defendant had taken one of the notes from the package, the plaintiff had treated the act as a conversion, and brought suit to recover the whole amount so received by the defendant at the bank, a different question might have been presented. It was the duty of the defendant to receive the money from the commission merchants at Pittsburgh, carry it to Coshocton, there pay to Stewart \$1,200, and take the balance of the money to the plaintiff and deliver it to him. As Bigelow, C. J., says in *Kent v. Bornstein*, 12 Allen, 342, "any act or dealing

with the money beyond this was outside of the scope of his employment. He had no authority to enter into any contract concerning the money in his hands, or to exchange it for other money with third persons." And see *Phillpott v. Kelley*, 3 Ad. & El. 106; *Clendon v. Dinneford*, 5 C. & P. 13; *Greenwald v. Metcalf*, 28 Iowa, 362; *Edwards on Bailments*, §§ 67, 97. But we do not find it necessary to decide as to the law that would have been applicable if the plaintiff had taken the course indicated. On being informed of the loss, the plaintiff accepted as cash the receipt of Stewart and the balance of the money in the defendants hands, making \$2,600.54, which he knew included the bills given by Finkbone in exchange for one of the \$500 bills, and the plaintiff brought suit against the defendant for the missing \$500 bill. This, therefore, was a complete ratification by the plaintiff of the act of the defendant to that extent. *Ewell's Evans on Agency*, 94.

No action could be maintained for the conversion of the missing bill, nor as for money had and received, the jury having found that there was no misappropriation of the bill by the defendant, and the verdict in that respect not appearing to be wrong. *Sturgis v. Keith*, 57 Ill. 451, 11 Am. Rep. 28; *Parry v. Roberts*, 3 Ad. & El. 113. But where an agent is guilty of negligence, whereby the money of his principal is lost, an action may be maintained on that ground. And here the question is whether we can say as matter of law that the acts of the defendant, in making the exchange in the car and the deposit in the safe, afford a ground of recovery, as to the missing \$500 bill, because of the defendants negligence, and without regard to the question of actual good or bad faith. But as to the deposit in the safe, we can see in it nothing objectionable, under the circumstances. It was the safe in which the plaintiff made his own deposits of money, and the safe was in charge of the brother and nephew of the plaintiff. Indeed, the plaintiff made no complaint that such deposit had been made. The real question, therefore, is as to the alleged negligence in making such unauthorized exchange of money in the cars.

An agent is not the insurer for the safe delivery of money placed in his care to carry to his principal. No doubt, however, where he claims such money entrusted to him is lost, the burden is upon him, whether the service be for or without reward (*Anderson v. Foresman*, Wright, 598; *Ewell's Evans on Agency*, 327), to show that the loss was not occasioned by want of that care, on his part, which men of ordinary prudence observe when clothed with such a trust. The real question, in every case where negligence is alleged, is whether there has been a breach of duty, and that is to be determined from a consideration of all the facts. But here the question whether the acts of the defendant amounted to such negligence as would afford ground of recovery, was a question of fact and not law. Cases can be found in which the question of negligence

has been determined as one of law. See 28 Ohio St. 340; 35 Ohio St. 627. See, however, 13 Ohio St. 71, 72; 35 Ohio St. 57; *Pierce on Railroads* (ed. of 1881) 312, 314, *et seq.* But where the facts are in dispute, or the question is to be determined by inference from facts proved, the question is necessarily one of fact; nor can it be a question of law in any case if reasonable men, unaffected by bias or prejudice, might disagree concerning the presence or absence of due care.

Judgment affirmed.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

I. T. McLAIN

v.

B. W. SIMINGTON.

JANUARY 31, 1882.

1. The undertaking for attachment provided by section 193 of the Code of Civil Procedure (2 S. & C. 1004), is not a *specialty*, and the want of a seal does not affect its validity.

2. Where the name of the surety to such undertaking does not appear in the body of the instrument, but the language used is, "We, A. B. and ——— hereby undertake &c," the omission of such name does not affect the validity of the undertaking or the obligation of the surety. Language of opinion in *Stephens v. Allmen et al.* 19 Ohio St. 486, qualified.

Error to the District Court of Union County.

The defendant in error, Simington, brought an action in the Court of Common Pleas of Morrow County, against McLain, plaintiff in error, for the recovery of money only, and obtained an order of attachment which was levied upon certain property belonging to McLain. The undertaking was given as follows:

Whereas, B. W. Simington has commenced a civil action against I. T. McLain in the Court of Common Pleas, within and for the County of Morrow, State of Ohio, to recover the sum of eighteen hundred dollars, with interest thereon, from the 6th day of July, A. D. 1876.

And whereas, the said B. W. Simington has applied to the clerk of said court, by filing the necessary affidavit for an order of attachment to be issued in said action, against the said I. T. McLain.

Now, therefore, we, B. W. Simington and ———, hereby undertake to the said I. T. McLain in the penal sum of twenty-two hundred dollars, that the B. W. Simington shall pay to the said I. T. McLain, all damages which the said I. T. McLain may sustain by reason of said attachment, if the order should have been wrongfully obtained.

Dated this — day of August, A. D. 1877.

B. W. SIMINGTON.

L. MAXWELL.

McLain moved the court to vacate the attachment for the reasons:

1st. That no sufficient undertaking had been given,—and

2d. That the affidavit upon which the attachment was obtained, was untrue.

The court overruled the motion, and error to

this ruling was prosecuted in the district court. The latter court affirmed the order of the common pleas. This judgment of affirmance is now before us for review.

LONGWORTH, J.

The undertaking in question is unsealed, and the name of L. Maxwell, the surety, is omitted in the body of the instrument. Do these omissions affect its validity? We think not.

Although often erroneously called a *bond*, the undertaking provided for by section 193 of the Code (2 S. & C. 1004), is in no sense a bond, nor is there any law which requires it to be executed with the formalities of a specialty. It is not required to be under seal.

Doubtless cases might arise when such a total omission of description of the parties existed as would render it uncertain whether the names were signed to the instrument as evidence of an obligation assumed or merely as an attestation. But such is not the case here. The language in the instrument before us is—"We, B. W. Simington and _____, hereby undertake &c." The pronoun *we*, in this connection can only refer to the persons whose names are subscribed.

Plaintiff in error relies upon the case of Stephens v. Allmen et al., 19 Ohio St. 485, and we are constrained to say that the language of Brinkerhoff, J., in delivering the opinion of the court, seems to bear him out. In that case the writing in controversy was the official bond of a Justice of the peace and was *unsealed*. It was properly held by the court that this defect was fatal and this is all that can be reasonably gathered from the judgment and the syllabus of the case. The learned judge however, in his opinion, seems to base his decision upon the statement that "The additional names subscribed to the official bond not appearing in the body of that instrument, there are no words of obligation to bind them, and they are of no significance whatever."

We cannot find from the report of the case cited, what was the language used in the bond referred to; but we have no hesitation in saying that if it was substantially the same as that of the undertaking before us, the reasoning of the judge was erroneous. It is directly opposed to the decision in State for the use &c. v. Boring et al., 15 Ohio R. 507-517, and numerous other cases.

Brandt in his work on Sureties, cites authoritative decisions in support of the following propositions which do not seem to have been seriously disputed:

"Although the name of a surety is not mentioned in any part of the body of a bond, but a blank intended for it is left unfilled, yet if he sign, seal and deliver it as his bond, he is bound. So where the name of the surety is not mentioned in the obligation part of a bond, but is mentioned in the recital of the condition, if he sign, seal and deliver it he is bound. Where one signs a lease between the signature of the lessor and lessee, in which lease it is said that

the lessee 'binds himself and his security,' but no name of a surety is mentioned in the lease and the lease is signed in the presence of others who sign it as witnesses, the party who signs between the signature of the lessor and lessee, will be held as surety on the lease. So where a lease had been signed by the lessor and lessees, and D., whose name was not mentioned in the lease, signed his name to it after the names of the lessees, adding to his name the word 'surety,' it was held that it sufficiently appeared that D. was the surety of the lessees and that he was originally and not collaterally liable." Brandt on Sureties § 15.

With respect to the second ground of alleged error, suffice it to say that, after a careful examination of the evidence, we do not feel warranted in disturbing the findings of fact made by the court below.

Judgment affirmed.

[This case will appear in 37 O. S.]

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

Tuesday, February 7, 1882.

GENERAL DOCKET.

No. 8. Union Central Life Insurance Co. v. Emma A. Cheever. Error to the Superior Court of Cincinnati. Judgment affirmed. Okey, C. J., dissented on the ground that the verdict is against the evidence. There will be no further report.

15. James P. Kilbreth v. Adelaide Bates et al. Executors. Error to the Superior Court of Cincinnati. Judgment affirmed. An opinion in the case will be prepared hereafter.

25. David W. Cross v. Tisdale Winslow. Error to the District Court of Cuyahoga County. Petition in error dismissed on the ground that there is a defect of parties.

181. Lake Shore and Michigan Southern Railroad Co. v. W. T. & A. K. West. Error to the District Court of Erie County. Dismissed on motion of plaintiff in error.

MOTION DOCKET.

No. 20. John Hanes v. E. H. Munger, administrator &c. Motion to dismiss No. 854 on the General Docket for want of printing, and counter motion for leave to file printed record. Motion to dismiss overruled, and counter motion granted.

28. Franklin Hubbard v. North Western Savings Bank. Motion to dispense with printed record in case No. 1008 on the General Docket, and to advance the case to be heard with No. 237 on same docket. Motions granted.

29. Daniel Bills et al. v. Myron Bills. Motion to dispense with printed record in cause No. 1024, on the General Docket. Motion Granted.

30. John W. Tweed v. George Shew. Motion to extend time for printing record in cause No. 977, on the General Docket. Motion granted.

The court called, under the rule, 75 cases, from 76 to 150 inclusive.

The court will take a recess from Thursday the 9th until Thursday the 16th inst. at 9 o'clock.

Ohio Law Journal.

COLUMBUS, OHIO, : : : FEB. 16, 1882.

RIGHT OF COUNSEL TO REPRESENT
PROSECUTING WITNESS IN CRIMINAL
CASES.

Feb. 10, 1882.

EDITORS LAW JOURNAL:

Your correspondent, "a subscriber," has done a service in calling attention to the fact that Section 7245, Rev. Stat. was amended, and repealed March 11, 1880, 77 O. L. 59.

The force to be given to the repeal of the statute, it seems to me reflects upon the present state of the law; as the statute stood before that repeal "nor shall the partner of the Prosecuting Attorney assist in the prosecution of a criminal act, unless assigned to such prosecution by the court &c." One year later the General Assembly amended that section by eliminating the restriction above in quotation. The rule is, that the act of the Legislature in changing the *terms* of a statute must be construed to have been done with the legislative intent to change its *meaning* and operation, 8 Blackfords Reports 275. The State on Complaint &c., v. Gray. When the Legislature, therefore, amended this section so as to leave out the enactment that the partner of a Prosecuting Attorney should not prosecute "unless assigned &c.," the change in phraseology changed the law.

It will be borne in mind that it was not claimed, originally, that any one had a *right* to appear and assist the prosecution, and hence very much of the argument made in the LAW JOURNAL has been upon a question not made. It was not claimed that counsel retained by outside parties might demand to appear. It was, and is only claimed that the court might in its discretion permit such counsel to appear.

The practice in Ohio for three-fourths of a century has been thus. There is no law which denies such discretion to the court. No rule of law is set aside by the practice; and no good reason can be found to condemn it.

I forbear to comment on the admirable temper, and judicial spirit manifested by the distinguished judge who made this decision, in his recent able defense of his opinion. The *animus* of the one relates back to, and gives color and explanation to the other.

G.

MANDAMUS—EXPENSES OF INSANE PATIENTS IN STATE ASYLUMS.

ATHENS COUNTY COMMON PLEAS.

SUPERINTENDENT OF ATHENS ASYLUM FOR
INSANE

v.
A. J. FRAME, AUDITOR.

KNOWLES, J.

This is an application for a mandamus against A. J. Frame, Auditor of Athens County, on the petition of the Trustees of the Athens Asylum for the Insane, to compel the Auditor to draw an order to pay an account for clothing and certain incidental expenses of inmates of the Asylum from said county. The application sets out that the county of Athens is indebted to the relator in this action in the sum of \$427.70 for certain incidental expenses, and for necessary clothing furnished the inmates from this county, which have been charged to its account by the Steward of the Asylum, which account is countersigned by the Superintendent and sealed with the seal of the Institution. It avers that this account was presented to the Auditor of the county for his allowance; that he was requested to draw an order on the Treasurer for the payment of same; that he refused to comply with this request, and that this is the only relief the plaintiff has in order to procure the payment of said sum, to wit: By writ of mandamus compelling him to comply with the request of the Trustees of the Asylum.

The averments in this application are that between the 14th day of February, 1880, and the 14th day of January, 1882, the Steward of said Asylum, at various times, paid incidental expenses of lunatics admitted into said Asylum from said Athens county, and for necessary clothing for them, furnished by the Steward and paid for out of the appropriation made by the State for current expenses of said Asylum the aggregate sum of \$427.76, of which disbursements said Steward, duly kept a separate account duly attested and on the 14th of January, 1881, forwarded and presented to A. J. Frame, Auditor of said county, who refused to pay the same.

To this application there is a demurrer interposed by the defendant, the Auditor, in two counts: The first is, that the application does not as a whole, state facts sufficient to constitute a cause of action against the Auditor; and the second, by dividing up the claim of the relator, claims if the relator is entitled to recover anything in this proceeding then only such charges as accrued prior to the 18th of March, 1881. This question is presented to the court for the purpose of procuring the construction of certain statutes now and heretofore in force, relating to the Benevolent Institutions of the State, and especially the Lunatic Asylums of the State, as to the liability of the different counties of the State to pay for certain expenses named in the

statutes and designated as traveling, incidentals and necessary clothing, for the insane subjects in said asylums.

An examination of the accounts as presented in the application shows that it is an account of said relator against said county of Athens running through a series of months from February 14th, 1880, the date of the first charge, to January 11th, 1882, for traveling and incidental expenses, and necessary clothing furnished to inmates of said Asylum from Athens county during said time.

It is claimed by the counsel for defendant that the county is only liable for the payment of said account, especially clothing, up to March 18th, 1881, and no more.

And by counsel for the relator that the county is liable for all traveling and incidental expenses and for all necessary clothing furnished such inmates during their stay in the institution.

This brings me to what I consider the proper construction of the legislation called in question, upon the issue of law raised in this case.

The legislation upon the subject of the Benevolent Institutions of the State is general and refers to all of the benevolent institutions of the State. Sections 631 and 632 of Revised Statutes of Ohio, are found in this general legislation, subject to any *exceptions* or *limitations* therein contained, or modifications therein referred to, in subsequent legislation and the general legislation with exceptions or limitations therein contained, with legislation referred to by said general legislation as limitations are to be taken and construed together, and, if possible, so construed (if in conflict) as to be reconcilable and consistent with each other, and as a whole, section 631 of the general act provides "that all persons admitted into any institution (except as otherwise provided in chapters relating to particular institutions) shall be maintained by the State subject only to the requirement, that they shall be neatly and comfortably clothed and their traveling and incidental expenses paid by those having them in charge."

It will be seen that there are two exceptions or limitations in the above section to the general provision: 1st as to any modifications found in chapters relating to particular institutions of the State, and 2d "subject to the requirement that such inmates shall have paid traveling and incidental expenses and shall be neatly and comfortably clothed by those having them in charge." What traveling and incidental expenses are here referred to? Clearly such as have accrued prior to the admission of the patient to the asylum, for there are none after they are admitted that would be a limitation on the word maintained.

And if so, who is to pay such traveling and incidental expenses? Not the Asylum, for the Asylum has as yet no control of them; they have not yet been admitted, and the exception is, such expenses are to be paid by the party having them in charge, the officer or friend deputed to take them to the Asylum by order of the

Probate Judge. And so, too, of the clothing—"they shall be *neatly* and *comfortably* clothed." When and by whom? In the language of the statute when they apply for admission, and traveling and incidental expenses paid by the party having them in charge, or themselves, not the Asylum, for up to that time the Asylum has no charge over them. Had the legislature intended to have put a further limitation on the word maintained as regards clothing they would have so enacted then and there, but if there should be any question as to the true interpretation or construction of this section in regard to this point all we have to do is to call into requisition section 632—and it is plain—which provides that if there be a failure in any case to pay incidental and traveling expenses or furnish the necessary clothing, then the Steward or other financial officers of said institution is authorized to pay such expenses and furnish the requisite clothing and pay for the same out of the current expense fund of the institution; he keeping a separate account of such expenses, and report the same back to the Auditor of the county from which such patients came and for whom such expenses have been paid, and the Auditor is required to pay the same.

So far then, if the county or the friends of a patient have complied with the provisions of the statutes, relating to insane persons, as to have paid traveling and incidental expenses and furnished the patient with neat and comfortable clothing, then such patient on application is entitled to admission into the Asylum and to be maintained therein at the expense of the State and without further charge upon the county from which such patient came. Any other construction would put a limitation upon the word maintained used in the statutes, which would destroy the force and effect of the word and unauthorized by the legislation under consideration. But to go a step further. Let us see if the particular legislation which we are called upon to examine by reading Sec. 631 is such as to interfere with the above views. Sec. 700, revised statutes under head Lunatic Asylum (*particular*) as to this class of institutions upon the subject of maintenance enacts as follows: "All persons who have been or may hereafter be admitted into either of the Asylums for the Insane belonging to the State shall be maintained therein at the expense of the State." This section (or the part above quoted) provides that when a patient is admitted and the conditions of Sec. 631 have been complied with he shall be maintained therein by the State. There is no uncertainty or conflict in these provisions—they are in my judgment and in the view I have taken, with the reasons given therefor, consistent and plain.

It seems, however, that doubts had arisen in regard to the meaning of this legislation, and that to settle any uncertainty that might arise in the construction of these statutes, the legislature on the 18th day of March, 1881, amended Sec. 700 by inserting in the original Sec. 700 the following language: "Except as provided

in section 631 of this title of the Revised Statutes of Ohio." Reading then as Sec. 700, amended, so far as applicable to this point, as follows: "All persons who have been or may hereafter be admitted into either of the Asylums for the Insane belonging to the State shall be maintained therein at the expense of the State, except as provided in section 631 of this title of the Revised Statutes of Ohio."

In other words, the legislature said if there was any doubt in the minds of any person traveling the road as to who should pay the expense of maintaining the patient after he entered the institution (with traveling and incidental expenses paid—and being neatly and comfortably clothed) in the original Section 700 this amendment to Section 700 is a guide board to direct us back to section 631 and 632 to let us know what it thought was plain then and which make it more plain, if need be, by this amendment.

If any additional reasons are needed in support of the above construction a brief reference to some of the particular legislation in regard to Lunatic Asylums, as showing more clearly the intention of the Legislature, will be found in Sections 705 and 706 of this particular legislation, which provides that upon examination of a person presented to a Probate Judge on an inquisition for insanity and the finding by such Judge that the party is insane he shall order such person sent to the Asylum, order the person or officer conveying the person to the Asylum to see that the patient shall be so conveyed at the expense of the county and supplied with proper clothing to be paid for by the county, and while the Superintendent may refuse to accept such person without such clothing or non-payment of expenses—preliminary to their admission—yet Sec. 632 of the general act provides that upon failure the Steward or other financial officer of the institution is authorized to pay the same and charge it back to the county, rather than the insane person should be confined in a *poor house* or prison or turned loose upon the community.

And again, should the other rule of construction prevail it would leave the officers of the Asylum, especially the insane, to be the judges of the amount and kind of clothing furnished to each patient, the incidental expenses paid, and then compel the county from which the lunatic came, to refund the same without any check upon the officers of the Asylum, or remedy in the event of gross or extravagant charges, which clearly was never intended by the legislature.

Under the view I have taken in the construction of these statutes I have reached the following conclusions:

1st. That the counties are liable for neat and comfortable clothing as provided by statute, and for all traveling and incidental expenses up to the time of the admission of the patient into the Asylum.

2d. That all expenses incurred after the admission of the patient into the Asylum are to

be paid by the State out of the current expenses provided by the State therefor. And a demurrer to an application seeking to recover for maintenance or other expenses, after the patient has been properly admitted and while so in the Asylum, will be sustained.

WILL—CONSTRUCTION.

SUPREME COURT OF OHIO.

WILLIAM B. MILLIKIN, ADMINISTRATOR,

v.

P. J. B. WELLIVER, ADMINISTRATOR.

ENOCH D. CRACRAFT ET AL.

v.

JOSEPH SMITH ET AL,

January 24, 1882.

A testator, after directing that his debts and funeral expenses be paid, gave all the residue of his estate, both real and personal, to his wife during her life, she to have full possession, management and control of the same, with the privilege of disposing of all or any of the personal property for her use, together with the proceeds of the real estate.

The estate consisted of lands, farming utensils, household goods, live stock and money. The residuary clause is as follows: "The residue of my estate is to be distributed to the heirs on my side of the house in such proportions as she may direct by will or otherwise."

No personal representative was appointed until after the death of the widow. She took possession of the personal property, paid the debts and funeral expenses, and deposited the balance of the money in bank in her own name, and died within five months after her husband's death, without making her election as required by statute to take under the will and without having disposed of any of the personal property or money, and without distributing any of said estate by will or otherwise.

Neither the testator nor his wife left any children or their legal representatives. Each left brothers and sisters of the whole blood, and their legal representatives.

Held: 1. The right of a widow to elect to take the provision made for her in the will of her husband, is a right to be exercised by her in person. If she dies without having made her election, those who claim under her, can only claim so much of her husband's personal estate as she was entitled to under the law.

2. In order to bar a widow of her right to dower and to such share of the personal estate of her husband as if he had died intestate leaving children, her election must be made, either by matter of record in the proper court as required by statute, or actually and in fact under such circumstances as would create against her an estoppel of her right to claim under the law.

3. Where it does not appear that a widow has acted with a full knowledge of the condition of her husband's estate and of her rights under the will and under the law, her acts in paying the debts of the husband out of his money, receiving and holding the balance, and having possession and control of the real and personal estate for five months after her husband's death, do not constitute such an election, in fact, to take under the will, as estops her from claiming, under the law, within the time allowed.

4. If the husband devise his real estate to his wife for life, with remainder to his heirs, and the wife elects to take her dower, or fails to make her election, the remainder vests in fee in the heirs, subject to the dower estate of the wife.

5. Where the residue of an estate is, by will, directed to be distributed among testator's heirs, in such portions as his wife may direct by will or otherwise, and she dies without having exercised the power conferred upon her, each of the heirs of the testator, or his legal representative, takes an equal share under the will.

Error to the District Court of Butler County.

The first above case relates to the rights of the parties in the *personal estate* of John D. Smith, deceased. The second case relates to the rights of the parties to the *real estate*.

The facts relating to each will be stated as if there was but one case. The first case was submitted in the trial court, upon an agreed statement of facts, which is substantially as follows:

John D. Smith died April 30, 1877, testate; his will was probated May 10, 1877; John D. Smith left no issue, but left Elizabeth Smith, as his lawful wife, to whom he was married in 1839. Elizabeth Smith (the widow) died August 1, 1877, intestate and without issue. She never attempted to divide or distribute the real or personal estate of John D. Smith, in any way. William B. Millikin is the administrator of Elizabeth Smith, and Enoch D. Cracraft and the other plaintiffs are her legal heirs and distributees. P. J. B. Welliver is the administrator of John D. Smith, and Joseph Smith and the other defendants are the brothers and sisters (and representatives of deceased brother and sister) of John D. Smith.

No administration was taken out on John D. Smith's estate, until August 10, 1877, (after Elizabeth's death), when Welliver was appointed his administrator, with the will annexed. Millikin was appointed administrator of Elizabeth Smith, August 22, 1877. The debts of John D. Smith and his funeral expenses were all paid by Elizabeth Smith out of his estate. No year's support was set off to her,—but \$500.00 would have been a reasonable sum for a year's support, if she was entitled to have same set off.

Besides paying his debts and funeral expenses, John D. Smith left \$8,750 in money, which at his death was taken possession of by Elizabeth (his widow), and by her on May 10, 1877, deposited to her individual credit, in Second National Bank of Hamilton, where it remained at her death. It is agreed that \$650.00 of said sum was her separate estate (being referred to in the will), and it is withdrawn from controversy, leaving balance of \$8,100 in bank in controversy.

The balance of John D. Smith's personal estate, consisting of horses, cattle, hogs, farming utensils, household furniture, grain etc., was, at John D. Smith's death, taken possession of by the widow (Elizabeth), and retained by her until her death.

Welliver, when appointed administrator of John D. Smith, took possession of the same, and had the same appraised and sold as the property of John D. Smith, the entire proceeds being \$2,359.89, (which was the reasonable value thereof), and now in hands of said Welliver as administrator. Said appraisement and sale was made against the protest of William B. Millikin, administrator of Elizabeth Smith.

Of the said grain sold was 715 bushels of corn (sold for \$250.25) which was planted after the death of John D. Smith, on the real estate owned by him, and devised in his will, by a tenant to

whom, by verbal agreement, before his death, John D. Smith had rented the farm for 1877 on the shares. The plowing was done by the tenant before John D. Smith's death.

The above are all the facts material to the controversy between the above named parties, and upon the above facts, it is by agreement of all the above parties submitted to the court to decide the following questions, and to enter judgment accordingly:

I. Is P. J. B. Welliver administrator with the will annexed of John D. Smith, deceased, or is William B. Millikin, administrator of Elizabeth Smith, deceased, entitled to have possession of said personal estate, and to administer upon the same?

II. Is William B. Millikin, administrator of Elizabeth Smith, entitled to have paid to him out of said estate the sum of five hundred dollars for said year's support of said Elizabeth Smith?

III. In what manner and proportion and to whom ought said money, proceeds of sale of personal property and other personal estate, be distributed and paid after the expenses of administration have been first paid, and after payment of taxes?

The will of John D. Smith, dated April 24, 1875, is as follows:

I, John D. Smith, of Reily Township, Butler County, Ohio, make and publish this my last will and testament as follows, to wit: I direct that my funeral expenses, and all just debts be paid as soon after my decease as possible. The residue of my estate, both real and personal, that I may possess at my decease, I give and bequeath to my beloved wife, Elizabeth Smith during her lifetime; she to have full possession, management and control of the same, with the privilege of disposing of any or all the personal property for her use, together with all the proceeds of the real estate; she to have the privilege of disposing of six hundred and fifty dollars at her death to whomsoever she may see fit [being the amount received from her father's estate]; the residue of my estate is to be distributed to the heirs of my side of the house in such portions as she may direct by will or otherwise.

In witness, whereof, I, John D. Smith, the testator, have hereunto set my hand and seal this 24th day of April, A. D. 1875.

his
JOHN D. X SMITH. [SEAL.]
mark.

Signed, sealed and acknowledged in the presence of us, who subscribe our names as witnesses in the presence of the testator and in the presence of each other.

HENRY A. CUBBERLEY,
JOSEPH WEIHER.

The second case, relating to the real estate, was submitted on an agreed statement of facts, showing, also, that John D. Smith, at his death, was seized of certain parcels of real estate, all of which, except 35 acres came not by descent, devise or deed of gift, and that Elizabeth Smith

was married to him in 1839, and continued his lawful wife until his death.

The court of common pleas adjudged:

1st. That the personal estate should be administered and distributed by the personal representative of John D. Smith.

2d. That he should pay to the personal representative of the widow \$300, which it was agreed, is a reasonable allowance for her year's support.

3d. That he should, after paying to the administrator of the widow said sum of \$650, and taxes &c., distribute the residue to the brothers and sisters, and their legal representatives, of John D. Smith.

4th. That the real estate vests in the brothers and sisters and their legal representatives.

The district court affirmed these judgments, except as to the amount allowed for the year's support of the widow.

Thomas Millikin, for plaintiff in error.

Moore & Moore, for defendant in error.

JOHNSON, J.

Much of the argument of counsel, as well as the judgment of the courts below, is on the assumption that Elizabeth Smith, the widow, took under the will of her husband, John D. Smith. This, necessarily involves a construction of the will, to determine the widow's rights thereunder, and the rights of her representatives.

If, however, the widow did not take under the will, expressly, as prescribed by the statute or impliedly, by such acts as would have estopped her from denying such election, then she takes under the law. If the latter is the case, it becomes immaterial to enquire what the will would have given her, had she taken under it.

If she did not take under the will, the law fixes her rights.

If any provision is made by will, for a widow of the testator, it is the duty of the probate court, forthwith after the probate of the will, to issue a citation to the widow, to appear and make her election, whether she will take such provision, or be endowed of the lands of her husband. This election is to be made within one year from the date of service of the citation upon her. It must be made *in person*, and in the probate court, except when a commission is authorized to take such election. It is to be made after an explanation of her rights under the will, and by law in the event of her refusal, and is to be made a matter of record.

"If the widow shall fail to make such election, she shall retain her dower, and such share of the personal estate of her husband as she would be entitled to by law, in case her husband had died intestate leaving children."

To determine the matters in controversy, we must first ascertain whether Elizabeth Smith took under the will, or under the law.

That she was not cited before the probate court, nor her election made a matter of record, is conceded. She died before the time had expired in which she could have elected. She

alone could elect. It is a personal right. Neither her administrator nor her heirs could make it.

But it is claimed that although she did not elect as prescribed by statute, yet she in *fact* did so elect, and that her rights depend on the terms of the will. This claim is, that the facts agreed on show such actual election as would have estopped her, had she lived, from claiming under the law.

The facts relied on for this purpose are, that during the time she survived her husband, some five months, no administrator was appointed; nor was any claim made for dower; that she paid the debts and funeral expenses; that there was left some \$8,000 in cash, which she deposited in bank, in her own name, and that she took and retained possession of the personal property of her husband, consisting of stock on the farm, farming utensils and other chattels. She did not attempt to convert any of this property to her own use, nor place it beyond the reach of an administrator of her husband's estate, when one should be appointed. Indeed, every dollar of the assets, as appears by the agreed statement, which remained after the payment of debts and funeral expenses, remained at her death, within the reach of the representatives of her husband. The will gave her a power of sale of the personal property, and the right to the proceeds of the farm, and an absolute disposal of \$650, the amount received from her father's estate, yet she exercised none of these rights.

The acts relied on are by no means conclusive. They are not inconsistent with an intention to elect, when cited, to take under the law. They are such acts as would preserve the estate intact for that purpose. This may have been the intention of the widow.

While they tend to prove that she was acting under the will, they are not so inconsistent with her rights under the law as to estop her from claiming under the law, especially when only a few months had elapsed since her husband's death, and there was no personal representative of the estate. It can hardly be claimed, that had she been cited to appear before the court to make her election after doing these acts, she would have been denied her election.

In order that acts of a widow shall be regarded as equivalent to an election to waive dower, it is essential that she act with a full knowledge of all the circumstances and of her rights, and it must appear that she intended by her acts to elect to take the provision which the will gave her. These acts must be plain and unequivocal, and be done with a full knowledge of her rights, and the condition of the estate. A mere acquiescence, without a deliberate and intelligent choice, will not be an election.

1 Lead Eq. Cas. Title Election.

Anderson's Appeal, 36 Penn. St. 476, 496.

Bradford v. Kent, 43 Penn. St. 474.

English v. English, 5 Green, ch. 504.

O'Driscoll v. Koger, 2 Desaus, 295.

Wake v. Wake, 1 Vesey, Jr. 335.

Reynard v. Spence, 4 Beav. 103.

Tooke v. Hardeman, 7 Geo. 20.

Dixon v. McCue, 14 Grattan, 540.

It is believed no case can be found where the facts are held sufficient to amount to an election to waive the widow's rights under the law, unless they are of such a marked character and of such long duration, as will clearly and distinctly evince a purpose to take the provisions of the will, and to operate as an effectual equitable bar to dower.

Thus, where real estate was devised to a widow for life, remainder in fee to her sons, and she in fact, took under the will and occupied the premises for more than sixteen years, she was estopped to deny her election. *Thompson v. Hoop*, 6 Ohio St. 480. So in *Bradford v. Kent*, 43 Penn. St. 473, it was held, that where a widow, with full knowledge of the value and character of her husband's estate, receives the provision made for her in his will, she cannot after seventeen years, claim that she did not intend to relinquish her dower.

In *Stille v. Folger*, 14 Ohio, 610, it was held: that the act of taking possession of the property within the time limited for making the election was not an election under the will. Indeed, it is said in that case, that the only mode of proving an election is by the record, unless the record is lost or destroyed. This decision seems at variance with *Thompson v. Hoop*, *supra*, and numerous other cases, where an estoppel *in pais* was proven and held effectual; but as applied to the facts of the case then before the court, where the acts relied on to create an estoppel, were within the time limited by law for an election before the court, and when such acts did not amount to an actual conversion of the property, there is no inconsistency. In all the cases in which it is held that an implied election bars dower, the acts relied on are long continued, unequivocal, and inconsistent with the claim for dower.

Reed v. Dickerman, 12 Pick. 146.

Delay v. Verral, 1 Met. 57.

Upshaw v. Upshaw, 2 Hen. & M. 381.

Ambler v. Norton, 4 Hen. & M. 28.

Clay v. Hart, 7 Dana, 1.

Craig v. Walthall, 14 Grattan, 518.

We conclude, therefore, that the acts relied on as an election, are not such as would have estopped her, had she been cited as the law requires, from making her election in court after a full explanation of her rights under the will. These acts were within the time the statute gave her to choose, and they are not such as in equity create an estoppel.

The widow must therefore be deemed to have failed to make her election to take under the will. In such a case the statute says she shall retain her dower and such share of the personal estate of her husband as she would be entitled to, had her husband died intestate, leaving children.

The judgments of the courts below must therefore be reversed, and a judgment rendered in accordance with the foregoing decision.

As to the real estate:

The failure of the widow to take under the will, left the real estate to vest in the devisees of the estate in remainder, subject to the widow's dower. Her death terminated her right to have dower assigned, or to claim any share of the accruing rents or profits. The will directs that the residue of the estate be distributed to the testator's heirs, in such portions as his wife may direct by will or otherwise. She died without exercising this power. Having failed to make such distribution, the devise takes effect in favor of each of the heirs, or his legal representatives in equal shares. As the real estate vested in the residuary devisees, the rents and profits accruing after the testator's death vest in them also. This settles the right to the proceeds of the sale of the crop of corn. As between the personal and legal representatives of John D. Smith, it belongs to the latter, but as the plaintiffs in error have no interest in this claim, the judgment of the court below, in regard to this item, is left undisturbed.

These heirs are the defendants in error in the second above case. This judgment is therefore affirmed.

[This case will appear in 37 O. S.]

CORPORATION—LOCATION—TAXATION.

SUPREME COURT OF OHIO.

FREDERICK W. PELTON, TREASURER OF CUYA-HOGA COUNTY,

v.

NORTHERN TRANSPORTATION COMPANY OF OHIO.

January 24, 1881.

1. A certificate of incorporation which, under the statute, specifies the place where the principal office of the company is to be located, is conclusive as to the location of such office.

2. Such office is to be regarded as the residence of the corporation within the meaning of the 4th section of the tax law of April 5, 1859, as amended April 8, 1865 (S. & S. 756), which provides that certain personal property "shall be entered for taxation in the township or town in which the person to be charged with taxes thereon resides at the time of listing the same by the assessor."

3. A corporation whose principal office is located in a specified township and without the limits of a city, may, if the city limits be so extended as to include the site of the office, remove the same to some other part of the township and thus avoid municipal taxation.

4. Steamboats, and articles of furniture are not enumerated in the seventh section of the tax law of April 5, 1859 (S. & C. 1442), within the meaning of section 4 of said act as amended April 8, 1865.

5. Personal property other than merchants' and manufacturers' stock, or articles enumerated in the 7th section of said act of April 5, 1859, or personal property upon farms and real property not in towns, subject to taxation in the county where the owner or person chargeable with taxes thereon resides, must be returned and taxed in the town or township where the owner resides.

6. Steamboats, whose home port is in the county where the owner resides, are subject to taxation in the township where the owner resides whether such owner be a natural person or a corporation.

Error to the Court of Common Pleas of Cuyahoga County. Reserved in the district court.

The Northern Transportation Company, a corporation organized under the laws of this State,

to wit: the statute of April 2, 1859, entitled "an act to authorize associations of persons for carrying freight on any of the navigable waters of the State of Ohio and the lakes and rivers bordering thereon," brought the original action against the plaintiff in error, as Treasurer of Cuyahoga County, to restrain the collection of certain taxes then upon the duplicate in his hands for collection. The plaintiff, for the year 1874, had listed, in Brooklyn Township, Cuyahoga County, its property, consisting of sixteen steamboats employed in navigating in waters between Ogdensburg, in the State of New York, and Chicago, in the State of Illinois, and certain other personal property situate in the city of Cleveland in Cuyahoga County, and the same was returned for taxation by the assessor of said township at the valuation of \$310,000. The property so returned was placed by the auditor of the county upon the duplicate and assessed as property subject to taxation in the city of Cleveland, a taxing district in said county other than said Township of Brooklyn. The amount of taxes so assessed upon said property was \$8,680.00; whereas the amount, according to the rate of taxation in Brooklyn Township, would have been \$3,255.00. The latter sum was tendered, but the treasurer refusing to accept the same, in full payment of the taxes on said property, and being about to compel the payment of the former sum, the original action was brought to restrain the collection of the excess over the sum tendered and admitted to be due.

In the court of common pleas, the injunction as prayed for was decreed; whereupon, on the overruling of a motion for a new trial, all the evidence was embodied in a bill of exceptions; and on error, the district court reserved the cause for decision in this court. A further statement of the case will be found in the opinion.

Heisley, Weh & Wallace, for plaintiff in error.

F. J. Dickman, for defendant in error.

McILVAINE, J.

Was the property of the Northern Transportation Company, which was listed for taxation in the Township of Brooklyn, subject to be taxed in the adjoining district of the city of Cleveland, or only in the Township of Brooklyn, both taxing districts being in the County of Cuyahoga? The listed property consisted chiefly of sixteen steamboats, owned by the Transportation Company and employed in navigation on waters between Ogdensburg, New York, and Chicago, Illinois, and intermediate ports, including the port of Cleveland, the home port of the vessels—being the one nearest to the residence of the owner, and where the same were enrolled and licensed in conformity to the laws of Congress, in such case made and provided. In addition to the vessel property there were also included among the listed property, the office furniture and other articles in the office of the company's agency, in the city of Cleveland.

The Transportation Company was duly organized in the year 1860, under the act of April 2d, 1859, (56 Ohio L. 115), which authorized any number of natural persons, not less than five, to become a body corporate for the purposes named in the act, by making and acknowledging a certificate to be recorded by the Secretary of State, specifying, among other things, "the name of the county or place where the principal office of such company is situate." In compliance with this requirement, the certificate of incorporation was as follows: "That the place where the principal office of said company is situated is Brooklyn, in the County of Cuyahoga and State of Ohio." The office so designated was established in said Brooklyn (Township) at the residence of one Pelton, where it remained until January, 1874. In the meantime, the limits of the city of Cleveland were so extended as to include the residence of Pelton, whereupon, the stockholders of the company, at their annual meeting in January, 1874, ordered that the principal office of the company should be removed to the house of one D. W. Hoyt, situate in said Brooklyn Township, but without the limits of the city of Cleveland, which was done accordingly; since which time, the annual meetings of the stockholders and the election of officers have taken place at the residence of said Hoyt, who, at the date of listing the property for taxation, was vice-president of the company, and who, as the specially authorized agent of the company, returned its personal property for taxation to the assessor of said township. Aside from the holding of the annual stockholders' meetings, the election of officers of the corporation and the listing of property for taxation from year to year, the record does not show any other business done at the office in Brooklyn. It does appear, however, that the affairs and business of the company are managed chiefly by agents in the cities of Chicago, Ogdensburg, Cleveland and at other ports where its steamboats are accustomed to enter, and that its principal accounting office is at St. Albans, in the State of Vermont, where the president of the company resides, and the office of its directors is located.

Upon this state of facts, several questions, involved in the determination of the case, arise.

For many purposes, a corporation is regarded as having a residence—a certain and fixed domicile. In this State, where corporations are required to designate, in their certificates of incorporation, the place of the principal office, such office is the domicile or residence of the corporation. The principal office of a corporation, which constitutes its residence or domicile, is not to be determined by the amount of business transacted here or there, but by the place designated in the certificate. True, several offices may be established at the place specified in the certificate, as it is sufficient, under this statute, to specify the "county or place." But where a single office is established in the county or township, or city, or other place designated, no further inquiry, as to the identity of the principal

office, is admissible. And as the statute does not require the office building to be specified, it is competent for the corporation to transfer its principal office from one building to another, within the specified county or place, whenever its own convenience or advantage may be subserved. No doubt the exact location of the office should be open and notorious, so that a secret or fraudulent removal would not avail any purpose, yet the particular motive in making the change is not material, as for instance, whether it was done to avoid taxation. If a natural person may change his residence for such purpose, (and of this there can be no doubt), we see no reason why a corporation may not do the same. Such removal is not a fraud against tax laws unless so declared by express legislation.

In the case of *Western Transportation Company v. Shea*, 19 N. Y. 408, which was similar to the present in many of its facts, it was held, that the organic certificate of a corporation, in which it was required to designate the city or town and county in which the principal office for the management of the affairs of the company was to be situated, was conclusive as to the location therein designated as that of the principal office of the company. In that case, the question arose under a statute which provided that "all the personal estate of every incorporated company, liable to taxation on its capital, shall be assessed in the town or ward where the principal office or place for transacting the financial concerns of the company shall be," and in the opinion, Judge Selden well said, "It is not important that a corporation should be taxed where it does the greatest amount of its business; but it is important that the place where it is liable to be taxed should be known." In that case, Tonawanda, a small village in the vicinity of the city of Buffalo, was designated as the place of the principal office. The fact was that several places, especially Buffalo, had priority over Tonawanda as principal localities for the business of the company, and it seems to have been conceded, that the office was located at Tonawanda to avoid taxation in Buffalo. In relation to this fact, the court said. "But it is no more inequitable or immoral for a corporation to do this, than for an individual to do substantially the same. A person may keep his office in Buffalo and transact business there to an unlimited amount, enjoying all the facilities and advantages which the enterprise and the expenditures of the city have afforded, and yet by residing without the city-bounds avoid all municipal taxation. When this shall be practiced, either by individuals or corporations to an extent which renders it a serious evil, it will be for the legislature to interfere."

The statutory provisions governing this case are found in section four of the act of April 5, 1859, as amended April 8, 1865. (S. & S. 756). The first part of this section designates the persons who shall list property for taxation; but as no question is made as to the listing of the property of the Northern Transportation Company, we will quote only the latter part of the

section which prescribes the township and town where property shall be entered and taxed. "And all real property, and merchants and manufacturers stock, and all the articles enumerated in the seventh section of this act, and all personal property upon farms and real property not in towns, shall be returned for taxation, and taxed in the township and town in which it is situated; all shares of stock in any national bank located within this State, whether held or owned by residents or non-residents of this State, shall be listed for taxation and taxed in the city, town and township in which the bank is located; and all other personal property, moneys, credits or effects, shall be entered for taxation in the township and town in which the person to be charged with taxes thereon resided at the time of listing the same by the assessor, if such person reside within the county in which such property, moneys or effects were listed, if not, then such property, moneys and effects shall be entered for taxation, and taxed in the town and township where it was situated when listed."

Section 7, to which reference is made, is as follows:

"Section VII. Such statement shall truly and distinctly set forth,

First—The number of horses, and the value thereof.

Second—The number of neat cattle, and the value thereof.

Third—The number of mules and asses, and the value thereof.

Fourth—The number of sheep, and the value thereof.

Fifth—The number of hogs, and the value thereof.

Sixth—Every pleasure carriage of whatsoever kind, and the value thereof.

Seventh—The total value of all other articles of personal property which such person is, by this act, required to list; provided, that if such person shall exhibit to the assessor the animals or other articles of personal property above enumerated, the value of such property so exhibited may be omitted in such statement, and the assessor shall, in such cases, determine their value without requiring the oath of the person making such statement as to the value thereof, and such person shall in that case be required only to make oath or affirmation to the value of the remainder of the personal property which he is required to list.

Eighth—Every gold and silver watch, and the value thereof.

Ninth—Every pianoforte, and the value thereof.

Tenth—The value of the goods and merchandise which such person is required to list as a merchant.

Eleventh—The value of the property of which such person is required to list as a banker, broker, or stock jobber.

Twelfth—The value of the materials and man-

ufactured articles which such person is required to list as a manufacturer.

Thirteenth—The value of moneys and credits required to be listed, including all balances of book accounts.

Fourteenth—The value of the moneys invested in bonds, stocks, joint-stock companies, or otherwise, which such person is by this act required to list."

(S. & C. 1442.)

The property of the Transportation Company was properly listed and included in the statement under the 7th clause or sub-division of section seven. It is very clear, that steamboats and office furniture are articles not enumerated in the 7th section, although embraced within the general description of property contained in the 7th clause.

It therefore follows, that inasmuch as this property was not "merchants or manufacturers stock," or "personal property on farms and real property not in towns," it was not required to be returned or taxed in the township or town in which it was situated, as provided in first part of 4th section above quoted. On the other hand, if it be conceded, as is claimed by plaintiff in error, that the *situs* of this property was in the city of Cleveland, still, being other personal property than merchants and manufacturing stock, or articles enumerated in the 7th section of said act, or personal property on farms or real property not in towns, it is clear, under the last clause of said section four, that it was properly returned by the assessor and should have been taxed in the township, "in which the person to be charged with taxes thereon resided," namely in the Township of Brooklyn—it being uncontroverted, that the Transportation Company was the person to be charged with taxes thereon, and as was above shown, the residence of the company was in the same county where the property was listed for taxation.

In thus deciding this case, we have been guided solely by the statute, without calling to aid the familiar doctrine of the common law, that the *situs* of personal property follows that of the owner; for we admit, that if the owner had not resided in Cuyahoga County, the result would have been different. And on the other hand, if the *situs* of the property had been in another county, subject to be listed and taxed there under the statute, the residence of the owner in Cuyahoga County would not have given the latter county any right whatever to tax it. The residence of the owner in any particular taxing district fixes the place where its personal property is subject to taxation only in case the property is required to be listed in the same county; in which case, if the property be other than merchants or manufacturers stock, articles enumerated in said seventh section, or personal property on farms or on real property not in towns, it must be taxed in the district of the owner's residence, otherwise it must be taxed where it is situated.

We fully agree with counsel for plaintiff in error, and the authorities cited by them, that

the *situs* of personal property, for the purposes of taxation, does not follow the domicile of the owner, unless so provided by local law. And we further agree with them, that the *situs* of steamboats, navigating waters within and bordering upon different States, is that of the home port, which is ascertained by the residence of the owners, and is the port of enrollment and registration. And, of course, if personal property, by local laws, be made subject to taxation in the district of its *situs*, steamboats would be taxed in the district of the home port. But, by our statute, if the home port be in the same county where the owner resides, then they are subject to taxation in the township or town of the owner's domicile.

Judgment affirmed.

[This case will appear in 37 O. S.]

PRACTICE—AVERMENT OF VIOLATION OF STATUTE.

SUPREME COURT OF OHIO.

OSHE v. THE STATE.

CAIN v. THE STATE.

JANUARY 31, 1882.

1. The Act to revise and consolidate the general statutes of the State, embodied in the Revised Statutes, is not void as being in conflict with Section 16, Article 2, of the constitution.

2. The offense defined in Section 6942, of the Revised Statutes, consists in the *keeping of a place*, where the business of the unlawful sale of liquor is carried on; and the section is not unconstitutional in not requiring such place to be one of public resort.

3. In an indictment under said section, it is a sufficient description of the unlawful sales to aver that they were made "in violation of Section sixty-nine hundred and forty-one, of the Revised Statutes of Ohio;" and the reference to the section must be understood as referring to the section then in force.

Motion for leave to file petitions in error to reverse the judgments of the District Court of Muskingum County.

The plaintiffs in error, Charles Oshe and Terrence Cain, were severally indicted, under section 6942 of the Revised Statutes, as keepers of places where intoxicating liquors were sold in violation of law. The indictments were severally demurred to. The demurrers having been overruled, Oshe pleaded guilty and was sentenced by the court; and Cain on a plea of not guilty was convicted and sentenced.

On error, the district court affirmed the sentence in each case.

Leave is now asked to file petitions in error in this court, to reverse the judgments of the court below. The cases are submitted together.

G. L. Phillips and Hollingsworth & McDermott, for Cain.

Southard & Southard and C. A. Beard, for Oshe.

A. W. Train, for the State.

WHITE, J.

On these applications there are only three questions we deem it necessary to notice.

1. It is contended that the Act to revise and consolidate the general statutes of the State, embodied in the Revised Statutes, is void as being in conflict with Sec. 16 of Article 2 of the Constitution. The provision of the section with which the Act is claimed to conflict is as follows: "No bill shall contain more than one subject, which shall be clearly expressed in its title." The view taken of this question by the Commissioners for the revision is found on page 7 of the preface to the Revised Statutes; and this view is sustained by several decisions of this court.

In *Pine v. Nicholson*, (6 Ohio S. 176) it is declared that this provision was incorporated into the Constitution for the purpose of making it a permanent rule of the two Houses, and to operate only upon bills in their progress through the General Assembly. That it is directory only, and the supervision of its observance must be left to that body. This doctrine was subsequently affirmed in the State *ex rel. v. Covington*, 29 Ohio S. 142. The first ground of error relied on is, therefore, without foundation.

2. Section 6942 of the Revised Statutes on which the indictments are founded is as follows: "A keeper of a place where intoxicating liquors are sold in violation of law shall be fined not more than one hundred nor less than fifty dollars, or imprisoned not more than thirty nor less than ten days, or both; and, upon conviction of such keeper, the place where such liquor is sold shall be deemed to be a common nuisance, and the court shall order him to shut up and abate the same, unless he make it appear to the court that he does not then sell liquor therein in violation of law. * * *"

It is claimed that this section is unconstitutional inasmuch as it does not require as did the Act of May 1, 1854, (S. & C. 1431) the place where the liquor is sold to be a place of "public resort." It is also claimed that without this qualification in defining the offense, the section is no more, in effect, than adding a double punishment to the offense defined in section 6941. Neither of these positions is tenable. Section 6941 operates only on the individual sales therein described, and makes such sales unlawful by whomsoever made. The offense defined in Sec. 6942, above quoted, consists in the *keeping of a place* where the unlawful sale of liquor is carried on as a business.

The section operates in the first place to punish the keeper; and after his conviction to require, in the mode prescribed, the unlawful business to be abated as a common nuisance.

In the argument for the plaintiffs in error, the power of the legislature to prohibit the making of individual sales as described in Sec. 6941 is admitted. Upon the same principle it is equally competent to prohibit the *keeping of a place* where such sales are habitually made as a business.

3. The indictment in the case of Cain is in

the form approved in *Miller v. The State*, (3 Ohio S. 475) and in *Kern v. The State*, (7 Ohio S. 411), except that instead of averring that the sales were made in violation of the Act named in those cases, it is averred that they were made "in violation of section sixty-nine hundred and forty-one (6941), of the Revised Statutes of Ohio, as amended March 9th, 1880." Under the rule of the cases last cited the averment is sufficient; but under it no sales can be proved that are not within the inhibition of the section.

In Oshe's case the averment that the place where the liquors were sold was a place of "public resort" is omitted, nor is Sec. 6941 referred to as being amended March 9th, 1880. The averment is that the sales were made "in violation of law, to wit, in violation of section sixty-nine hundred and forty-one (6941) of the Revised Statutes of Ohio." The time laid for the commission of the offense is subsequent to the passage of the section as amended. In other respects the indictments are alike.

At the time of the passage of the amended section it took the place of the original section in the revision, and was thereafter the only section 6941 of the Revised Statutes in force. The reference in the indictment, therefore, to that section of the Revised Statutes must be understood as referring to the section then in force. *Brigel v. Starbuck*, 14 Ohio S. 285.

For these reasons we think the indictments are sufficient, and the motions must be overruled.

[This case will appear in 37 O. S.]

SUPREME COURT ASSIGNMENT.

FOR ORAL ARGUMENT.

February 16th—No. 959. *J. H. Devereux et al. v. Hugh J. Jewett, Trustee, &c., et al.* No. 953. *Ohio ex rel. Attorney General v. William H. Vanderbilt et al. Quo Warranto.*

February 23d—No. 6. *Shorten v. Drake et al.* No. 30. *Pitts, Graham & Co. v. Foglesong.*

February 23d—No. 794. *Elias Sims et al. v. The Brooklyn Street Railroad et al.*

February 24th—No. 23. *Pittsburgh, Cincinnati & St. Louis R'y Co. v. Anderson.* No. 24. *Same v. Shuss.* No. 73. *Same v. McMillan.*

March 1st—No. 33. *Little v. Eureka Fire and Marine Insurance Co.* No. 34. *Roland v. Meader Furniture Company.*

March 2d—No. 18. *Marietta & Cincinnati Railroad Company v. Western Union Telegraph Company.*

March 3d—No. 37. *Phoenix Insurance Company v. Priest, adm'r, etc.* No. 39. *Morris et al. v. Williams.*

March 8th—No. 40. *Crabill, ex'r v. Marsh.* No. 50. *City of Ironton v. Kelley and wife.*

March 9th—No. 7. *Dawson v. Ohio and J. B. Koch.* No. 74. *Ohio ex rel. Dawson et al. v. Board of Education of Wooster.*

March 10th—No. 45. *Williams v. Pomeroy Coal Company.*

Ohio Law Journal.

COLUMBUS, OHIO, : : : FEB. 23, 1882.

HON. D. M. WILSON, a well-known lawyer of the Western Reserve, died at Youngstown, the 11th of this month, aged 60 years. Mr. Wilson was well known throughout the state, having occupied several offices of prominence and trust, and was an active member of the last Constitutional Convention.

EX-JUDGE CHARLES FOX, who recently died in Cincinnati, was, at the time of his death, the oldest member of the Ohio bar. His many years of labor in the walks of the profession covered many interesting periods in the country's history, and we trust at an early day to be able to publish an outline of the life and services of Judge Fox, as we feel such would be of great interest to the profession.

THE Supreme Court after a week's recess, met last Thursday, all the judges being present, to hear oral argument, in the cases involving the question of the right of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, and the Cincinnati, Hamilton and Dayton Railroad Company, consolidating, as was in process of consummation last October, when stayed by injunction gotten out by Hugh J. Jewett and R. Suydam Grant. The latter were represented by Attorney General Nash, B. H. Bristow, Aaron F. Perry, E. A. Ferguson, and Hon. H. J. Booth. The Vanderbilt-Devereux party were represented by Messrs. Harrison, Olds & Marsh of this city, Rufus P. Ranney and Judge Burke of Cleveland, and H. J. Glidden, of Cincinnati. The arguments were masterly and exhaustive from both stand-points, and attracted no little attention. The decision of the court on the questions involved, will be anxiously awaited by the public generally, and the railway magnates in particular.

QUÆRE?

MARYSVILLE, O., Feb. 15th, 1882.

EDITORS OHIO LAW JOURNAL:

I would like to have the following question answered by you or some of your subscribers:

"Has the Probate Court power to appoint a guardian of the person and property of one who is monomaniac on the subject of his wife's chas-

tity, and perfectly sane on all other questions."

B.

We presume it is within the province and power of the Probate Court, when satisfied, after careful examination of the case, of the necessity thereof, to provide for the care and protection of a person who, from any cause whatever, has become incapacitated for the performance of the duties incumbent upon him in his business, or, in the judgment of the court, unable to properly care for himself or his property.

RIGHT OF COUNSEL TO REPRESENT PROSECUTING WITNESS IN CRIMINAL CASES.

Feb. 17, 1882.

EDITORS OHIO LAW JOURNAL:

The true question presented by "G." in No. 24 is—how far shall the aggressive tendencies of debatable discretion in our courts be extended? And this constantly arises in practice. As presented, it would seem to be not at all difficult. It and many kindred questions relating to the amenities and rights properly existing between court and bar, ought to be promptly met and emphatically, though respectfully, acted upon. The growing encroachments of our courts upon the dignity, personal respect and sense of right of the attorney, are so many weapons of danger against both his honorable standing and his successful practice.

It would seem that he, whose life had been endangered, had an interest in the prosecution above and beyond community at large, which, although he was assured of the services of the Prosecuting Attorney, entitled him, at his own expense, to procure to his personal satisfaction, further assistance. And when and where has it been ascertained that a lawyer's admission, after years of time and preparation and at great outlay, to practice, was after all, only partial and subject to the whim, or perhaps worse, of another who may or may not be the better lawyer, but who by political accident merely and without test of either worth or ability, happens to hold the office of Judge.

But the tendency constantly increases in favor of a pure personalty and "My Court"-ism. Just the other day, another court having read "G." and in greedy haste to fly to the phalanx of this new usurpation, upon a purposely prepared presentation of the same question—made the same holding.

Is it not in fact, a more and more glaring necessity, that in simple self-defense the bar must with vigor repel the ever growing and advancing attacks which have respect for neither ability as a lawyer nor manhood as a citizen. Shall arbitrary one-man-ism rule our courts? Or, while their rightful power and proper dignity should be the just pride and respectful veneration of every attorney, is it not also to be remembered that the lawyer has *his* rights, just as sacredly to be guarded.

The Prosecuting Attorney had the undoubted charge and responsibility of the case, and it may be that he might have objected to sharing it, but the court, not being applied to for an appointment—and, not being called upon by any proper person to interfere—had no right to do so, and its action was simply a gratuitous insult and outrage upon the rights of the attorney employed, as assured to him from a higher and only court having the power, and of which the Legislature could not either directly or indirectly direct him, except upon case made against him.

We say again, these tendencies are *growing*. They are not entirely new. There have been still greater outrages, they are not simple errors, upon both attorney and client. There have been cases where courts have absolutely refused the appointment of counsel chosen by the defendant as he has the clear constitutional right to do, and where the courts have even against the defendant's remonstrance, appointed in the same cases, other counsel whom defendant refused to acknowledge or consult. But there are other growing abuses of the utterly arbitrary powers assumed by our courts, the result of this supposed personal court ownership which in self protection demand the prompt throttling of the attempted swallowing of justice in the individualism of the Judge.

There are many crying evils degrading to the practicing lawyer and full of injustice and overt wrong to the client, that are only to be averted by an avowed condemnation from the bar.

Look at one now common assumption, though beginning only by agreement of parties in specified instances as being just then and there convenient, but now usurped as a discretion of the court. It is bad enough when it is said among the people—"No use to employ him, I would rather have him, but the Judge won't let him win"—but when you add to this as a matter of fact, that the court won't let the case be tried as the attorney feels it should be, then, is it not

bad indeed? Whence comes the wisdom, or the power, that enables and authorizes a court to say that to the satisfaction of the attorney's conscience he can discharge his duty to his client in either a civil or criminal case in any fixed limitation of minutes?

It would seem that so long as an attorney, without repetition and not straying from, in the honest discharge of a sworn duty, seeks to perform it, he should be the judge, and the court should lend him every aid instead of as in very many cases is the consequent result, actually and fatally crippling him.

We know what the decisions are, and that in our higher courts are differences of opinion, but you will remark that those who have doubted or differed from these views, worthy and reputable judges as they are, are yet those who have longest retired from actual practice and therefore know really least of the overbearing arrogance often exemplified.

The vast powers of discretion are dangerous, and with them there should be no latitude.

S.

EMOTIONAL INSANITY AS A DEFENCE IN HOMICIDE.

HENRY COUNTY COMMON PLEAS.

THE STATE OF OHIO

v.
PETER D. COLE.

The following is a part of the charge of the court in the above case. We are indebted to J. M. Haag, Esq., of Napoleon, O., for the extract.

Of course Mr. Haag, who is an excellent gentleman and a good lawyer, could not know that the portions of the charge of the court in its points of strength and logical diction, had been taken, word for word almost from the charge of Judge Davis in the Coleman case, recently tried in New York. We presume judges have the right to plagiarize, but laying aside the question of right it certainly indicates a not very sound discretion and raises a presumption of dependence upon the views of others not exactly consonant with the high functions of a judge. We give the extract, however, notwithstanding the plagiarism, and feel sure that Judge Davis will be highly complimented by the adaptation of Judge Moore.

MOORE, J.

* * * The defense of insanity as set up in this case on the part of the defendant is an af-

firmative one. The law presumes every person to be of sane mind until the contrary is shown, hence the burden of proving the defendant insane rests with him and he must satisfy you by a fair preponderance of testimony that at the time he committed the offence charged in the indictment he was of unsound mind, and to the extent that will hereafter be explained to you.

It is claimed on the part of the defense that at the time the defendant shot and killed John Harmon he was unconscious for the instant, by an irresistible impulse which, without power on his part to resist, compelled or prompted him to do the act.

The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, when the offender has the ability to discover his legal and moral duty in respect to it has no place in the law; and there is no form of insanity known to the law as a shield for an act otherwise criminal, in which the faculties are so disordered or deranged that a man, although he sees the moral quality of his act as wrong, is unable to control them and is urged by some mysterious pressure to the commission of the act, the consequences of which he anticipates and knows. To recognize such a principle, life, property, and rights of persons would be insecure, and every man who, by brooding over his own wrongs, real, or imaginary, shall work himself up to an irresistible impulse to avenge himself, can, with impunity, become his own judge and jury in his own case for the redress of his own injuries.

Therefore, if the defendant at the time he shot and killed John Harmon, had knowledge enough to know that he was firing a pistol, that he was shooting Harmon, and thereby doing an act injurious or likely to be injurious to Harmon, and that the act was a wrongful one, he can not assert an irresistible impulse arising from any cause whatever, as an excuse for the crime.

In determining this question of insanity, you will inquire if the defendant was a free agent in forming the purpose to kill John Harmon. Was he, at the time the act was committed, capable of judging if that act was right or wrong, and did he know it was an offense against the law? If you say he did not, you should acquit; if he did, he is guilty of one of the degrees of homicide to which I have called your attention.

I have said to you and you will bear in mind that the law presumes every man of mature years to be sane, that is, to have mind sufficient to form a criminal purpose, to deliberate and premeditate upon the acts which malice, anger, hatred, revenge or other evil disposition might impel him to perpetrate. To defeat this presumption of sanity which meets the defense of insanity, at the very threshold, the mental aberration relied on by the defendant must be affirmatively established, by positive, or circumstantial proof.

It is not sufficient that evidence is offered

tending to prove a cause that might produce insanity. There must be proof to satisfy you that actual insanity did exist at the time of the commission of the offense. It is not sufficient if the proof barely shows that such a state of mind was possible—nor is it sufficient if it merely shows it to have been probable.

The proof must be such as to overrule the legal presumption of sanity—it must satisfy you that the defendant was insane. It would be unsafe to let loose upon society great offenders upon mere theory, hypothesis, or conjecture. A rule that would produce such a result would endanger community, by creating a means of escape from criminal justice, which the artful and experienced would not fail to embrace.

The defense of insanity is not uncommon; it is a defense often attempted to be made in cases where aggravated crimes have been committed under circumstances which afford full proof of the overt acts and render hopeless all other means of avoiding punishment. While then, the plea of insanity is to be regarded as a not less full and complete, as it is a powerful defense, when satisfactorily established, and while you should guard against inflicting the penalty of crime against the unfortunate maniac, you should be equally careful that you do not suffer an ingenious counterfeit of the malady to furnish protection to the guilty.

You will, therefore, carefully distinguish between acts done under the influence of a diseased mind and those which originate from or rest in anger, hatred, ill-will or other evil, or depraved passion, disposition, propensity or condition. Acts done under the influence of the latter cannot be excused in law under any circumstances.

In solving this question of insanity, do not let your minds rest in theory, hypothesis or speculation, but endeavor to test it by the facts as they appear to you, applied with a careful and intelligent judgment. Carefully consider and weigh all the testimony in the case touching the question, to the end, that you may arrive at the truth as it in fact existed, divested of speculation or conjecture.

Then, if upon the whole the defendant has satisfied you by a fair preponderance of the testimony that he was, at the time he committed the offense charged, insane, and to the extent of being unable to determine that the act he was doing was right or wrong, or that it was an offense against law, or his relation to the act committed and against whom it was directed, your verdict will be one of acquittal. If he failed to satisfy you, you will hold him responsible for his acts as one that is sane.

The evidence of insanity as usually produced in cases of this kind consists in delusions, hallucinations, or illusions, as the manifestations of the diseased mind. No such evidence is here offered. Neither have you to any extent the opinion of either experts or non-experts as is usually produced to establish insanity. So you are left to determine from such facts as are of-

ferred of the defendant being at times more silent and down-hearted in appearance, with similar conditions, to determine the question.

You have also the evidence offered by the State upon these same appearances and conditions. Inquire if he was about his usual and ordinary employment; was there or had there been anything unusual in his conversation; did he provide for himself and family in the usual and ordinary way.

Look, gentlemen, carefully and considerately to all these things, and then ask yourselves if you are satisfied by a fair preponderance of the testimony that at the time the defendant shot and killed John Harmon he was insane and to the extent that I have said to you it must exist to make him irresponsible. If you so find you must acquit, if not he must be held responsible for his acts. I have said in your hearing and now repeat to you, that the defendant had no right in law to take it on himself to avenge his own wrongs, whether real or imaginary; and whatever improper relations may have existed between the deceased and the wife of the defendant, it furnishes no excuse or justification to the defendant for the act of killing for which he is charged.

If he was wronged the law furnished him a remedy. If such a claim were permitted to prevail and such a rule of law established, there would be no protection to society. The most atrocious criminals would under it be permitted to escape, by setting up the plea that they had been first wronged.

If you permit any such claim to control your action in this case, you will not only have violated your sworn duty, but will be doing a great injustice to the State, and the people of your country.

JUDGMENT LIEN.

SUPREME COURT OF OHIO.

MARY LETITIA GIFFORD

v.

DAVID MORRISON.

January 31, 1882.

A court of equity will not decree a judgment lien to be invalid on the ground of the want of legal notice to the defendant, where the plaintiff has not been guilty of misconduct and the defendant had actual knowledge of the pendency of the action, unless a meritorious defense to the action be shown.

Error to the District Court of Cuyahoga County.

The plaintiff in error, Mary L. Gifford, filed the original petition against the defendant in error, David Morrison, in the Court of Common Pleas of Cuyahoga County, to quiet her title to certain real estate in her possession, against a certain judgment lien thereon, which the defendant claimed to own and hold. The real estate in question was purchased by the plaintiff from one Allaire, on the 14th, of February, 1876. On the 28th, of December previous, the defendant

commenced an action against Allaire before a justice of the peace in said county, to recover a claim for \$129.56, and caused a summons to be issued returnable on the 31st of December, at the hour of 9 o'clock, a. m., which was delivered to a constable for service on the day of its issuance. A copy of the summons so issued was delivered by the constable to Allaire on the afternoon of its return day. Before the service on Allaire, however, the return day of the summons, without the knowledge of the justice or of the plaintiff, Morrison, was changed from the 31st of December, 1875, to the 3d of January, 1876. The summons so altered was returned by the constable endorsed "Served on the defendant, Allaire, December 31, 1875." On the 3d of January, judgment was rendered by the justice in favor of Morrison, against Allaire by default, for the amount claimed, whereupon a transcript of said judgment was filed in the clerk's office of said county, which constitutes the lien complained of in the original action. The petition in the original action, in addition to the above facts, alleged that no other summons in said action was issued by said justice, and that no action was had by said justice, or entry made upon his docket, between the day said summons was issued and the time said judgment was rendered. The court of common pleas sustained a demurrer to the petition and dismissed the action, which judgment was affirmed by the district court.

McILVAINE, J.

For aught that appears on the record before us, the plaintiff had actual knowledge of all the facts stated in her original petition, at the time she purchased the property, as well as constructive notice of the existence of the judgment and lien of the defendant. It is not pretended that any ground for equitable relief exists in her favor, which could not, with equal right, be asserted by Allaire, her grantor; and we think it is quite clear, that, upon the facts stated, equity would not afford relief to Allaire, the judgment debtor.

That errors and irregularities intervened in the action and proceedings before the justice, must be conceded, but whether they appear on his record is not shown. If they do appear on his record, the judgment, no doubt, might have been reversed on proceedings in error. And the rule is, that equity will not afford relief, where there is a plain and adequate remedy at law.

Allaire had knowledge of the pendency of the action before the justice. True, the notice by summons was not regular, but it informed him that the action had been commenced, and he was thus afforded an opportunity to correct the irregularity on motion, to the justice, or by petition in error if the irregularity appeared on the face of the record. But whether the irregularity appeared of record or not, he could have no standing in a court of equity without an allegation of meritorious defense. Having failed to exercise diligence in seeking redress at law, equity would not set aside the judgment until

he made it appear that the result should be other or different from that already reached. No such showing is made in the case before us.

We do not deny that equity, under some circumstances, will restrain the execution of a void judgment, without an allegation of defense, as for instance, when the fraud or misconduct of the plaintiff in obtaining the judgment is shown; but such jurisdiction is never exercised without such showing, where the judgment is voidable merely, or where, though absolutely void, it appears to be regular on the face of the record. No misconduct is alleged against the judgment creditor, Morrison, and for aught that is alleged, the record of the justice may be entirely regular upon its face. If the justice adopted the change made as to the return day of the summons, (as would seem to be the case), the docket would be unobjectionable in form. True, the return of the constable that the defendant was summoned to appear on the 3d of January, 1876, was false; but the falsity of that return would not relieve either the judgment debtor, or the plaintiff, from the necessity of showing in the petition for equitable relief, a meritorious defense to the action.

The contention of the plaintiff in error is that the justice's judgment is absolutely void for want of jurisdiction over the person of Allaire. But in disposing of the case, I have not deemed it profitable to trace the many nice distinctions which have been drawn between judgments void at law and those voidable merely, and have confined myself to the consideration of those principles upon which courts of equity will or will not interfere and set aside judgments for want of proper notice, whether they be such as are commonly denominated void or only voidable.

The practice upon this subject is fairly stated by Mr. Freeman in his work on "Judgments" as follows: "Section 498. It has been held that a judgment rendered without process and without the knowledge of the defendant, may be relieved against without any showing on the question of merits, for the reason that 'in such case the injury consists in the rendition of the judgment against a party without notice and opportunity of defense; and that it is unjust and unconscientious to attempt to enforce a judgment so obtained. But the better established rule undoubtedly is, that notwithstanding an alleged want of service of process, a court of equity will not interfere to set aside a judgment until it appears that the result will be other or different from that already reached.'" See, also, Taggart v. Wood, 20 Iowa 236; Gregory v. Ford, 14 California, 138; Fowler v. Lee, 10 G. & L. (Ind.) 363; Piggot v. Addicks, 3 G. Greene, 427; Crawford v. White, 17 Iowa 500; Stokes v. Knarr, 11 Wis. 389.

Equity is not concerned about a judgment which, though irregular, is in fact equitable and just.

Judgment affirmed.

WHITE, J., concurred in the affirmance of the judgment without approving of the syllabus as applied to the case. He was of opinion that the

judgment of the justice of the peace in question was not void but voidable only. Hence, the question as to what are the rights of a purchaser from the judgment debtor when the land purchased is sought to be charged in execution under a void judgment does not arise in this case.

[This case will appear in 37 O. S.]

LOCATING DITCH RUNNING IN MORE THAN ONE COUNTY.

SUPREME COURT OF OHIO.

ALONZO CHESBROUGH

v.

COMMISSIONERS OF PUTNAM AND PAULDING COUNTIES, ET AL.

JANUARY 31, 1882.

1. It is within the scope of legislative power, to provide, as is done by Section 22 of the Act relating to Ditches (68 O. L. p. 60), that where a proposed ditch is in more than one county, a majority of the board of county commissioners of each county, may, in joint session, locate and establish the same.

2. Under said section, each board of county commissioners constitutes an integral part of the joint body, and it is essential to the validity of the proceedings in joint session, that a majority of each board should concur therein.

3. In a proceeding under said section, application for damages must be made to the commissioners of the county where the land is situated. The commissioners of such county, and not the joint body, are to determine the compensation and damages to be paid such applicant.

From such award an appeal lies under secs. 12 & 13 of said act as if said ditch was wholly within that county.

4. It is the public health, convenience or welfare of the community to be affected by the proposed ditch, and not that of the public at large, that is to be regarded in the construction of a ditch. Hence, if it appears that the proposed ditch will be "conducive to the public health, convenience and welfare of the neighborhood" through which it will pass, the commissioners are authorized to construct the same.

5. When the commissioners have apportioned the cost and expenses and amount of work to each land owner, and have on due notice heard exceptions thereto, and confirmed such apportionment, it will be presumed in the absence of proof to the contrary, that such apportionment is just and fair and was made with reference to benefits to be derived from the improvement.

Error to the District Court of Putnam County.

The object of this proceeding in error, is to reverse the judgment of the district court, dismissing plaintiff's petition.

This petition was to enjoin the Commissioners of Putnam and Paulding Counties, and others, from constructing a certain ditch, and from assessing against plaintiff's lands the cost of constructing six hundred feet thereof, that being the distance allotted to him for construction. This proposed ditch was partly within Putnam and partly within Paulding County, and was located and established by a joint session of the commissioners of the two counties. It is alleged as the grounds for an injunction, that said proceedings of the Boards in joint session are without authority of law and void for reasons which will be stated in the opinion.

The answer admits the location and establishment of the ditch, claims the proceedings valid and takes issue on all the other allegations of

the petition. On the trial a bill of exceptions was taken setting out all the evidence. To support the issues on plaintiff's side he offered a copy of the records, "from the ditch records of Putnam County," and rested.

No other evidence was offered on either side.

JOHNSON, J.

The proceedings to locate and establish this ditch were had under Sections 1, 4, 5, 11 and 12, of vol. 68, O. L. p. 60, and amendments to Sections 2, 3, 13, 14, and 22, 70 O. L. 79.

Section 22 contains the authority for the action of the two Boards. It reads: "Sec. 22. In all cases where any proposed ditch shall be in more than one county, the application shall be made to the commissioners of each of said counties, and the county surveyor or engineer must make a report for each county, and application for damages must be made in the county where the land is situated, and a majority of the commissioners in each county when in joint session, shall be competent to locate and establish the ditch * * *"

1. It is objected that said section is unconstitutional, because it attempts to confer jurisdiction on the county commissioners, beyond the limits of their respective counties for which they were elected.

It is admitted there is no provision of the Constitution expressly prohibiting such a statute, and this admission is a sufficient answer to the objection. All legislative power, not prohibited, is vested in the legislature. It is clearly a legislative power to provide for the construction of ditches where they are conducive to the public health, convenience or welfare, and to designate such agencies as are appropriate, and not prohibited, to carry out the provisions of the act. This section provides, that when the proposed ditch is in two or more counties, it must be established by the boards of commissioners of the respective counties, in joint session, and it requires a *quorum* and concurrence of each board, to make the necessary orders. As amended, (70 O. L. p. 82), this section requires as the foundation of joint action, that the petition must be filed in each county, and the proceedings, preliminary to the joint action, such as the bond and notice as required by sec. 2 of the Act, 68 O. L. 60, are to be had in each, the same as if the ditch was in a single county. The joint action consists in the finding that the provisions of law, preliminary to the consideration of the petition on its merits, have been complied with, a finding that the proposed ditch is conducive to the public health, convenience or welfare, the location of the same if they so find, and the apportionment of the costs and work of construction. If damages are claimed, the application therefor must be made to the commissioners of the county where the land is situated. The joint session has nothing to do with the assessment of damages for property appropriated. It locates and establishes the ditch and apportions the cost of its location and construction, and damages if any,

to the persons owning lands through or in the vicinity of which the proposed ditch is to be constructed. As the ditch is an entirety, and lies in more than one county, the statute requires the concurrent action of each county to locate and establish it, and to apportion among land owners its aggregate cost. A majority of each board, in joint session, and not a majority of the joint board, is required. Hence, each board acts as an integral part of the joint body. The assumption that the commissioners of either county are acting and exercising authority over the internal affairs of the other county, is therefore not well founded. *Engle v. Boards of Commissioners*, 25 Ohio St. 425.

2. Again, it is objected, that Section 22 is unconstitutional and the proceedings void, because no provision is made for a jury to assess the compensation for lands appropriated.

It was held, in *Engle v. The Board of Commissioners*, 25 Ohio St. 425, that no appeal was provided from the final action of the joint boards in establishing a ditch in more than one county. It was not however held, that no appeal would lie from an allowance of compensation and damages, made by the commissioners of the county where the land was situated. We think this section, when construed in connection with other provisions of the same statute, does provide for such an appeal from the action of the commissioners allowing compensation and damages for land appropriated. In proceedings under this section, application for damages must be made in the county where the land is situated, and the commissioners of such county must act thereon. It is no part of the duty of the joint boards, to assess such damages and compensation.

Section 13, provides for an appeal from this action to the probate court, where the same provision is made for a jury, as in other cases, under the Act of April 30, 1852. A constitutional jury is thus provided. It is true, no appeal lies from the order of the joint boards establishing a ditch, yet one is provided from the separate and independent action of each board in allowing compensation and damages. After all questions of damages and compensation are settled, the boards in joint session award to land owners their proper proportions of the costs and labor of construction.

3. These proceedings are said to be void, because the petition on which they are founded was not sufficient to warrant action, and because the findings of the joint sessions are alike defective.

The petition states, and the order establishing the ditch finds that the proposed ditch, "will be conducive to the public health, convenience and welfare of the neighborhood." The statute (Sec 1) authorizes such action, "when the same will be conducive to the public health, convenience or welfare." The record shows that this proposed ditch extended something near five miles in the two counties. The finding is, that it will be conducive to the public health, convenience and welfare of the neighborhood, that is, of the neighborhood along the entire line of the proposed ditch.

The object of the law is, to provide means for drainage wherever the public health, convenience or welfare requires it. It is not essential that the public at large shall be benefitted, but only that part of the public affected by want of proper drainage or by the improvement to be made. The injury for want of drainage and the benefits to be derived from the ditch, are necessarily local in their nature. Public welfare, health and convenience, in this connection, are terms used in contradistinction from a mere private benefit. A nuisance is said to be public, when it affects the surrounding community generally, and impairs the rights of neighboring residents as members of the public, and private when it specially injures individuals. Abbott's Law Dictionary, Title Nuisance.

The finding by the commissioners in joint session, that the proposed ditch will be conducive to the public health, convenience and welfare of the neighborhood, is a finding, that the community generally are benefitted, and not merely the lands of the petitioners or others. It is a finding that it is for the public welfare as distinguished from a mere private advantage.

4. It is further claimed that no notice was given such as the statute requires, as a condition precedent to the order establishing the ditch, and also that plaintiff had no actual notice.

The petition alleges a want of such notice. This is denied by the answer. The burden of proof was on the plaintiff. He offers in evidence a copy of the proceedings in Putnam County only. What was done in Paulding does not appear. It can only be inferred from the recitals in the record made in Putnam County, and in the action of the joint boards. These show notice by publication in Putnam County. For aught that appears the record of Paulding County shows a like notice in that county. If they do not the onus was upon plaintiff to show it. The auditors of each county are required to keep a record of all proceedings had in each case, (Sec. 19). This record when properly kept, would include the separate action of his board, preliminary to the joint action, the joint action, and all subsequent action of his own board. The record of Putnam County would not therefore show the action of the Commissioners of Paulding County, except when in joint session.

The plaintiff has therefore failed to show, that there was no notice by publication, in Paulding County, or that he did not have actual notice of these proceedings. As this is an action to enjoin proceedings and not in error to reverse them, the burden is upon plaintiff to make good the allegations of his petition.

5. The last objection we shall notice is that the record fails to show an order apportioning the work to be done according to benefits to be derived by the lands along the line.

Sec. 13, as amended, (70 O. L. 80), provides that the commissioners shall make a just and fair estimate of the average cash value of the construction per linear rod, cubic yard or foot of earth, and every section or allotment of such

ditch, and apportion the cost of the location thereof, and labor of constructing the same, and award to each person owning lands through and in the vicinity of which it is proposed to pass, as shall be just and right according to benefits to be derived by constructing the same.

They shall specify the time for the payment of costs and the time and manner in which the labor is to be performed, and appoint a day to hear exceptions to such apportionment. The auditor shall give notice of such apportionment, showing the names of the owners, each parcel of land assessed, number of feet each is to construct, estimated value for construction, and the expenses including damages and compensation, if any, that have been awarded. On the day named in such notice, the commissioners shall meet, and if exceptions have been filed, they shall hear the same upon sworn evidence offered by any party. On such hearing, and an actual view if they desire, they may confirm or change the apportionment as in their judgment is just. (70 O. L. 81-2). The petition charges that the apportionment of cost of locating, and the amount of work each was to do, was made without any estimate of the cost of construction and without regard to the benefits to be derived therefrom. This is denied by the answer. The record shows the apportionment as required by Section 13, as published in the Putnam County Sentinel, by the auditor of that county. We may assume that like notice was also given in Paulding County.

The time therein fixed for hearing exceptions was fixed, as well as the time for completing the work. At the time fixed for hearing exceptions the two boards held a joint session, certain exceptions were filed and after mature consideration they were overruled and the apportionment was confirmed. The time for doing the work having expired, the part allotted to plaintiff was sold to McPheters, one of the defendants, pursuant to notice.

The record is silent as to the estimates made of cost of construction, and of the method adopted to apportion the work. It does show the apportionment in detail. Whether it was in all respects just and fair, with respect to benefits to be derived. These two boards were created a tribunal to hear exceptions upon sworn testimony and after publication of due notice. The record shows they performed that duty, and until the contrary appears, we must presume their apportionment was just and fair and made with reference to the benefits to be derived.

6. Other objections are urged against these proceedings, but as they relate to their regularity, rather than their validity, we have not regarded it as necessary to consider them in this connection.

Judgment affirmed.

[This case will appear in 87 O. S.]

Digest of Decisions.

CALIFORNIA.

(Supreme Court.)

TEUNENBROCK v. SOUTHERN PACIFIC COAST RAILROAD COMPANY. December, 1881.

Railroad Company—Right of Way—Negligence. For the free use of its passenger and other trains a railroad company is entitled to the possession of its roadway. The traveling public has no right to the possession of it, nor the use of it, except at crossings and other places of public passage. But if persons traveling on a railroad track are seen in time to avoid danger, by warning them off by proper signals, such as ringing a bell, sounding a whistle, slowing down, or stopping the train, it is the duty of the officers of the train to resort to such means to prevent injury to the life or limb even of trespassers on the road.

Engineer—Whistle.—No duty is imposed upon the engineer of a railroad train to sound a whistle in the lawful use of the roadway, except in approaching crossings on a road, or other places of public passage, or in coming to stations, or into towns or cities. Accordingly, *Held*, defendant was not responsible for injuries occasioned while it, without fault, was running its train at the customary speed and without sounding a whistle, at a portion of the road not approaching a crossing or place of public passage, but upon a trestle bridge crossing a ravine about a mile from a station. *Held further*, plaintiff was guilty of contributory negligence.

KENTUCKY

(Court of Appeals.)

TATE, TREASURER, v. SALMON. December, 1881.

A State cannot be sued in her own courts.—In the absence of a statute authorizing it, a State cannot be sued in her own courts. Parties will not be allowed to evade this inhibition by ignoring the State in their suits, and proceeding directly against the public officer having the custody of the moneys sought to be reached.

SANDERS v. MILLER. December, 1881.

Fraudulent conveyance—Ante-Nuptial agreement—Creditors.—An assignment of a portion of the proceeds of the sale of his real estate by a husband in payment of a certain sum of money to be paid to his wife under an ante-nuptial agreement, and in consideration of the marriage, will not be set aside as fraudulent as against creditors.

WEDDINGTON, ETC., v. THE COMMONWEALTH. January, 1882.

Bail—Failure of accused to appear—Fear of personal injury—Liability of sureties.—Where the accused fails to appear for trial, the sureties in a bail-bond given for his appearance are not excused on the ground that the accused was compelled to abscond to save his life, unless they also show that they made application to the proper authorities for protection to the accused, and that the authorities were either unable or unwilling to extend the protection necessary to enable the accused to appear.

MICHIGAN.

(Supreme Court.)

PHELPS v. CODY. January 18, 1882.

Lease—Head of Family.—Where the assignee of an invalid lease has abandoned his family, and a new lease is given to his wife, running in his name but signed by the wife by attaching her mark to his name, he is not bound by her act and does not become a party to the lease; and if she and her minor children farm the land she is en-

titled to the crops and they cannot be taken upon an execution against the husband.

The wife is the head of the family when the husband abandons it.

WARNER AND ANOTHER v. BENNE. January 18, 1882.

Chattel Mortgage—New Trial.—Where an instrument transferring title by way of security has been recorded as a chattel mortgage but has not been renewed as such except by an oral understanding that later dealings between the parties shall be conducted on the same footing, there is no change of legal ownership in the property.

A mortgagee of chattels cannot base an action of assumpsit upon his interest as such mortgagee.

A new trial must be granted where a general verdict has been rendered upon a charge embracing an unsound theory and it is uncertain whether the error did or did not affect the result.

RUST v. CONRAD. January 18, 1882.

Specific Performance.—The specific performance of contracts is not a matter of right, but rests in the sound discretion of the court.

If the contract is unequal; if the consideration is inadequate; if it contains unreasonable provisions, or if there are indications of overreaching or unfairness, a court of equity will refuse to interfere for specific performance, and leave the party to his remedy at law.

If the case is one in which either the provisions of the contract or the law would permit to a party the option to nullify a decree for specific performance, should one be granted, the court will not do a vain thing by granting one.

Where therefore a contract for a lease contained a provision that the lease, when given, might at any time be terminated by the lessees, either as to the whole of the land or a part thereof, on giving 30 days' notice; *Held*, that this option is a conclusive answer to a bill by those who would be lessees, for the specific performance of the contract.

A license to two or more is in general revoked by the death of one of the licensees.

L. S. & M. S. RY. CO. v. BANGS. January 18, 1882.

Negligence.—It is negligence for a passenger to leap from a moving train for the mere purpose of getting off at a station where the train should stop, but does not do so, even though he takes that course in order to save others distress on account of his absence.

It is not necessarily negligence to take a choice of risks or to do, without freedom of choice, an act involving danger; but it is negligence to risk life or limb merely to escape inconvenience or mental vexation.

One cannot recover damages for a personal injury to which he contributed by his own negligence.

In re CANNON. January 18, 1882.

Extradition.—A requisition was made by the governor of Michigan upon the governor of Kansas for one C., under a complaint for seduction. After his delivery to the authorities of this state he was brought before a justice upon a criminal warrant, and the hearing adjourned for several days, C., in the mean time being out on bail. Before the adjourned day proceedings were commenced against him by the same prosecuting officer for bastardy, and C. refusing to plead to the merits, claimed that he could only be prosecuted for the offense for which he had been extradited. He was required to give recognizance to appear at the next term of the circuit court, and refusing so to do was imprisoned. The charge of seduction was not prosecuted, it having been discovered after the extradition it could not be maintained. Upon *habeas corpus*, *Held*, that the arrest for bastardy and prosecution of the bastardy proceedings, under the circumstances, were improper, and C. should be discharged from custody.

GOEREL AND ANOTHER v. LINN AND ANOTHER. January 18, 1882.

Contract.—Defendants were large brewers and had a

contract with an ice company to supply them with ice during the season of 1880 at one dollar and seventy-five cents a ton, or two dollars if the crop was short. The contract was made in November, 1879. The following winter was so mild that the ice crop was a failure. In May the defendants were notified by the ice company that no more ice would be furnished them under the contract. Defendants had then on hand a considerable amount of beer that would be spoiled without ice, and under stress of the circumstances they made a new arrangement with the ice company, and agreed to pay three dollars and a half per ton for the ice. At this rate ice was received and paid for afterwards. A note given for ice at this rate in October being sued, defendants disputed its validity, claiming that it was obtained without consideration and under duress.

Held (1) that it was entirely competent for the parties to enter into the new arrangement if they saw fit.

(2) That the note was not without consideration, being given for ice received.

(3) That the refusal of the ice company to perform its contract, and the exaction of a higher price, was not legal duress.

PARSELL v. PATTERSON AND ANOTHER. January 18, 1882.

Assignment.—When a general assignment for the benefit of creditors is assailed as fraudulent in fact, and there is some evidence that a portion of the assets was not delivered over to the assignee, it is competent, in support of the assignment, to show that the assignee was not aware anything was retained, and acted himself in entire good faith.

An assignment is not necessarily to be held fraudulent and void because some small portion of the assets was withheld from the assignee. If the assignment is legal on its face and the assignee is acting in good faith, he may by proper remedies pursue and recover anything wrongfully retained from him.

When, in opposition to an assignment, it is shown that one of the assignors did not deliver to the assignee possession of a house and lot to which he had title, it is competent for the assignee to show, on the other hand, that the property was encumbered to its full value.

LELAND v. KAUTH. January 18, 1882.

Witness.—In a civil action for an indecent assault it was held proper to cross-examine the defendant as to whether he was ever arrested on a criminal charge made by a woman, and whether he settled it by payment.

Where the defendant in a civil action for an indecent assault appears as a witness therein, it is admissible for its bearing on his credibility, to cross-examine him as to the antecedents of his life, if the questions do not call for self-accusation.

MINNESOTA.

(*Supreme Court.*)

CITY OF WINONA v. MINNESOTA RAILWAY CONSTRUCTION Co. January 10, 1882.

Practice—Damages.—Applications for amendments of pleadings are addressed to the discretion of the court, and its action will not be set aside unless it is apparent that the court has abused its discretion. The question whether the court has exceeded its discretion in allowing amendments to pleadings before the trial may be reviewed upon appeal from the judgment.

The plaintiff had executed its negotiable coupon bonds, which, by their term, bore interest at the rate of 6 per cent. per year, and had deposited them in escrow, to be delivered to the defendant only upon the performance of certain conditions.

The defendant had wrongfully procured the delivery of the bonds, without the performance of the conditions, and had sold and disposed of them for a valuable consideration.

Held, that the measure of plaintiff's damages (the bonds still outstanding) is the amount of the bonds, so procured and negotiated, at the time of the recovery, interest being computed at the rate of 6 per cent. upon the principal of the bonds to the date of said judgment, and

also upon coupons maturing before the judgment at the legal rate of 7 per cent. from the time of their maturity until judgment.

STATE OF MINNESOTA v. RING. January 13, 1882.

Embezzlement.—In an indictment for embezzlement by a county treasurer committed by a refusal to deliver to his successor in office the moneys in his hands, it is not necessary to set forth all of the steps by which such successor became county treasurer. It is enough to allege that he was duly appointed by the board of county commissioners duly qualified, and thereby became the successor in office of the defendant, without alleging that a vacancy existed in the office, by reason of which the right to make such appointment existed. But if the indictment purports to set forth particularly the means by which the appointee became county treasurer, and some event, legally necessary to that end, is not averred, the particular allegations modify and control the general averment of the ultimate fact, and such fact is not well pleaded.

The court may exclude from the jury one who is shown to have an insufficient knowledge of our language to enable him to intelligently try the cause, although no challenge was interposed for that reason.

It is not necessary that an indictment for embezzlement of money set forth the whole amount of money received by defendant, a part of which is alleged to have been embezzled. Under an indictment alleging the receipt of a gross sum "exceeding" a sum named, proof may be made of the receipt of any amount, although it greatly exceed the sum thus named.

The semi-annual official statement of moneys in the county treasury, required by statute to be made by county treasurers, and shown to have been executed by the defendant, is competent evidence of the amount of money in his hands, although the amount of money therein expressed is only indicated by figures, without other index of denomination than the separating of the two right-hand figures in a column from the others by a perpendicular line.

An appointment to a public office, originally coupled with a condition that was never performed, becomes a valid appointment when the appointing power subsequently, having authority to do so, dispenses with the condition.

A county treasurer is, under the law, chargeable as with money, the amount of all taxes paid to him, although he may receive payment in certain orders. The amounts so charged to him, and upon trial proved to have been paid, are presumed *prima facie* to have been received in money; and it is for the defendant, if he would overcome this presumption, to present proof of the manner of payment.

The stub duplicate of tax receipts made by a county treasurer, as required by law, are evidence of the receipt of the tax represented thereby, although they have never been returned by him to the auditor, as he is required to do.

A person appointed in regular form to a public office is presumed to have been eligible to office, in absence of proof to the contrary.

The improper neglect or refusal of a public officer to deliver to his successor in office all money remaining in his hands, upon demand therefor, is, under the statute, embezzlement *per se* of such moneys, although no particular sum was demanded.

NEBRASKA.

(*Supreme Court.*)

GREEN v. CROSS. November, 1881.

Assignment—Attachment of property assigned for benefit of creditors—Deed executed in another State—Certificate of acknowledgment.—B., a resident of Illinois, made an assignment of all his property, including lands in this State, for the benefit of creditors. *Held*, that a resident of that State, claiming the benefit of the assignment, could not maintain an attachment levied after the assignment of the lands in this State. A deed of lands in this State, made in another State, must be executed according to the laws of such State; and if no witness is required to the deed by the laws of such State, the deed is effectual to pass title without being so attested.

When a deed is made in another State, the certificate of acknowledgment of a notary public thereto, duly attested by his official seal, entitles such deed to be recorded without further authentication.

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

Tuesday, February 21, 1882.

GENERAL DOCKET.

No. 212. Edward G. Morgan, assignee, etc. v. William G. Kinney, et al. Error to the District Court of Belmont County. Death of plaintiff in error suggested, and by consent, Conrad Troll, Trustee, made party plaintiff in error in his place.

299. Edward Davis v. Mary Beeze. Error to the District Court of Lorain County. Death of plaintiff in error suggested, and by consent, proceeding revived in the name of Charlotte Davis, Executrix of said Edward Davis, as plaintiff in error.

MOTION DOCKET.

No. 32. Mary A. Knicey, et al. v. Cornelia M. Arthur, et al. Motion for leave to file printed record in No. 1035, on the General Docket. Motion granted.

33. Henry Bothwell v. The State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Jefferson County. Motion overruled.

34. Backus Oil and Car Grease Company, et al. v. Backus Oil Company. Motion to take out of its order, cause No. 1040, on the General Docket. Motion overruled.

35. Alonzo Chesbrough v. Commissioners of Putnam County, et al. Motion for re-hearing in cause No. 29, on the General Docket. Motion overruled.

36. Cornelius Parmenter, et al. v. Melinda Binkley. Motion of defendant in error to dismiss cause No. 303, on the General Docket, for want of printed record, and counter motion for leave to print. Cause dismissed on motion of defendant in error.

37. Hartly Jenkins v. State of Ohio. Motion to file a petition in error to the Court of Common Pleas of Jackson County. Motion withdrawn by leave of court, with a view to making application for a reversal in the district court.

38. Joseph Dresbach v. The State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Fairfield County. Motion granted and cause taken out of its order for hearing.

SUPREME COURT ASSIGNMENT.

FOR ORAL ARGUMENT.

February 23d—No. 6. Shorten v. Drake et al. No. 30. Pitts, Graham & Co. v. Foglesong.

February 23d—No. 794. Elias Sims et al. v. The Brooklyn Street Railroad et al.

February 24th—No. 23. Pittsburgh, Cincinnati & St. Louis R'y Co. v. Henderson. No. 24. Same v. Shuss. No. 78. Same v. McMillan.

March 1st—No. 33. Little v. Eureka Fire and Marine Insurance Co. No. 34. Rowland v. Meader Furniture Company.

March 2d—No. 18. Marietta & Cincinnati Railroad Company v. Western Union Telegraph Company et al.

March 3d—No. 87. Phoenix Insurance Company v. Priest, adm'r, etc.

March 8th—No. 40. Crabill, ex'r v. Marsh. No. 50. City of Ironton v. Kelley and wife.

March 9th—No. 7. Dawson v. Ohio and J. B. Koch. No. 74. Ohio ex rel. Dawson et al. v. Board of Education of Wooster.

March 10th—No. 45. Mighton v. Dawson et al.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Feb. 21, 1882.]

No. 1053. Joseph P. Shaw, Receiver, &c. v. Isaac Peters. Error to the District Court of Lawrence County. Ralph Leete and O. F. Moore for plaintiff.

1054. German Evangelical Protestant Church, &c. v. City of Cincinnati et al. Appeal—Reserved in the District Court of Hamilton County. J. J. Glidden, et al. for plaintiff; Kumler, Ampt and Warrington for defendants.

1055. Charles C. Voight v. Hedwig A. Voight, F. W. Bronsheim and Samuel Bailey, jr., Sheriff. Error to the District Court of Hamilton County. C. H. Blackburn and A. G. Collins for plaintiff.

1056. The Cincinnati and Warsaw Turnpike Co. v. William H. Kelley et al. Error to the District Court of Hamilton County. S. T. Crawford for plaintiff.

LXVTH GENERAL ASSEMBLY OF OHIO.

SYNOPSIS OF LAWS PASSED THIS SESSION.

FEBRUARY 14, 1882.

H. B. No. 21. Authorizing the Commissioners of Clermont County to construct certain turnpike roads—repealing section one of act, passed April 18th, 1881, in relation thereto.

H. B. 91—Authorizing the Trustees of Westfield Township Medina County, to levy a tax to improve and fence the park of the center of said township.

H. B. 34—Supplementary to an act passed February 24, 1881, entitled an act for the better improvement of public highways, in counties having a population in 1870, of 40,609.

H. B. 30—To authorize the election of one additional judge in the third sub-division of the 8th Judicial District.

FEBRUARY 17, 1882.

S. B. 19—Authorizing the Commissioners of Pike County to pay certain bonds and coupons, issued by said county, and for that purpose to apply certain moneys in the treasury of said county, and to levy a tax.

H. B. 133—Relieving John A. Miller, James A. Porter, James A. Salisbury and John P. Cropper, bondsmen of W. P. Williams, late Treasurer of Jefferson Township, Brown County.

H. J. R. 25—Directing the Librarian to distribute copies of the so-called St. Clair papers to members of the press.

H. B. 160—Making partial appropriations for the benevolent, penal and reformatory institutions.

H. B. 54—To amend section 1723 of the Revised Statutes to read as follows:

Section 1723. The first Monday of April shall be the regular annual period for the election of officers of municipal corporations, provided, that any village situate in a township, where the annual elections are held outside of the limits of such village, the council of such village may, by ordinance, fix the time for holding the annual election for the officers of such village on the Saturday next preceding the first Monday in April.

S. B. 1. To authorize the Commissioners of Adams County to construct certain free turnpike roads.

H. B. 130—Authorizing the Trustees of Franklin Township, Tuscarawas County, to apply certain money now in the treasury of said township, to purchase a site, and erecting a township house thereon.

S. B. 6—Making an appropriation to re-build locks on, and to repair that portion of the Miami and Erie Canal between junction in Paulding County, and the west line of the village of Antwerp in said county.

H. B. 88—To regulate the sale and distribution of proceeds of railroads and for the protection of creditors thereof.

Ohio Law Journal.

COLUMBUS, OHIO, : : MARCH 2, 1882.

WHO IS LIABLE?

The following inquiry comes to us from one of the back counties, and we present it to our readers for their deliberate consideration, in its primitive condition, without mark or change therein:

Sir:

I ask you for information a gentleman ask me but I did not know he was playing a game of cards and got robed of his money unfair and is the House Responsible for the lost in which he was playing can he have it Replaced.

Your

C.

In a note upon "digesting and indexing," the *Albany Law Journal* has somewhat to say concerning an article written by a Mr. W. H. Bailey, of North Carolina. The editor says:

"Mr. Bailey will find a cross reference to his mind, in the editor of the North Carolina Statutes, who puts down 'Stud Horses, see Religious Societies.' On turning to the latter we find that it is against the law to exhibit such animals within a specified distance of a meeting of any religious society—it being feared that the operations of nature will prove more attractive to Kentuckians than the services of the sanctuary."

The italics are our own.

The mode of cross reference adopted by the editor of the North Carolina Statutes is very funny indeed. But it is unfortunate for the editor of the A. L. J. that he reveals his own peculiar quality of mind by his quotation and allusions thereto. His mental endowment is so firmly transfixed by the humorous point, and he finds the picture so charming withal that he forgets that the North Carolina Statutes do not in general have any binding force upon Kentuckians. We have had occasion heretofore to refer to this peculiar mental aberration of this gentleman in this same line of horse business, and sorrowful indeed is our regard for our otherwise distinguished brother editor.

IN MEMORIAM.

At the session of the Supreme Court, Tuesday morning of this week, Hon. Chauncey N. Olds in a few fitting words, presented on behalf of a Committee of the Hamilton County Bar, the following report of the action taken by the mem-

bers of the Bar at Cincinnati, on the death of the Hon. Charles Fox.

At a meeting of the Bar of Hamilton County, held at the Court House, on Friday February 10, 1882, to take suitable action in memory of Charles Fox, deceased, on motion, Hon. William Johnston was called to the Chair, and Samuel J. Thompson appointed Secretary. On motion, Messrs. T. D. Lincoln, Alphonso Taft, Rufus King, Aaron F. Perry, George Hoadly, Joshua H. Bates, John W. Herron, W. M. Bateman, John F. Follett and John B. Stallo, were appointed a Committee to report such paper as they might deem proper for the consideration of the meeting. This Committee, by their Chairman, Mr. Lincoln, presented the following report, which was unanimously adopted:

The decease of the Honorable Charles Fox, late Judge of the Superior Court of Cincinnati, at the venerable age of eighty-four years, being deemed by the Bar of Hamilton County an occasion worthy of their meeting, they have therefore assembled to-day, not for the formalities of mourning, but to crown the close of this long and useful career with a fitting memorial of his virtues and of the appreciation we cherish for the ripened fullness of that career.

We honor him not merely as the last remaining link connecting us with the Bench and Bar of our county and State, in the first quarter of this century, we affectionately desire to leave some enduring recognition of his professional and personal character which shall evidence to those who come after us our sense of his sterling merits.

Judge Fox was a native of England, and began his life as a mechanic. Emigrating to this city, he here continued awhile his early employment, but his natural bent and energy of character soon impelled him to the study of the law, and in the year of 1823 he was admitted to the bar. He was not long in acquiring position and practice. Notwithstanding his want of the ordinary course of preparation for the ordeal which he thus ventured to court, his rare practical sense, his sound judgment, his great readiness and fertility of resource and his amazing and never-tiring capability for work, were such elements of success that he gradually rose to the foremost practice in this county and in the higher Courts, and in his day, probably, he tried more cases than any man who has been at the bar in Ohio. He was remarkable for the straightforward and manly courage with which he conducted all his contests. And there was ever this characteristic in all of them, that whilst his antagonists might be sure of his very best effort to carry his point, such was his high sense of professional honor that they were never afraid it would be by chicanery or any underhanded practices. Fairness and open-dealing were the invariable habits of Charles Fox in all his long and remarkable practice at the bar.

In his private life and character he was without ostentation, and there was the same honora-

ble dealing. Music was his chief luxury and his relaxation from the strain of professional labor. His integrity was never suspected. In the thickest pressure of his business he rarely lost his temper, and never the native kindness of his heart. He was not only generous, but had a truly magnanimous soul. And though adversities swept away most of the fruits of his toil, he never repined, but constantly and to the end made the same brave struggle for independence, which ushered in his professional life.

The Bar of Hamilton County, therefore, record with pride and pleasure this tribute to the honor in which, professionally and personally, we hold the memory of Charles Fox as a lawyer, and our affection for the many excellencies of his heart and character.

Resolved, That a copy of this memorial and resolution be transmitted to the family of Judge Fox, and that the officers of this meeting also present the same to the Courts of this county and the United States District Court, and to the Supreme Court of the State, with our respectful request that they be entered on their minutes.

WILLIAM JOHNSTON, *Chairman.*

SAMUEL J. THOMPSON, *Secretary.*

EXEMPLARY DAMAGES FOR INJURIES TO PROPERTY, FRAUD, ETC.

In Sedgwick on Damages, [Sixth ed., p. 554], the following language is used in the text: "That the intent of the defendant is material in regard to damages has always been recognized in our law. Damages are graduated by the intent of the party committing the wrong." The authority to sustain this proposition is *Kron v. Schoonmaker*, [3 Barb. 647]. He also says: [3 Barb. 555, 556]. "It might be said, however, that the malicious or insolent intention does not in fact increase the injury, and the doctrine of exemplary damages might thus be reconciled with the strict notion of compensation; but it will appear from the cases we now proceed to examine, that the idea of compensation, is abandoned and that of punishment introduced." This rule has been applied to cases of injuries to property, replevin, trover, fraud, negligence, etc. In the case of *Nagle v. Mullison*, [34 Pa. St. 48], one Dr. Armour had hired a horse from one Mullison, to attend to his professional calling, and while visiting a patient the horse was levied upon and sold under an execution issued on a judgment against him. Mullison recovered the possession of the horse in an action of replevin, and then brought an action against the officer levying the execution for damages. The jury, after finding the above facts, say "that they are ignorant in point of law on which side they ought to find the issue. That if upon the whole case the court should be of the opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at \$50 exemplary damages; but if the court are of an opposite opinion, then they find for the defendant." Judgment was rendered for \$50. The

court say: "In *Amer v. Longstreth*, [34 Pa. St. 53], Bell, J., said the court below were correct in their statement of the abstract rule that in actions of trespass the jury are not confined to the actual damages sustained; they may go beyond that if the case shows a wanton invasion of the plaintiff's rights, or any circumstance of an aggravation or outrage. This is for the jury to determine, and within reasonable bounds it is a matter peculiarly within their control." In *Craig v. Kline*, [65 Pa. St. 399], in an action of replevin for certain logs and a quantity of lumber, the court say: "Hence exemplary damages may be given when there has been outrage in the taking or vexation and oppression in the detention; and on the other hand, an innocent mistake in the taking or detention may reduce the damages to mere compensation." In the case of *Hoyt v. Gelston and Schenck*, [13 Johns 141], the action was for trespass against Schenck, the surveyor of customs at New York, for seizing a vessel called "The American Eagle." Spencer, J., in delivering the opinion of the court, [13 Johns. 151], says: "The presiding judge held that such admission [that the defendant had not been influenced by malicious motives] precluded the plaintiffs from claiming any damages against the defendants, by way of punishment or smart-money, and that after such admission the plaintiff could recover only the actual damages sustained. The defendants have no cause of complaint that the facts set out in the notice were not admitted in mitigation of damages; for the admission made by the plaintiff's counsel was held to preclude him from recovering anything beyond the actual damages sustained. * * He was entitled, at all events, to recover his actual damages, and it is not pretended that he has recovered beyond that amount." In *Woodward v. Paine*, [15 Johns. 493], a justice of the peace had tried an action to recover damages for assault and battery, and rendered judgment for \$15, and issued an execution thereon under which the constable levied upon and sold a pair of horses, two sets of harness, and a wagon. In an action by the defendant against the justice and constable for damages, a verdict was rendered for \$270. The property levied upon was sold for \$19, and there seems to have been no doubt that the actual owner, through an agent, purchased the same at the sale. An instruction that "if the jury believed from the testimony that the defendant had acted from improper motives and knowingly, they might give a verdict not only for the actual damage sustained by the plaintiff, but in addition, for smart-money for the oppression and vexation which they created," was held to be correct. The opinion is *per curiam*. There is no discussion of the question, and in view of the fact that the testimony tended to show that the plaintiff had purchased his own property, and therefore had sustained no damage beyond \$19, it is difficult to reconcile the reasons given by the court with justice and right. The court say: "There was room for an honest difference of opinion as to the conduct of the defend-

ant, and as to the damages sustained by plaintiff. We are inclined to think that the better conclusion is, that the magistrate acted under an honest and real impression that he had jurisdiction of the case before him. The testimony is pretty strong to show that the property was purchased in under the constable's sale for the benefit of the plaintiff, so that he has only sustained damages to the amount of the judgment against him." In *Woert v. Jenkins*, [14 Johns. 352], in an action of trespass for beating the plaintiff's horse to death, the jury were told that they might give smart-money. In *Cable v. Dakin*, [20 Wend. 172], the action was replevin. The court say: "There can be little doubt that the defendants actually sustained as much damage, in consequence of the interference of Losee on behalf of the plaintiffs and the replevin, as the jury has given." It is said, however, that "they might allow smart-money." In *Brisee v. Maybee*, [21 Wend. 144], Cowen, J., says: "Where the writ of replevin has obviously been perverted to the purpose of a wilful injury, with a full consciousness in the plaintiff that he has no claim, the jury may perhaps assess smart-money, as they might for a wilful or malicious trespass. That would certainly be going far enough. It supposes a right to recover damages as for a malicious prosecution; and to go even that far would be dangerous, unless a malicious replevin be conceded as an exception to the rule which allows an independent action for a vexatious suit." In *Edwards v. Bebee*, [48 Barb. 106], in an action to recover damages occasioned by a collision of boats on the Erie Canal, the court say: [48 Barb. 107, 108]. "It must be acknowledged that we have no uniform rule of damages to apply to the variety of cases in tort which continually come before us for adjudication. The courts of this State, however, do not favor the doctrine of giving anything more than the necessary and unavoidable damages in cases of tort, without aggravation. * * * In cases of collision, hypothetical and consequential damages are excluded." In *Lane v. Wilcox*, [55 Barb. 815], in an action for fraudulently adulterating milk, the court say: [55 Barb. 620], In all such cases, while damages should not be stinted, and should be liberal to cover all the losses caused by the fraud, I think the rule allowing exemplary damages cannot be allowed."

In *Mowry v. Wood*, [12 Wis. 414], in an action of trover for certain certificates of school land, there are certain expressions as to the right of a jury in a proper case to give damages by way of punishment. The question does not seem to have arisen in the case, as it was held that the plaintiff had sustained no injury for which an action would lie. In *Barber v. Kilbourn*, [16 Wis. 485], in an action for fraudulent representations, an instruction, that "if they [the jury] should find the fraud alleged in the answer of the defendant established, they might give him exemplary and vindictive damages, to punish the plaintiff by way of example; that is, damages over and above the damages actually sus-

tained by the defendant, to act as a punishment of the plaintiff by way of preventing such fraudulent practices," was held to be erroneous. The court say: [16 Wis. 489]. This rule of damages is frequently acted on in actions of trespass to the person,—slander, libel, *crim. con.*, etc. But I doubt its application to a case like this, even where it appears that the defendant has sustained something more than nominal damages by the false representations." In *Bronson v. Green*, [2 Duv. 234], in an action, in the nature of trespass, for inciting, advising, and causing an insurgent force to camp at appellant's dwelling on his farm, destroying his property, consuming his provisions, and taking away three mules and three horses, it was held that the person who advised and procured this to be done was liable to the owner of the property for its value and for smart-money in damages. In *Jones v. Allen*, [2 Head, —], in an action to recover the value of a slave, who was killed on the premises of the defendant while there with the defendant's consent but without the consent of the master, it was held that the action would not lie. *McKinney, J.*, says: [2 Head, 635]. "In trover, the rule of damages is arbitrary; the measure in general is the value of the property tortiously converted."

In *Byron v. McGuire*, [3 Head, 529], in an action for the loss of an animal, the jury were instructed that "they might in their sound discretion give such increased damages as they thought right and proper for any aggravating circumstances in the conduct of the defendant, if any such are shown to exist in the proof, so that they were not unreasonable and did not evince passion or vindictiveness on their part." It was held that the instruction was not erroneous. In *Fort v. Saunders*, [5 Heisk. 487], in an action for the conversion of cotton, it was held, that the measure of damages for the conversion or illegal withholding of the property was the value of the property at the time of the illegal act complained of.

In *Moore v. Schultz*, [31 Md. 418], it was held that where the goods of a person engaged in business were unlawfully seized under an attachment, which was finally quashed and the goods returned, greatly deteriorated in value, it was competent for the jury, in addition to the ordinary measure of compensation and the allowance for aggravation, to allow, as special damages, for the destruction and loss of business of the plaintiff, to the extent of the loss actually sustained, if it was made to appear that such destruction and loss was the natural consequence of the trespass.

In *Dibble v. Morris*, [26 Conn. 416], in an action for the conversion of a yoke of oxen, the court say: [26 Conn. 426, 427], "By a series of decisions in this State, it is settled that in actions sounding in tort, where the injury was inflicted wantonly or maliciously, the jury are at liberty to give, and it is proper for them to give, damages beyond a mere compensation for the actual loss or injury, and exemplary or vindictive in proportion to the degree of malice evinced by the

defendant, and to increase the amount by taking into consideration the plaintiff's expenses in litigation. [See also 15 Conn. 236-267; 24 Conn. 491].

In *Windham v. Rhame*, [11 Rich. 283], it was held, in an action for obstructing a public way, that vindictive or punitive damages beyond the amount of the plaintiff's actual loss might be given. In *Greenville and Columbia Railroad Company v. Partlow*, [14 Rich. 283], in an action of trespass, *quare clausum fregit*, the court say that an instruction, if the jury "believed the defendant to be actuated by malicious or wrongful motives they might give exemplary damages to any amount," was not erroneous. In *Hearn v. McCaughan* [32 Miss. 17], it was held, that exemplary damages were recoverable against a common carrier for wilfully and capriciously refusing to land his vessel according to published notice, and receive the plaintiff on board as a passenger.

In *New Orleans, Jackson, and Great Northern Railroad Company v. Hurst*, [36 Miss. 661], the defendant carried the plaintiff about four hundred yards beyond the station to which he had paid his fare, and refused to run the train back to the station. A verdict for \$4,500 was sustained. [See also *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 374]. In *Oliver v. Chapman*, [15 Texas, 400], in an action to set aside and annul certain deeds of conveyance and to recover back the land conveyed, upon the ground that the deeds were obtained by fraud, it was held that the jury might give exemplary damages. [See also *Bull v. Griswold*, 19 Ill. 631; *Dorsey v. Manlove*, 14 Cal. 553; *Mendelshon v. Anaheim Lighter Co.*, 40 Cal. 657; *Campbell v. Chamberlain*, 10 Iowa, 387; *Cochran v. Miller*, 13 Iowa, 128; *Emblen v. Myers*, 30 L. J. (Exch.) 71].

In the cases cited there is but little discussion of the principle upon which punitive damages are awarded, although it is said in some of them that the object is to deter others from the like crime. It is claimed that the principle is sanctioned by the case of *Huckle v. Money*, [2 Wils. 205], decided by Chief Justice Pratt in 1763. That was an action for an assault and imprisonment under a general warrant; in other words, for false imprisonment. A verdict for £300 was held not excessive. The decision, to be understood, must be read by the light of the political history of the time. And while the chief justice, on overruling a motion for a new trial, said, "I think they (the jury) have done right in giving exemplary damages," it is pretty clear that it was not intended to overturn the rules fixing the measure of damages existing prior to that time, nor to introduce a new rule; nor would the damages in such a case be considered so excessive at the present time as to justify a court in granting a new trial. *Tullage v. Wade* [3 Wils. 18], was for debauching the plaintiff's daughter, and a verdict of £50 was sustained. In *Merest v. Harvey*, [5 Taun. 442], decided in 1814, the defendant, a member of Par-

liament, while intoxicated, forced himself into the plaintiff's company, and grossly and insolently persisted in hunting upon his land. It is evident that the shooting was done in violation of the game laws, the penalties of which were very severe. Blackstone says: "For unqualified persons transgressing these laws by killing game, keeping engines for that purpose, or even having game in their custody; or for persons, however qualified, that kill game or have it in possession at unseasonable times of the year, or unseasonable hours of the day or night, or Sundays or Christmas Day, there are various penalties assigned, corporal and pecuniary, by different statutes: on any, if but only one at a time, the justice may convict in a summary way, or in most of them prosecutions may be carried on at the Assizes." [4 Bla. Comm. 175]. In *Sears v. Lyons*, [2 Stark. 317], decided in 1818, in an action for breaking the plaintiff's close and laying out poison upon it to destroy the plaintiff's poultry, Abbott, J., instructed the jury that they might consider not only the mere pecuniary damage, but also the intention whether for insult or injury. The same ruling was had in *Brewer v. Den*, [11 Me. & W. 625], in an action for seizing the plaintiff's goods under a false and unfounded claim, whereby he was prejudiced in his business. [See also *Doe v. Filter*, 13 Me. & W. 47; *Thomas v. Harris*, 3 Hurl. & N. 961. These cases merely show the ease with which a precedent may be established, and the danger of departing, in particular cases supposed to be attended with particular hardship, from established rules].

The object of an action to recover damages for injuries is compensation. If the plaintiff's property or business is injured by another, and a jury awards full compensation for the same, is it not a complete satisfaction? Take the case of an attachment against the property of a debtor. Under the custom of London, the plaintiff, to obtain the order, was required only to make an affidavit that the defendant was indebted to him in a specific sum. [Drake on Attach., sect. 6]. But in this country he is generally required to swear to certain facts designated by statute, in addition—such as the nature of the claim, that it is just; and some fact upon which the right to the attachment depends—such as fraud or non-residence.

Not unfrequently an attachment is the only mode of securing a debt. It is a remedy given to the creditor, based upon his positive, sworn statements, and usually accompanied by a bond in double the amount of the debt. If the remedy fails, the creditor may be liable for the actual damages sustained; but the mere failure to sustain the attachment is not in all cases conclusive proof of the want of probable cause, yet some of the cases seem to base the right to recover vindictive damages thereon. So, in replevin, which is the universal remedy in the United States for the recovery of the possession of chattels wrongfully taken or detained from the plaintiff. This, too, is a statutory action, and

the plaintiff in most or all of the States must have a general or special property in the chattels, and be entitled to the possession of the same; and this right must be shown by affidavit before the writ is issued. The officer seizes the property, if it can be found, and delivers it to the plaintiff upon receiving a bond, with sureties, for its return in case the plaintiff fails to sustain the action. Both parties are actors. If the plaintiff recovers, he takes judgment for any damages he may have proved, while if the defendant recovers, he takes judgment for a return of the property and such damages as he has proved, or for the value of the property. In many of the States the action may even proceed to judgment without a return of the property, where the officer was unable to find the same, or the plaintiff was unable to give satisfactory security for its return. The rights of both parties seem to be sufficiently guarded, and it is difficult to perceive how the writ could be obtained without committing perjury, or be used as a means of oppression.

The cases where punitive damages have been allowed in cases of fraud, negligence, etc., do not, so far as I am aware, rest on the decision of any English court. But even if they did, they are not sanctioned either by the common or civil law.

The rule of damages for a breach of contract to do or not to do some particular thing, as laid down in *Hadley v. Baxendale*, [9 Exch. 341], that "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be either such as may fairly or substantially be considered as arising naturally,—i. e., according to the usual course of things,—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it," is generally accepted as a correct statement of the law. In that case the plaintiffs were the owners of a steam-mill, and the shaft being broken, it was delivered to the defendant, as a carrier, to be taken to an engineer to serve as a model for a new one. At the time of the delivery the defendant's clerk was informed that the mill was stopped, and the shaft must be sent at once. The shaft was not sent immediately, in consequence of which the mill remained idle. In an action for breach of contract, it was held that if the carrier had been informed that a loss of profits would result from the delay on his part, he would have been liable; but as this did not appear, he was not liable for such profits.

The rule is broader in cases of tort than in actions on contract, but the damages complained of must be the direct and natural result of the wrong or injury in either case. And this rule certainly applies in actions of trover, replevin, injuries to property, fraud, negligence, etc., and is fully carried out by making full compensation for the injury sustained. Any attempt to sup-

plant this principle by submitting the damages in such cases as punishment to an inexperienced jury cannot fail to be productive of mischief. A jury, which, under the direction of a capable, conscientious, fearless judge, who will instruct them in as few words as possible, in a clear and direct manner as to the law applicable to that particular case and the rule fixing the measure of damages, will rarely go astray; but, if left to themselves, without limitation or direction, are very liable to err, and this, too, without the possibility of correcting the error, as the damages, being in the nature of punishment, are properly left to them to fix the amount.

But it is said that the doctrine of punitive damages is now too firmly rooted in our jurisprudence to admit of further serious discussion. This is begging the question. It is equivalent to saying the rule, although wrong in principle, has been sanctioned by a number of courts for many years, and therefore must be followed. We must remember that this is not a rule by which title to property or rights are acquired or held, and while it is called a rule for measuring damages, it is in fact a discarding of all rules. This is not the age to quietly accept an arbitrary rule as the law simply because it may have received the sanction of any tribunal. Every case must be submitted to the crucial test of whether it is right; and decisions based upon wrong principles will be continually assailed until overturned.

It may be well to enquire by what authority courts impose punitive damages. Courts are organized to administer the law. The law which they are to administer is derived from constitutions, statutes, and the common law, including equity. If a power is exercised by a court which is not conferred upon it, it is pure usurpation. The Constitution of the United States provides that no person shall "be deprived of life, liberty, or property without due process of law." [Art. V. Amendments]. Art. VI. provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury, etc. There are other provisions that are intended to guard the rights of the citizen and prevent the confiscation of his property, to which it is unnecessary to refer. These provisions, in substance, have been incorporated into the constitutions of all, or nearly all, of the States. At common law, before a party could be put on trial for an offence he must be charged with the commission of the same, either by indictment, or, in case of a misdemeanor, it might be by information. Blackstone says: "It [the information] differs in no respect from an indictment in its form and substance, except that it is filed at the mere discretion of the proper law officer of the government, *ex officio*, without the intervention of a grand jury." [4 Bla. Comm. 308]. And these provisions exist by statute I think, in every State of the Union. Suppose a party was convicted of some offence, and a fine of \$1,000, or any other sum, imposed upon him, but no accusation or information charging the

offence had been made and filed against him, is there a court in the United States that would sustain such a judgment? I think not, because the court that imposed the fine would have no jurisdiction. If, then, a court would have no jurisdiction, without an information or indictment, to try a party accused of an offence created by statute, has it any authority to proceed without such accusation in offences that have no statutory existence, and which in fact exist only in the imagination of the court?

The object of punitive damages, we are told, is punishment; and if this power is sustained at all, it must be under the criminal law of the State as a fine, as there is confessedly no power under the civil jurisdiction of a court to require A., as a punishment, to convey his property to B., and a judgment of that kind would be void. But in a criminal trial for any offence, the proof must establish the guilt of the accused beyond a reasonable doubt, and the presumption of innocence continues as evidence in his favor until overcome by the testimony. Now, suppose a judgment for punitive damages is rendered against a party because he was unable to sustain an attachment, and his property is sold to satisfy the judgment, can it be said that he has been deprived of his property by due process of law? In such case he would be convicted of an offence unknown to the law, without being charged therewith in writing, or his guilt established beyond a reasonable doubt. It will be seen at once that every element necessary to give the court jurisdiction is wanting. If the action of a creditor who has failed in an attachment, and who will thereby perhaps lose his debt, or if a claimant in replevin who has failed in his action, is not to be tried on the merits and damages awarded according to the injury, but according to the intent of the party instituting the action, is this principle not capable of being extended to that of a debtor who wilfully refuses to pay a debt whereby his creditor becomes bankrupt, and make him liable for the wrong? It will not do to say that the measure of damage is different in such cases, because all actions to recover money are based upon the wrong done the plaintiff. So, too, if a common carrier, by permitting its train to pass the depot a few yards by which the plaintiff sustained a trifling injury, is to be mulcted in \$4,500 for the use of the plaintiff, as in the Mississippi case cited, how much should the man who fails to pay his note when it becomes due be required to pay as a penalty for his negligence? The cases rest upon the same foundation, and the principle of punitive damages cannot be adopted without overturning the rules for determining the measure of damages, and producing chaos and confusion.

SAMUEL MAXWELL.

Southern Law Review, March, 1882.

EXTRADITION.

SUPERIOR COURT OF CINCINNATI.

In November last, John Larney, (known as Mollie Matches), was arrested in Cincinnati on a requisition from the Governor of Illinois, charging him with complicity in a bank robbery at Galesburg. Larney had a hearing before Judge Harmon of the Superior Court of Cincinnati, during which the prisoner endeavored to introduce certain testimony tending to show that he was not a fugitive from justice, not having fled from the State of Illinois, as he was not within that State at the time he is charged as having committed the crime set forth in the indictment, and that, therefore, the Governor of Ohio had no authority to issue the warrant upon which he was in custody. On a motion to exclude this testimony, Judge Harmon gave his opinion, in substance, as follows:

The question is a double one. What is it competent for the prisoner to prove in such a case, and does the evidence tend to prove it? It is broadly contended for the prisoner that the fact of his being a fugitive from justice, in the sense of having fled from the demanding State on purpose to avoid the consequences of his conduct there, is jurisdictional, and that, therefore, if it appear that there was no evidence of that fact before the Governor when he issued the warrant, it is void, while if there was such evidence, it is open to be rebutted by the prisoner in this proceeding. The propositions followed to their logical results would abolish all limitation to the inquiry to be made by the court upon habeas corpus in such cases. While it is settled that the question of the prisoner's guilt or innocence can not as such be raised, because all the Constitution requires for his extradition is that he be duly *charged* with crime in the demanding State, yet, if the actual fact that he fled from justice in the sense contended for be the basis of the Governor's jurisdiction to surrender him, and not the fact that he is *charged* with actual criminal presence in the demanding State, and *demanded* as having left it before he could be arrested, why may he not prove his innocence as bearing upon the question of his having fled and being a fugitive from justice? If he committed no crime, how can he be a fugitive from justice? If he merely left the State, not having offended its laws and not even aware that he was charged with so doing, how can it be said that he fled from it? The Constitution refers to "a person *charged* * * * with crime who shall flee from justice," while the act of 1793, R. S. U. S., 5278, provides for the surrender of any person "*demanded* as a fugitive from justice," as does our act of March 3, 1875. The argument of prisoner's counsel would require the

very strict construction of the Constitution that it refers only to those who flee with hot foot because already charged or about to be charged with crime. But such has not been the ruling of courts nor the opinion of jurists. It is sufficient if the person "withdraws himself without waiting to abide the consequence of his conduct." *Matter of Voorheis*, 3 Vroom, 147. Judge Cooley, in *Princeton Review*, 7 A. L. Rec., 722.

The framers of the Constitution naturally used language which described the ordinary conduct of guilty persons in such cases, yet it can not be doubted that they intended it to cover any case of voluntary withdrawal of physical presence however deliberate, and although in fact occasioned by other motive than fear of prosecution, where its effect is to escape prosecution. They certainly did not refer to a person not actually, but only constructively present in the demanding State. The language is not "a person charged, etc., in one State and found in another," but "who shall flee and be found." *Wilcox v. Nolze*, 34 O. S., 520.

Upon the case just named the prisoner's counsel mainly relied, and some of the language of the opinion, considered without reference to the question under discussion, would perhaps bear the construction that the absolute fact of actual presence of the prisoner in the demanding State at the time of the alleged offense and flight therefrom is jurisdictional and always open to disproof. But when it is considered that in the same opinion it is said as to the questions open to inquiry, "nor have the courts larger powers in these respects than the Governor;" that in *Work v. Corrington*; p. 64 of the same volume, it is held that when requisition is made, "and the case shown to be within the provisions of the Constitution and act of Congress, no discretion is vested in the Governor, but it is his imperative duty to issue the warrant;" and that in *Ex parte Sheldon*, p. 319, id., it was held that "an alleged fugitive, etc., will not be discharged on the ground that there was no evidence before the executive issuing the warrant showing that the fugitive had fled from the demanding State to avoid prosecution," "that it was for the executive to put a construction upon this language" of the affidavit before him upon the subject; we are bound to understand the court as meaning that where it is made clearly to appear, not that there is greater testimony for the prisoner than for the demanding State upon the issue of his having been present in that State when charged with so being, but that the prisoner is not really charged with having been actually present there at all, or really demanded as a fugitive in the sense of the constitution, but only as constructively present and a fugitive, the Governor has no jurisdiction. The court found that there was "no conflict in the testimony that Nolze's statements were all made in this State," referring to the statements alleged to have been false pretenses, upon which he was charged with obtaining goods from a firm in New York. It appears

that the court had before it all the papers and proofs upon which the Governor had acted, yet there was no conflict upon this question. The prisoner was probably merely charged in those papers as in *ex parte Sheldon*, with being a fugitive—a mere legal conclusion.

But suppose there had been a conflict in the testimony. Suppose the papers and proofs upon which the Governor acted had specifically charged that Nolze had made, in the State of New York, the false statement with which he was charged, that he had been there and afterward came to Ohio. Did the court mean to say that upon the production by the prisoner of a preponderance of evidence to the contrary, the jurisdiction of the Governor would cease and the prisoner become entitled to his discharge? I do not think so. The prisoner was permitted, not to disprove what was proven on behalf of the demanding State, but to prove something which did not appear before the Governor, which took away his power to act. I do not understand the court as dissenting from the well settled law (see *Wharton on Criminal Pleadings and Proceedings*, section 35, No 6; *Spear on Extradition*, page 303), that the averments of the indictment and affidavit can not be contradicted by parol. I do not think the Governor's jurisdiction depends upon the uncertain and varying judgment of the many courts to which the prisoner may appeal by habeas corpus upon a question of weight of evidence. Even if the same evidence were presented, courts might differ as to the side having the preponderance. The ultimate power of determination must rest somewhere, and the policy of the law requires that it be with the Governor.

When the prisoner is demanded as having committed a crime, while actually in another State, as having placed himself beyond the reach of prosecution therefor by withdrawing his presence, and the evidence duly presented by the Governor of such State sustains those facts, our Governor's jurisdiction attaches and certainly does not shift and re-shift by any subsequent conflict of evidence; though the prisoner's rights are fully protected by the Governor's right to revoke his warrant. *Work v. Corrington*, 34 O. S. 64.

But if I am mistaken, and the supreme court mean to announce the broad rule that it is always open to the prisoner, not merely to show upon habeas corpus what I have just indicated, but to overcome, by evidence, the proof made against him, the evidence sought to be excluded here does not go far enough to entitle him to invoke the principle of that case.

The indictment charges that the prisoner committed the crime of grand larceny at Galesburg, Ill., on July 3, 1879. The accompanying affidavit avers that on or about July 4, 1879, he fled from that State to this. The crime charged is one requiring his actual presence at the place of commission. He is not sworn in general terms to be a fugitive, which might include construction by the witness, but to have fled from that State to this at or about a certain time. The

depositions and the prisoner's own testimony are to the effect that during the whole of the 3d and 4th days of July, 1879, he was in Cleveland, O., his home. He says he arrived there at 6 a. m. on the former day, whence he does not state. There is no evidence that he never was in Illinois, not even that he was not there about the time laid in the indictment and mentioned in the affidavit. For aught that appears he may have been there on the 1st of July or the 6th. He does not apply his evidence to the material portions of the charge against him, as Nolze did. He does not show that he was not in Illinois, when the money was stolen which he is charged with stealing. He does not contradict the affidavit that he fled from that State on or about July 4, 1879. He assails only the immaterial part of the charge in the indictment, the time laid, variance as to which even upon trial would be immaterial. (Roscoe's Crim. Ev., page 100; Wharton's Crim. Ev., Sec. 103.) Nor does he make it appear, the evidence does not even suggest the possibility, that an effort is being made to extradite him upon the theory of his constructive presence at the commission of the crime.

While the fact that the evidence offered might be competent upon his trial to prove an alibi is no objection to its use for another legitimate purpose here, yet the fact that it tends to prove nothing but a mere alibi is fatal to it.

The suggestion that a guilty person may escape extradition by showing that he did the guilty acts in another than the demanding State, while a person fully prepared to show his innocence may be taken if the evidence be excluded, has no weight. Extradition does not depend upon actual guilt, but upon flight from a charge of guilt, and if in showing he never was present in the demanding State and never fled therefrom he shows he was guilty somewhere, as in the case of Nolze, it is a mere incident.

The motion will be granted, and the prisoner remanded to the Sheriff's custody to be dealt with according to law.

M. F. Wilson, Attorney for the Sheriff.

T. F. Shay, Attorney for defendant.

Digest of Decisions.

CALIFORNIA.

(Supreme Court.)

COTA v. JONES AND WIFE. January 20, 1882.

Limitation of Action—Discovery of Fraud.—It appeared that plaintiff discovered the fraud alleged, only two months before the commencement of the action in 1878; that defendants had, in 1866, by false and fraudulent practices, obtained from her, for \$1,500, a conveyance of property of the value of \$8,000, and that she did not know of the fraud by which it had been accomplished until the investigation of counsel revealed it, because she was ignorant and unacquainted with business and could neither read nor speak the English language, and could not ascertain for herself anything upon the subject, and was

wholly ignorant in relation to it until she ascertained it from counsel. *Held*, the statute of limitations could not be invoked; and the complaint stated a cause of action.

GETTIN v. WALKER. January 12, 1882.

Rescission—Contract of Sale.—Plaintiff, successor to one H., sued defendant in ejectment. Defendant had entered into possession under a contract of sale made with H. while he (H.) was the owner of the premises. *Held*, the testimony showed a rescission of the contract between defendant and H. prior to the acquisition of title by plaintiff.

Escrow—Tender of Deed.—By agreement between defendant and H. the latter placed the deed in escrow to be delivered on the payment of the balance of the purchase money. Defendant knew where the deed was and the mode in which he could procure it under the agreement. *Held*: It was not necessary to tender the deed, in order to place defendant in default after his failure to pay the balance, so as to affect a rescission of the contract on the part of H.

Evidence—Notice to Produce Writing—Notice.—It is not necessary to give notice to the opposite party to produce a writing, which is itself a notice. Parol evidence is admissible to prove the contents of such notices.

Deed—Certified Copy—Recorder's Office.—A certified copy of a Deed from the Recorder's office is primary evidence.

ARNAZ v. ESCANDON ET AL. January 9, 1882.

Notary's Certificate—Deed—Married Woman—Interpreter—Notice.—The Court found that the Notary taking the acknowledgment of a married woman failed to make known to her the contents of the deed; that the acknowledgment was taken through an interpreter, who did not correctly interpret the contents of the instrument, but told her it was a mortgage to secure the payment of a certain sum of money. Plaintiff, the grantee, had no notice of such facts: *Held*, the Notary's certificate was conclusive as to the facts recited in it.

Husband and Wife—Delivery of Deed.—Being conclusively bound by the certificate of acknowledgment, which shows her knowledge of the contents of the deed, and having permitted her husband to take and use it according to his own judgment, the wife has no right to complain that he delivered it in accordance with its terms and manifest purpose. Under such circumstances a delivery by him must bind her as well as himself, the grantee having no notice of her dissent.

HARRIS, ADMINISTRATRIX v. HARRIS. January 12, 1882.

Execution of Deed—Signature—Written Authority.—It is not necessary that the person who guides the hand of another, while such other is signing a deed, should be authorized by writing so to do. "One signing a contract commonly writes his name with his own hand; but, if another writes it for him in his presence and at his request, or especially if he holds the top of the pen while the other writes it, or makes his mark to his name which the other has written, or if he acknowledges the signature, however made, to be his own, this is sufficient."

Findings.—The jury found, first, the deceased was "in the possession and use of his mental faculties at the time said deed was signed, so as to be capable of understanding and comprehending what was being done in the execution of said deed." Second, that deceased "was not capable to contract. *Held*, the last finding was not a legitimate inference from the facts found in the first finding.

Assuming that deceased was in the possession and use of his mental faculties at the time, and capable of understanding and comprehending what was done, *Held*, the finding "that he did not, after reading the deed or hearing it read, know its contents," was "preposterous."

The finding of the jury that the deed was not signed and delivered, *Held*, not sustained by the evidence.

Consideration.—Want of consideration is not sufficient to vitiate a deed.

Fraudulent Conveyance—Reconveyance.—That land had been conveyed to defraud creditors, does not affect the validity of a voluntary reconveyance.

PEOPLE v. SIMONS. February 1, 1882.

Homicide—Commencement of Affray—Self-Defense—Instruction.—The following instruction held erroneous: "If you believe beyond a reasonable doubt that the defendant killed the deceased, then to render said killing justifiable it must appear that the defendant was wholly without fault imputable to him by law in bringing about or commencing the difficulty in which the mortal wound was given."

If defendant had been the assailant, if he had really and in good faith endeavored to decline any further struggle before the homicide was committed, the killing might be justifiable in self-defense.

PEOPLE v. HURLEY. February 2, 1882.

Larceny—Recent Possession.—Upon a charge of larceny the fact that the stolen property is found within a certain period, in the possession of defendant, is not sufficient to justify the inference that he stole the property. To justify that inference it must further appear that the possession was personal, and that it involved a distinct and conscious assertion of possession by him. Accordingly, the bare fact of finding hides of cattle that had been stolen in the defendant's barn, which was shown to have been open to any one who chose to enter it, in the absence of any evidence tending to prove that he knew or had any reason to suppose that such hides were there, is insufficient to justify the inference of guilt.

Explanation of Possession of Stolen Property.—Further: Until the declaration of defendant that he knew nothing about the hides being in his barn was shown to be false, he was not called upon to give any explanation as to how they came there.

Character—Possession.—The presumption arising from possession alone of stolen property, is completely removed by evidence of the good character of defendant.

PENNSYLVANIA.

(Supreme Court.)

KERN v. POWELL. November, 1881.

Unrecorded assignment in trust for benefit of single creditor—Assignment for benefit of general creditors.—An unrecorded assignment of property, in trust for the benefit of a single creditor, is invalid as against a subsequent general recorded assignment for the benefit of all the assignor's creditors. If, therefore, the assignees under the last-named assignment take and sell the property named in the first assignment, the assignee under said first-named assignment can recover neither the proceeds nor avails of the said property.

WISCONSIN.

(Supreme Court.)

WILEY v. AULTMAN, ET AL. January 1882.

Writ of Attachment—Sufficiency of Affidavit.—An affidavit attached to a writ of attachment which is not made by the plaintiffs or one of them, and does not on its face state that it is made in behalf of the plaintiff, nor that the affiant is the agent or attorney, or where the plaintiff is a corporation, the agent, attorney, or officer of the plaintiff, is not a sufficient affidavit under the statute; and all proceedings based upon the same are void. It is the better practice in such case that the affiant, in addition to stating the relation of the affiant to the plaintiff, should further state the affiant's knowledge upon the subject of the indebtedness of the defendant to the plaintiff.

LXVTH GENERAL ASSEMBLY OF OHIO.

SYNOPSIS OF LAWS PASSED THIS SESSION.

FEBRUARY 17, 1882.

House Bill No. 102.—To amend section 4443 of the Revised Statutes, to read as follows:
Section 4443. A bushel of the respective articles here-

inafter mentioned shall mean the amount of weight averdupols, in this section specified, viz:

Of Wheat, 60 pounds; of Rye, 56 pounds; of Oats, 82 pounds; of Clover seed, 60 pounds; of Timothy seed, 45 pounds; of Hemp seed, 44 pounds; of Millet seed, 50 pounds; of Buckwheat, 50 pounds; of Beans, 60 pounds; of Peas, 60 pounds; of Hominy, 60 pounds; of Irish Potatoes, 60 pounds; of Sweet Potatoes, 50 pounds; of Onions, 50 pounds; of Dried Peaches, 33 pounds; of Dried Apples, 22 pounds; of Flax seed, 56 pounds; of Barley, 48 pounds; of Malt, 84 pounds; of Hungarian grass seed, 50 pounds; of Lime, 70 pounds; of Coke, 40 pounds; of Bituminous Coal, 80 pounds; of Cannel Coal, 70 pounds; of Corn, shelled, 56 pounds; of Tomatoes, 66 pounds; of Corn in the ear, 70 pounds, until the first of January next after it is raised, and after that date, 68 pounds.

Senate Bill No. 26. Authorizing the incorporated village of Doylestown, Wayne County, to levy a tax and issue bonds to raise money to build a town hall.

S. B. 4. Repealing an act to provide for the more effectual drainage of Hog Creek Marsh, in Hardin County, passed June 5, 1879, and an act amendatory thereof.

SUPREME COURT RECORD.

[New cases filed since our last report, up to Feb. 23, 1882.]

No. 1058. P. P. Mast & Co. v. Lucinda Gustin. Error to the District Court of Clinton County. L. H. Baldwin and A. H. Jones for plaintiffs; Slous & Walker for defendant.

1059. Samuel Martin, et al. v. E. E. Roney, auditor &c. et al. Error to the District Court of Brown County. D. W. C. London and G. Bumbach for plaintiffs; Moore & Harding for defendants.

1060. Herman Levi v. George Tremmel. Error to the District Court of Hamilton County. Yaple, Moos and McCabe for plaintiff; Jordan, Jordan & Williams for defendant.

1061. William Edwards, et al. v. The Bedford Chair Co. et al. Error to the District Court of Cuyahoga County. Mix, Noble & White for plaintiffs.

1062. Harriet Tompkins v. Theodore B. Starr. Error to the District Court of Cuyahoga County. Mix, Noble & White for plaintiff.

1063. W. H. Harrison et al. v. J. M. Neeley et al. Error to the District Court of Hamilton County. O'Connor, Glidden & Burgoyne and P. W. Steubacher for plaintiffs.

1064. Waldemar Otis v. The Euclid Avenue Opera House. Error to the District Court of Cuyahoga County. Mix, Noble & White for plaintiff; Gilbert & Johnson for defendant.

1065. Rachel Gaff, Exe'x. &c. and Mary J. Pevin, Exe'x. &c. v. Robert Crigie. Error to the District Court of Hamilton County. Moulton, Johnson & Levy for plaintiffs; McDowell & Strafer for defendant.

1066. Samuel Cadwallader v. John W. Barrack, Treasurer of Seneca County. A. L. Brewer for plaintiff; Lutes & Lutes for defendant.

SUPREME COURT ASSIGNMENT.

FOR ORAL ARGUMENT.

March 2d—No. 18. Marietta & Cincinnati Railroad Company v. Western Union Telegraph Company et al.

March 3d—No. 37. Phoenix Insurance Company v. Priest, adm'r, etc.

March 8th—No. 40. Crabill, ex'r v. Marsh. No. 50. City of Ironton v. Kelley and Wife.

March 8th—No. 740. City of Ironton v. Thomas D. Kelley.

March 9th—No. 7. Dawson v. Ohio and J. B. Koch. No. 74. Ohio ex rel. Dawson et al. v. Board of Education of Wooster.

March 10th—No. 45. Mighton v. Dawson et al.

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

Tuesday, February 28, 1882.

GENERAL DOCKET.

No. 38. *Pomeroy v. Buckeye Salt Co.* Error to the District Court of Meigs County.

LONGWORTH, J.

1. The general rules of law which govern the rights and obligations of the owners of dominant and servient estates, apply as well to subterranean rights of way as to those upon the surface.

2. The owner of coal lands, through which another has a right of way, by subterranean entry, to reach coal mines in an adjoining tract, may lawfully construct an entry crossing such right of way, provided; it be done without destroying or substantially interfering with the use thereof.

Judgment affirmed.

386. *The State of Ohio on relation of Uriah Horseman administrator v. The Commissioners of Fayette County.* Mandamus.

McILVAINE, J. Held:

1. The act of March 29, 1867, and the acts amendatory and supplementary thereto, commonly called the two mile road improvement laws, authorize the commissioners of counties, for the purpose of raising money necessary to meet the expenses of road improvements, "to issue the bonds of the county," and thereby create a debt of the county in its quasi corporate capacity, notwithstanding they also require the commissioners to assess the cost and expense of the improvement upon the lands benefited thereby and situate within two miles thereof.

2. When from any cause, sufficient money be not realized from such local assessments to pay the debt so created, it is the duty of the commissioners to levy a tax thereon upon all the taxable property of the county.

3. A purchaser of such bonds, who has no actual knowledge of any defect in their execution, is not bound to look beyond the findings and record of the commissioners, for the purpose of ascertaining whether conditions precedent to their execution have been performed. Peremptory writ awarded.

68. *Mary Sidenor v. James E. Hawes, Adm'r, et al.* Error to the District Court of Greene County.

JOHNSON, J. Held:

1. The creditors of an estate are entitled to have the same settled in due course of administration, and in case of a sale of real estate to pay debts, that it be made by order of a competent court. It is no bar to an action by an administrator to sell land to pay debts, that the heir has, without an order of court, sold the same at private sale and applied the proceeds in satisfaction of preferred claims.

2. An order of sale of real estate to pay debts, made by the court of common pleas on a petition which states facts sufficient to warrant such an order, will not be reversed for want of a journal entry showing that the facts stated in the petition were found to be true. In such a case the reviewing court will presume that the judgment was founded on proper proof.

3. If an heir, to whom lands descend subject to the debts of his ancestor, sells the same with covenants of general warranty at private sale, without administration on his ancestor's estate, to a bona fide purchaser who applies the purchase money to discharge liens thereon created by the ancestor, and to the payment of preferred claims, such purchaser is in equity entitled, in the distribution of the purchase money, to be subrogated to the rights and equities of the holders of such claims.

4. In a proceeding to sell land to pay judgment creditors pending in the court of common pleas, it is competent for the heir, who still retains an interest in the subject matter, by cross-petition to attack such judgments on the ground of fraud.

5. A sale of the real estate by the heir with covenants of general warranty, before the commencement of proceedings to sell the same to pay debts, where the purchase money is applied to the payment of preferred claims thereon, does not thereby divest himself of such an interest in the subject matter, so as to defeat his right to file such cross-petition, and to protect his vendees.

6. If the allegations of the cross-petition implicate the administrator, as well as the judgment creditors in fraudulently obtaining such judgments, they are as against the heir, united in interest as to the subject matter of the controversy.

7. On error by the heir to reverse a judgment dismissing such cross-petition, service upon the administrator within the time fixed for the commencement of such proceedings, saves the action as to his co-defendants so united in interest, though not served within that time. Judgment reversed.

42. *The State ex rel. v. Kleesewetter, Auditor of Franklin County.* Mandamus.

WHITE, J. Held:

1. Under Sec. 700 of the Revised Statutes, prior to its amendment March 18, 1881, patients, after their admission into the asylums of the State for the insane, were clothed at the expense of the State. Since the amendment, the expense of furnishing such clothing is, under Sec. 631, chargeable on the estates of the patients or on those who would be legally bound to furnish it, if they were not in the asylum.

2. If the duty of supplying patients with clothing as required by Sec. 631, should not be performed, the remedy in such case of failure, is for the institution to furnish it under Sec. 632; and for the amount so furnished, it is to be re-imbursed as therein provided.

As to the clothing furnished by the State prior to the amendment of Sec. 700, the writ is refused; and as to that subsequently furnished a peremptory writ is granted.

24. *Pittsburgh, Cincinnati & St. Louis Railway Company v. George Henderson.* Error to the District Court of Harrison County.

OKEY, C. J.

1. Where the superintendent of a railroad company has made an order as to the management of a particular train, which order will be reasonable or unreasonable according to the circumstances under which it is to be enforced, the question whether in any particular case such order is to be deemed reasonable or unreasonable is a question of mixed law and fact, to be determined by the jury under proper instructions.

2. Where an action is brought against a railroad company by one of its employees to recover damages for personal injuries sustained by the enforcement of an order made by the superintendent of the company as to the management of a particular train, which order was unreasonable and the enforcement of the same was dangerous to such employee, the fact that the negligence of a fellow servant of the injured person, while executing such order, contributed in producing the injury, affords no defense to the action.

Judgment affirmed.

24. *Pittsburgh, Cincinnati and St. Louis Railway Co. v. Joseph Shuss.* Error to the District Court of Harrison County. Judgment affirmed. There will be no further report.

73. *Pittsburgh, Cincinnati and St. Louis Railway Co. v. John McMillan.* Error to the District Court of Harrison County. Judgment reversed. To be reported hereafter.

MOTION DOCKET.

No. 39. *Van Hyning & Co. v. William Jennings et al.* Motion to re-instate number 207 on the General Docket of last term. Motion overruled.

40. *Amos Ainsworth v. The State of Ohio.* Motion for leave to file a petition in error to the Court of Common Pleas of Van Wert County. Motion granted.

41. *Abram Sharp v. John Ball.* Motion to extend the time for filing printed record in cause number 996 on the General Docket. Motion granted and time extended to October 1st next.

Ohio Law Journal.

COLUMBUS, OHIO, : : MARCH 9, 1882.

We present in full in this issue, the opinion of the Supreme Court, in the celebrated Jewett-Vanderbilt railroad litigation, which gives judgment of ouster against the Vanderbilt party, and puts a stop to consolidation.

THE HENRY COUNTY COLE-HARMON CASE.

EDITORS OHIO LAW JOURNAL:

In your careful regard that a just division of credit should be given in judicial charges to juries, to all sources from which the law is derived, you did not reflect in charging Judge Moore with appropriation from Judge Davis' charge in the Coleman case, that Judge Moore had not furnished his charge for publication, nor claimed any originality in it, but merely fitness and accuracy of law in what directions he gave to the jury. And hence possibly he did not indicate by proper quotation marks the particular sentences he adopted or the authorities he cited. But without any personal knowledge I venture to assert that when Judge Moore made his charge he had never seen or read that of Judge Davis to which you refer, and did not quote it. He may have made use of Judge Burchard's charge in the note to Clark v. The State, 12 Ohio Reports 483, 494-5, familiar to the profession, but no one would on consideration predicate a charge of plagiarism on that fact. And I take higher ground, that the whole range of the law is the common property of judges for the instruction of juries, limited only in this, that the law given shall be applicable to the facts of the case, and necessary to determine the issue joined between the parties, and this without parade of authorities cited which would only be a pedantic show of learning, and useless to the jury.

What is called originality, which is a merit in the composition of a sonnet or an essay on aesthetics, is not such in delivering the law to a jury in a nisi prius trial, though correctness in the law delivered as applied to the facts is so. The principles of law cannot well be separated from the language of the authorities in which they are expressed, and while originality may be found in clearness of statement, and in the orderly and logical arrangement of the subject matter of the charge given, to essay it in the statement of the principles of law is scarcely what a careful judge would ordinarily aim to do. Law deals with fixed principles and for a century or centuries these are couched in nearly identical formulas of statement, except as it may be necessarily applied to new conditions of life, industries and pursuits, or is modified by statutes. It is based on expedient and practicable morals, at least in so much of its criminal system or codes

as include crimes *malum in se*; and these do not change with each new hypothesis in science, or with the latest variations of periodical literature. And the plagiarism you assert was in the statement of matter of law. But perhaps your animus was directed against the law as announced by the judge, in that it did not follow the precedent of the Washington leading case, in which a distinguished assassin coolly and safely shot to death his unsuspecting victim, for alleged improper intimacy with his wife, and when arraigned, set up that intimacy as a defense, and doubtless emotional insanity, to excuse his crime. And he found a convenient jury, guided I presume by a judge whose charge in that case was unquestionably free from the charge of plagiarism from any law human or divine, to acquit him of all wrong in what he had done. And then the distinguished slayer of his fellow man, took back his erring wife, good as new, to his bed and bosom. Judge Moore did not in this very similar Cole-Harmon case follow that peculiar modern precedent, though it has been urged in desperate cases ever since. He does not seem to appreciate that a man has such ownership in a worthless wife, (while as you not long since indicated, divorce was not at all difficult), that he may continue to live with her, and at his convenient leisure kill whoever he fancies that her worthlessness has tempted to adultery with her. Certainly Judge Moore's charge states correctly the law of Ohio as declared by our Supreme Court, whether it coincides with that of Judge Davis or not, which I do not know. But from what you published of Judge Moore's charge—if liable to your intimation of plagiarism from Davis, the latter judge is chargeable with following the language of older authority than either, and most likely, the case of Clark v. The State, already referred to. But neither is chargeable with what is properly called plagiarism. They only did what they had a right to do. Besides the ruling of the highest court in New York, reversing Judge Davis' decision in the case you refer to, is not the law of Ohio, and it is to be hoped never will be. It denies to society needed protection against "cranks," incomplete men, of abnormal minds, the most dangerous class of society, by excluding the preventive example of punishment from reaching them, to restrain from crime, as under that ruling they will be conscious that they are rarely likely to be found by sympathetic juries sane beyond a reasonable doubt when charged with murder, and ably defended. That class is by the New York rule emancipated from responsibility for grave crime, which is only to be made effectual upon that portion of society, the clearly sane and sensible class, those who have the least tendency to commit offenses against humanity. The fact is, if we must travel east for our law on this subject, I prefer the rulings in Massachusetts to those of New York, sustained as the former are by those of the English Courts. As to your criticisms, I presume Judge Moore is indifferent. I have no right to speak for him, and

he is in no way responsible for my opinions or suggestions, and I have never conversed with him about the matter. He and the bar generally in this part of the State are conscious that he has fully and well discharged his duty.

J. M.

LIMA, O. February 26, 1882.

Our plain spoken correspondent no doubt intended to render to Judge Moore a friendly service when he penned the foregoing in his defence. It will not be apparent to that gentleman however, that his position has been rendered any more pleasant by the well meant endeavor. The basis of the remarks and conclusions of "J. M." seem to lie in his belief, as he admits, that we charged Judge Moore with plagiarism of the *law*, or of the *principles* of law only, as he gave them in his charge to the jury.

We would be narrowminded indeed if we could make such a ridiculous charge. We are very well aware of the fact that no credit need be given where a legal principle is announced; but we have always believed that where the *exact language* of another is used in the discussion of any question, whether in metaphysics, religion or law, that custom as well as honesty demanded at least a recognition of the mind that conceived and the skill that formulated the new thought or expression.

Those who quote an aphorism so old even as "Thou shalt not steal" generally refer in some way to the Author of that ancient inhibition, and those who give expression to their own thoughts in the language of another rarely fail to give the proper credit by reference at least. But those who take not only the thoughts but the language also of another, in poetry or prose prediction or conclusion, history or logic, never (hardly ever) fail to give to that other the proper credit. Therefore to show our correspondent that we did refer to *both* thought and language in speaking of the adaptation of Judge Davis' charge, we quote a sentence from each.

JUDGE DAVIS.

The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, when the offender has the ability to discover his legal and moral duty in respect to it has no place in the law; and there is no form of insanity known to the law as a shield for an act otherwise criminal, in which the faculties are so disordered or deranged that a man, although he perceives the moral quality of his act as wrong, is unable to control them and is urged by mysterious pressure to the commission of the act, consequences of which he anticipates and knows.

JUDGE MOORE.

The doctrine that a criminal act may be excused upon the notion of an irresistible impulse to commit it, when the offender has the ability to discover his legal and moral duty in respect to it has no place in the law; and there is no form of insanity known to the law as a shield for an act otherwise criminal, in which the faculties are so disordered or deranged that a man, although he sees the moral quality of his act as wrong, is unable to control them and is urged by mysterious pressure to the commission of the act, consequences of which he anticipates and knows.

A careful comparison of these two sentences will reveal the fact that the two judges have a singular identity of thought and expression.

We find no fault with the law relating to homicide as laid down by Judge Moore, and do not claim that the seduction of a wife affords any excuse or justification of the killing of the seducer by that wife's husband. Indeed we are not convinced that any excuse or justification is required. On the contrary we are not quite sure that it is not the christian duty of any husband to kill the man who deliberately seduces his wife from her virtue and purity, just as we believe it to be the duty of mankind to destroy the animals in the form of men who perpetrate rapes upon little girls or grown up girls either.

Judges may look with a degree of allowance upon the seducer of other men's wives, and influence juries to convict the man who properly takes their worthless lives; but the restraint thus imposed upon injured husbands will hardly give very much aid and comfort to professional libertines and seducers. We however desire to be understood, that the avenger shall be certain of the purity of the victim, the crime of the seducer, and then of his own skill as a marksman. These properly combined will leave no room for cavil and no necessity for tears.

ROAD IMPROVEMENTS—BONDS.

SUPREME COURT OF OHIO.

OHIO EX REL. URIAH HORSEMAIN, ADM'RS

v.

THE COMMISSIONERS OF FAYETTE COUNTY.

February 28, 1882.

1. The act of March 29, 1867, and the acts amendatory and supplementary thereto, commonly called the two mile road improvement laws, authorize the commissioners of counties, for the purpose of raising money necessary to meet the expenses of road improvements, "to issue the bonds of the county," and thereby create a debt of the county in its quasi corporate capacity, notwithstanding they also require the commissioners to assess the cost and expense of the improvement upon the lands benefited thereby and situate within two miles thereof.

2. When from any cause, sufficient money be not realized from such local assessments to pay the debt so created, it is the duty of the commissioners to levy a tax therefor upon all the taxable property of the county.

3. A purchaser of such bonds, who has no actual knowledge of any defect in their execution, is not bound to look beyond the findings and record of the commissioners, for the purpose of ascertaining whether conditions precedent to their execution have been performed. Peremptory writ awarded.

Mandamus.

This proceeding is prosecuted to compel the Board of Commissioners of Fayette County to levy a tax to pay a balance due upon certain bonds issued by them and known as "The State road bonds."

The class of bonds so known, amounting to \$35,000, was issued by the commissioners to Grove & Coffman, contractors, to pay for a certain road improvement, under the act of March 29, 1867 (64 Ohio L. 80), entitled "an act to authorize county commissioners to construct roads on the petition of a majority of the resident land-holders along and adjacent to the line of said road, and to repeal an act therein named" and the acts amendatory and supplemental thereto.

The commissioners to whom a petition for the road improvement had been duly presented, proceeded regularly under the statute to construct the road, finding, among other things, that a majority of the resident land-holders of the county whose lands were reported as benefited and ought to be assessed, had subscribed the petition, and issued bonds as aforesaid to the contractors, who completed the construction of the road in accordance with their contract in the year 1870.

For the purpose of satisfying the bonds so issued, the commissioners caused an assessment to be made upon the lands benefited and situate within two miles of the road. The amount so assessed was sufficient to pay all the bonds; but certain of the land-holders whose lands were assessed obtained a perpetual injunction against the enforcement of the assessment against their lands, (see *Hays v. Jones*, 27 Ohio St. 218), so that, after applying the amount collected on the assessment, twenty-nine of the bonds, so issued, for \$500 each, were left wholly unpaid and unprovided for.

Nine of these last named bonds, before maturity, had, in the usual course of business, been endorsed and transferred by Grove & Coffman to relators' intestate, Uriah Horsemain.

Upon this state of facts, it is submitted by the defendant that they have no power to provide for the payment of relators' claim by a levy of taxes either upon the taxable property of the county, or of the road improvement district.

McILVAINE, J.

If the defendants have power to provide for the payment of relator's claim by taxation, their duty to do so is not questioned. Nor is the power of the commissioners to provide, by taxation, for the payment of the debts of the county, disputed. The principle contention, therefore, is, does the claim of relators constitute a debt of the county?

The form of the bond, if that alone were to be considered, would clearly indicate an obligation on the part of the county. The following is a copy:

"No. 181. STATE OF OHIO, \$500.00.
County of Fayette.

"Be it known that the County of Fayette, in the State of Ohio, hereby acknowledges to owe Grove & Coffman, or bearer, the sum of five hundred dollars, payable at the office of the Treasurer of said Fayette County, on the first day of March, 1871, with interest at the rate of seven per centum per annum, from the first day of September, 1868, payable semi-annually at said

Treasurer's office on the 1st day of March and September in each year on the surrender of each coupon hereto annexed—attested by the Auditor of said county.

"This bond is issued in pursuance of and according to an act of the General Assembly of the State of Ohio, entitled, 'an act to authorize the county commissioners to construct roads on petition of a majority of the resident land-owners along and adjacent to the line of said road, and repeal an act therein named,' passed March 29, 1867, and the acts amendatory and supplementary to said act, passed March 31, 1868, and May 16, 1868, respectively.

"In testimony whereof, the Commissioners of said County of Fayette, and as such commissioners have hereunto set our hands and names, and affixed the seal of said county, this 4th day of November, 1869.

A. McCANDLESS, ALLEN HEGLER, } Commissioners
Auditor of WM. CLARK, } of said Fayette
Fayette County, O. ENOS REEDER, } County, Ohio.
Registered Nov. 4, 1869."

The question of the power of the commissioners to obligate the county, is, however, raised on the statutes to which reference is made in the bond. The holder of the bond is notified by its face, that the power assumed by the commissioners is to be found in these statutes. Section 7 of the statutes provides, "that for the purpose of raising money necessary to meet the expenses of such improvement, the commissioners of the county are hereby authorized to issue the bonds of the county, payable in instalments, or at intervals not exceeding in all five years, bearing interest at the rate not to exceed seven per cent. per annum, payable semi-annually, which bonds shall not be sold for less than their par value." From the language of the statute here quoted, perhaps no one would deny that the debt evidenced by the authorized bond is the debt of the county in its quasi corporate capacity—indeed, the language is not susceptible of any other meaning, but, inasmuch as the same section provides for an assessment upon the lands specially benefited and lying within two miles of the improvement to meet the payment of the interest and principal of the bonds, it is contended, that no other mode or manner of taxation can be resorted to for the purpose of paying the bonds. However plausible this contention may be, we think it cannot be maintained. That the legislature might have so provided, we don't deny, but if such was the intention, it should have been expressed in very clear and unmistakable terms. Such terms were not used, nor is such inference clear. On the other hand, the liability of the county in its quasi corporate capacity is expressed in apt and unmistakable words; and if for such liability a portion only of the taxable property of the county can in any event be taxed, such intent on the part of the legislature should have been expressed in like apt and unmistakable terms.

As between the county and the taxing district created by the statute, to wit: the territory

within two miles of road improvement, it cannot be doubted, that the intent of the statute was to impose the burden of the improvement upon the latter, but as to the creditor holding bonds issued to meet the expenses of the improvement, the faith of the county to the extent of all its taxable property was pledged by the express authority given to the commissioners to issue therefor, "the bonds of the county." Whenever, therefore, payment of the bonds cannot be provided for by local assessment under the statute, it is the duty of the commissioners to make provision for their payment, as for the payment of other debts of the county, by a levy upon all the taxable property of the county.

Again, although the question is not raised by the pleadings in this case, it is suggested, that, inasmuch as the power of the commissioners to make improvements under the act of March 29, 1867, and its amendments depends on the fact that the petition for the improvement be subscribed by a majority of the resident land-holders whose land was reported benefited thereby, which fact did not exist in the case before us, as was adjudged in the case of *Hays v. Jones*, 27 Ohio St. 218, therefore the bonds in question were unauthorized and void. True, it was found in that case that the jurisdictional fact named was wanting, and therefore it was adjudged that the defendants, parties in that case, be forever restrained from enforcing the collection of the special assessment against the property of the plaintiffs in that action. But the relators, or their intestate, though he purchased the bonds during the pendency of the action, were not parties to it or bound by its result.

The jurisdictional fact in question is thus stated in the answer of the defendants to its proceeding:

"During said proceedings, and before the final order, a majority of the land-holders resident in said Fayette county whose lands had been reported for assessment, as aforesaid, had signed said petition for said improvement.

"That in the month of July, 1868, the said report of said viewers and surveyor came on to be heard before the said Board of County Commissioners, at which time a number of said petitioners presented a remonstrance to said Board asking that said improvement be not made, yet the said commissioners, decided that a majority of the land holders whose lands had been reported for assessment had signed the petition, and then made the final order for said improvement on the ——— day of July, A. D. 1868, and such further proceedings were had that the contract for making such improvement was awarded to Grove and Coffman, to be paid for in the bonds of Fayette County, of which the said bonds mentioned in the plaintiffs' petition constituted a part, and said improvement completed in the year 1870, according to the contract and specifications therefor."

The rights of the relators, as we conceive, do not depend upon the fact whether or not a majority of the land-holders had subscribed the pe-

tion for the improvement. That their intestate purchased the bonds before maturity, for a valuable consideration and without actual knowledge of any defect in their execution is conceded. Of course, to the extent he was bound to inquire as to the regularity of their execution, he is chargeable with any information which reasonable diligence would have revealed. He was bound to know that the bonds were issued under the authority of certain statutes. The face of the bond, gave him this information. It was certified in the bond that it was "issued in pursuance of and according to" the statute; and there are authorities which hold that an endorsee may rely on such recital, without further inquiry as to the regularity of the execution. *State et al. v. Robertson et al.*, 27 Ohio St. 96; *Warren v. Marcy*, 97 U. S. 96.

But conceding that such recital does not relieve the purchaser of such bonds from further inquiry as to the performance of conditions precedent to their execution, an examination of the records of the commissioners would have revealed the fact that every condition precedent had been fully performed; and among others, that a majority of the resident land-holders whose lands were reported benefited by the improvement had subscribed the petition, and that the commissioners had so found the fact to be. True, under the decision of *Hays v. Jones*, this finding was not conclusive in such a case, nevertheless it was a fact which it become the duty of the commissioners to pass upon, and having found it in favor of the information and issued bonds reciting the fact, that every condition precedent had been performed, it appears to us, that an innocent purchaser of the bonds, relying upon the improvements thus acquired, should be protected against such defense on the part of the county, which, in fact, has realized and enjoyed the full benefit of the proceeds. *Commissioners v. Aspenwall*, 21 Howard, (U. S.) 53; *Bissell v. Jeffersonville*, 24 *Ibid*, 287; *Warren v. Marcy*, 97 U. S. 96; *State ex rel. v. Robertson*, 27 Ohio St. 96; *State ex rel. v. Garrett*, 7 Ohio St. 327; *Shoemaker v. Goshen Township*, 14 Ohio St. 569.

Peremptory writ awarded.

[This case will appear in 37 O. S.]

RAILROAD CONSOLIDATION.

SUPREME COURT OF OHIO.

THE STATE v. VANDERBILT.

March 7, 1882.

1. Two railroad companies owning lines of railroad connected only by other railroads which such companies hold by lease, are not authorized to become consolidated into one corporation under Rev. Stats. § 3379.

2. The lines of two railroad companies, which are in their general features parallel and competing, cannot be connected for the carriage of freight and passengers over both "continuously," within the meaning of Rev. Stats. § 3379, and hence such companies cannot become consolidated into one corporation under that section.

3. A certificate made by the directors of consolidated

ing railroad companies under Rev. Stats. § 8381, which fails to show any place of residence of the directors of the new company, is fatally defective.

George K. Nash, Attorney General, B. H. Bristow, A. F. Perry, E. A. Ferguson, Converse, Booth & Keating, and R. C. Parsons for the State.

R. P. Ranney, Harrison, Olds & Marsh, S. Burke, W. B. Sanders and O'Conner, Glidden & Burgoyne, for the defendants.

OKEY, C. J.

George K. Nash, Attorney General, on October 25, 1881, filed in this court a petition in quo warranto. The action is against William H. Vanderbilt and other persons named, and it is alleged in the petition that those persons, with others too numerous to be brought before the court, have usurped the franchise to be a body corporate, under the name of the Ohio Railway Company, and that they wrongfully claim to possess certain corporate franchises, powers and privileges. The prayer is for judgment ousting the defendants from exercising such franchises, powers and privileges. The record consists of the petition, answer, reply, and an agreed statements of facts.

The burden is on the defendants to show by what authority they claim to exercise such powers, and the order of trial is the same as if the cause was for hearing on testimony. Consequently, we have held that under the statute (Rev. Stats. §§ 5190, 6760, 6772), the defendants were entitled to open and close in the argument.

The defendants claim to be such corporation, clothed with such powers and privileges, under authority of certain proceedings had in the months of July and September, 1881, whereby the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, and the Cincinnati, Hamilton and Dayton Railroad Company, Ohio corporations, were consolidated into one corporation, under the corporate name of the Ohio Railway Company.

The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company is a corporation, with a line of railroad extending in a north-west direction from Cleveland, in Cuyahoga County, to Springfield, in Clark county, a distance of one hundred and sixty-three miles; and the Cincinnati, Hamilton and Dayton Railroad Company is a corporation, with a line of railroad extending from Cincinnati, in Hamilton county, via Hamilton, in Butler county, to Dayton, in Montgomery county, Dayton being in a direction east of north from Cincinnati, and distant therefrom sixty miles. The authority to make the alleged consolidation is based by the defendants on section 3379 of the Revised Statutes, which is as follows: "When the lines of road of any railroad companies in this State, or any portion of such lines, have been or are being so constructed as to admit the passage of burthen or passenger cars over any two or more of such roads continuously, without break or interruption, such companies may consolidate themselves into a single company."

As the southern terminus of the first named road is twenty-four miles from the northern terminus of the latter road, being the distance between Springfield and Dayton, it is not claimed by the defendants that the consolidation could be effected under authority of that section, if the power to consolidate can only be exercised where burden and passenger cars can pass from the road of one company to the road of the other, "continuously, without break or interruption." It is said, however, that it is not essential to a valid consolidation that such companies' own lines should be thus connected, but that where the consolidating companies, or either of them, holds from another railroad company a perpetual lease of its road, and such leased line is so constructed that cars may thus pass from the line of the lessee to the leased line, and from the latter line to the line of the other consolidating company, the latter company and such lessee may consolidate; in other words, that such leased line is embraced by the words of the section, "lines of road" of the consolidating companies.

As each of the consolidating companies is possessed of such leased lines, by means of which it is said such connection is made, the importance of this contention of the defendants is manifest, and hence it is proper to state more definitely the condition and situation of the several roads affected by this controversy.

The line of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, as already stated, extends from Cleveland to Springfield. This is by way of Galion, in Crawford county, and Delaware, in Delaware county. It also extends from the latter place to Columbus, in Franklin county; and another part of its line, extending from Galion to Indianapolis, Indiana, crosses the track of the Dayton and Michigan Railroad Company at Sidney, in Shelby county. This constitutes the line of road which it owns.

The Cincinnati and Springfield Railway Company is a corporation with a line of railroad extending from a point near Cincinnati to Dayton. It also has by lease from the Cincinnati, Sandusky and Cleveland Railroad Company, a line of railroad extending from Springfield to Dayton. These two lines do not directly connect at Dayton, but by arrangement between the Cincinnati and Springfield Railway and other railroad companies, a connection is made between the two roads, by means of a road used in common by several railroad companies. In 1871, the Cincinnati and Springfield Railroad Company (party of the first part), the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company (party of the second part), and the Lake Shore and Michigan Southern Railway Company (party of the third part), executed an instrument in writing, called by the defendants a

conveyance of the fee, or at least a perpetual lease, to the party of the second part, and by the relator called a running arrangement between the parties, which instrument contains numerous stipulations with reference to the construction of the line between Cincinnati and Dayton, the division of the earnings, and other matters, and by force of which agreement the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company acquired the right to run its cars from the terminus of its road in Springfield to Cincinnati, via Dayton, and cars of that company pass regularly over the roads stated, without break or interruption, from Cleveland to Cincinnati, a distance of two hundred and forty-three miles.

Among the stipulations in that instrument it is proper to mention the following:

"Nothing herein contained shall operate to grant and demise, or be construed to include the franchises to be a corporation granted to the party of the first part by the State of Ohio, or any other right, privilege or franchise which is, or may be, necessary to preserve the corporate existence or organization of the party of the first part, and all the said franchises to be a corporation, and all the rights, privileges and franchises last aforesaid are reserved and excepted from these presents. And said party of the first part further covenants and agrees, that upon the written request of said second party, its successors or assigns, it will appropriate, under the laws of the State of Ohio, such real estate, rights and interests as shall be required for the maintenance and operating of said railway; and the costs and damages thereof shall be paid by the party of the first part."

"At the end of ten years from the delivery of possession of said Cincinnati and Springfield Railway Company's railway to the said party of the second part, the railway and appurtenances of the said party of the second part shall be consolidated with the railway and appurtenances of the said party of the first part, in case the laws of Ohio shall then permit and authorize such consolidation to be made, and said consolidation shall be made upon the basis of the proportionate values of the respective railways and appurtenances of said first and second parties, as the same shall appear by the net earnings of each for the three years next preceding the time of such consolidation."

"The intent and purpose of this indenture is to form and construct a shorter and continuous railway between Buffalo, N. Y., and Cincinnati, Ohio, of uniform gauge, for the transportation of persons and property between the last named cities and places beyond

each, and to promote the interests of the public and the parties hereto."

The lessor companies have at all times maintained their organizations.

In 1863, the Dayton and Michigan Railroad Company (party of the first part), owning a line of railroad from Dayton to Toledo, in Lucas county, via Sidney, a distance of one hundred and forty miles, executed to the Cincinnati, Hamilton and Dayton Railroad Company (party of the second part), a perpetual lease of its road, which lease was modified by agreement, under the seals of the parties, in 1870. This instrument, so modified, contained numerous covenants, among others an agreement by the party of the second part to pay to the stockholders of the party of the first part certain dividends, and by the instrument the continued existence and organization of the Dayton and Michigan Railroad Company is contemplated. The lease contains this clause:

"In case said party of the second part, its successors or assigns, shall at any time hereafter, fail to pay said dividends to the stockholders of said party of the first part, as hereinbefore provided for, or shall fail to keep and perform any of the other covenants and agreements in said lease (as hereby modified) contained, on its part to be kept and performed, and shall continue in such default for the period of ninety days, then, and in every such case, it shall be lawful for the party of the first part, its successors and assigns, at its or their option, without demand, to enter into and upon said demised premises and remove all persons therefrom; and from thenceforth the said demised premises and all additions and improvements which shall or may have been made to the same, shall be held by the party of the first part, as of its first and former estate; and upon such entry for non-payment of rent, or breach, or non-performance of any agreement or covenant, all estate of said party of the second part in said demised premises, and the additions thereto, shall cease and determine, and the party of the second part hereby covenants and agrees upon the determination of said lease for the causes aforesaid, to surrender and deliver up to the party of the first part, its successors or assigns, the said demised premises, including rolling stock, equipment, machinery and tools, equal to that now on said premises, in as good order and condition, as the same may be at this time in, together with all additions and improvements that may be made thereto."

The agreed statement of facts contains the following: "Said Dayton and Michigan Railroad Company has, ever since said indenture as before it, maintained and kept up its organization as a corporate body by regular elections of directors and officers, keeping a business office, and in all things conforming to the provisions of its charter and the laws of the State as a railroad company."

Burden and passenger trains pass regularly over these roads (the Cincinnati, Hamilton and Dayton Railroad and the Dayton and Michigan Railroad), without break or interruption, from Cincinnati to Toledo, a distance of two hundred miles.

The Cincinnati, Hamilton and Dayton Railroad Company also controls and operates the following lines of railroad under leases, that is, the Cincinnati, Richmond and Chicago

Railway, extending from Hamilton to Richmond, Indiana, and the Cincinnati, Hamilton and Indianapolis Railway, extending from Hamilton to Indianapolis.

At Dayton cars may pass from the lines so under the control and management of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company to the lines so under the control and management of the Cincinnati, Hamilton and Dayton Railroad Company, and *vice versa*. The hiatus at that place between the northern terminus of the Cincinnati and Springfield Railway and the southern terminus of the Cincinnati, Sandusky and Cleveland Railroad, supplied by arrangement with and used in common by all the railroads at that place, as already stated, consists of two tracks, and all cars going in one direction pass over one of the tracks, and all cars going in the other direction pass over the other track.

At Sidney the track of the Dayton and Michigan Railroad, so operated by the Cincinnati, Hamilton and Dayton Railroad Company, crosses the line of the Cleveland, Columbus and Indianapolis Railway, leading from Galion to Indianapolis, eighteen feet above the track of the latter road, and the two roads are connected at that place by a side track six hundred feet in length, by using which cars may pass from one road to the other.

If we regard the instrument by which the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company acquired the right to operate and control the Cincinnati, Sandusky and Springfield Railroad between Springfield and Dayton, and the Cincinnati and Springfield Railroad between Cincinnati and Dayton, as a permanent lease, we state the case as favorably for the defendants as the law and the fact will warrant; and the same thing is true with respect to the instrument under which the Cincinnati, Hamilton and Dayton Railroad Company operates and controls the Dayton and Michigan Railroad. We recur then to the question whether lines held by leases are within the terms of section 3379. In order to determine that question, it is proper to consider all the legislation upon the subject.

The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, and the Cincinnati, Hamilton and Dayton Railroad Company, were each subject to all the restrictions and conditions prescribed in the act of 1848, "regulating railroad companies", (2 Curwen, 1394), and the amendments thereto, and are subject to the restrictions and conditions of all general laws of the State relating to railroads and railroad companies. The act of 1848, provided by section two as follows: "Said cor-

poration shall be authorized to construct and maintain a railroad, with a single or double track, with such side tracks, turn-outs, offices and depots, as they may deem necessary, between the points named in the special act incorporating the same, commencing at or within, and extending to or into any town, city or village named as the place of beginning or terminus of such road, and construct branches from the main line to other towns or places within the limits of any county through which said road may pass."

Previous to 1851, special provision was made in the charters of certain railroad companies for consolidation with other specified companies, but there was no general law upon the subject. The act of 1851, "relating to railroad companies" (2 Curwen, 1056), provided as follows: "Whenever the lines of railroad of any railroad companies in this State, or any portion of such lines, have been or may be constructed so as to admit the passage of burden or passenger cars over any two or more of such roads continuously, without break or interruption, such companies are hereby authorized to consolidate themselves into a single corporation." This evidently is to be understood as referring to the *line* of each road, but the word is made plural in form for the reason that the two companies are referred to in the same form. And it was required, furthermore, by that act, that the agreement between the directors of the consolidating companies should specify, among other things, "the manner of converting the shares of capital stock, in each of said two or more corporations, into shares in such new corporation, (and) the manner of, compensating stock-holders, in each of said two or more corporations, who refuse to convert their stock into the stock of such new corporation. * * * Provided, that all stock-holders, in either of such corporations, who shall refuse to convert their stock into the stock of such new corporation, shall be paid at least par value for each of the shares so held by them, if they shall so require, previous to the consolidation being consummated." And it was further provided, in effect, that when such consolidation was effected, the consolidating companies should cease to exist, and "all and singular their rights and interests, in and to every species of property, real, personal and mixed, and things in action, shall be deemed to be transferred to and vested in such new corporation, without any other deed or transfer."

Apart from the provision relating to consolidation, and wholly independent of it, the same act provided that any railroad company organized in pursuance of law might lease any part or all of any railroad constructed by any other company, if the lines of such lessor and lessee were continuous or connected, "upon such terms as may be agreed on between said companies, respectively." This was the first general provision on the subject.

By force of such lease the right to the use of the road passed from the lessor to the lessee, according to such terms and conditions with respect to the use as are proper in a lease, but it seems clear that nothing else passed. In Pennsylvania it is said, "that the lessee is the assignee for a term or period of the lessor—his bailiff to hold possession for him." *Penn. R. Co v. Sly*, 65 Pa. St. 205. In case of consolidation by the lessee with another railroad company, the rights of the lessee under that lease, passed to the new company; but the corporation thus leasing its road retained unimpaired its corporate existence, powers and privileges, except as affected by the agreement for such use, and among the powers so retained by the lessor was that of consolidation. In other words, the power to take a lease does not imply a power to consolidate, nor does the power to consolidate imply a power to lease, but the powers are distinct and independent. Evidently that was the view taken by the parties when the lease to the Cleveland, Columbus, Cincinnati and Indianapolis Railway was executed, as will appear from the extracts from that instrument quoted in this opinion, and I am unable to see that it is not a perfectly fair interpretation of the statute. While the connection is formed and only exists in this case by lines of road of the lessors, and while there can be no consolidation unless the companies whose roads form the connection are consolidated, it is equally true that there is no consolidation as to these lessor companies in law or fact. Moreover, the statute, which makes ample provision for the protection of the stockholders of the consolidating companies, makes none with respect to the stockholders of the lessor companies; nor is there any word, as I read the provision in relation to consolidation, which properly or naturally refers to lines held by lease. True, under the former as under the present statute, the power to consolidate may, in general, have been in obedience in the lessor company; but it was the lessor's voluntary act if its power in this respect was suspended; and it is equally true that upon termination of the lease for any cause, the power to consolidate would revive with all its force.

Suggestion is made that the danger of defeating the consolidation by non payment of rent, or the like, and consequent forfeiture of the lease, was not greater than the danger arising from the foreclosure of a mortgage, which practically might have the same effect as such forfeiture. If we admit this to be true, it does not militate against the construction we have given to the statute. The real question is as to the meaning of the words of the statute,

"lines of road." In *Harkrader v. Leiby*, 4 Ohio St. 602, 612, the judge delivering the opinion said that "a mortgage is now treated in both courts (law and equity) as a mere security for the debt, and the mortgagee is permitted to use the legal title only for the purpose of making effectual such security." But the title of a lessee is very different, and the road so leased to it is not its *line of road*, in the sense of the statute, but the road of the lessor company. Indeed, if we are permitted to depart from the plain words of the statute, and determine that where the control of a railroad by another company is permanent in its character, such ownership is sufficient to satisfy the requirement, it is difficult to see why a company having no other than leased lines, or one having a permanent running arrangement with another, may not come within the provision. I am fully persuaded that nothing of the sort was contemplated by the legislature.

I have so far spoken in the main of the proper construction of the acts of 1848 and 1851. But, although certain changes have been introduced into the subsequent acts (3 Curwen, 1882, 1884; 3 Saylor, 1760, 1872; 4 Saylor 2950; Rev. Stats. §§ 3300, 3379), there is nothing in any of them leading to any other conclusion in this respect than the one stated. Indeed, it is a well settled principle, that where a statute has undergone revision, it should be construed as before, unless the new act plainly requires a change in the construction. Application has been given to this principle in cases where the change was very marked. *Williams v. The State*, 35 Ohio St. 174. And it is also a well settled rule that, it being of the very essence of a law that it be uniform and unchangeable, whatever was the meaning of a statute when first enacted, should be its meaning through all future time. *Reed v. Evans*, 17 Ohio, 128, 134. This, of course, is to be taken with the qualification that such statute, though unchanged in its language, may be modified or controlled in its operation by a subsequent statute. *Slater v. Cave*, 3 Ohio St. 80. But there is nothing in the present statutes requiring any different construction, in the particular under consideration, than should have been placed on the former acts.

In holding that lines held by lease are not within the provisions as to consolidation found in section 3379, we give expression to that which seems to be the plain construction of our statute. But if we regarded the question as doubtful, the result should be the same; for it is a principle perfectly well settled, that where a statute granting corporate power admits of two probable but conflicting constructions, that construction should be given to it

which is least favorable to the existence of the power. In no case is this principle more distinctly asserted than in *Strans v. Eagle Ins. Co.*, 5 Ohio St. 59.

We are told that other consolidations, based on such leased lines, have been made, and that the Secretary of State has received and filed the certificates of such consolidation, and furnished copies thereof. No doubt the practical construction which the statute has received in the Executive Department of the Government, may in some cases aid in its construction. *Work v. Corrington*, 34 Ohio St. 64, 75. But we are not advised that there has been such uniform usage in that particular as to afford aid in the interpretation of this statute, much less control its construction.

But there is another view of this case to which I assent and that view leads to the same result. It is in respect to the situation of these roads, and the relation they bear to each other, without special reference to the title by which they are held. It is admitted, "That for many years last past, a very large commerce has existed between the portions of the United States lying southerly, southeasterly and southwesterly of Cincinnati, on the one hand, and the regions conveniently reached by the commerce of Lake Erie, and of the great lakes connected therewith, on the other hand. That the course of this commerce has been such that goods, wares and merchandise in large amounts, have been brought to the city of Cincinnati by the transportation lines upon the Ohio River, and by the railroad lines converging at Cincinnati, and the same have been transported by the railroads running through the State of Ohio to points upon Lake Erie, and thence transported by the way of the lakes, and the railroads running from cities upon the lakes to the Atlantic Seaboard and the Northwestern States. That owing to the great competition existing between the transportation lines upon Lake Erie, the rates of transportation of merchandise from either Cleveland, Sandusky or Toledo to points upon the said great lakes, except Lake Erie, either easterly or westerly, from the said cities, have been generally the same to and one of such points, notwithstanding the difference as to distance in favor of either of the said cities; so that merchandise going from either of said cities through the said lakes and destined to any point, either upon the Atlantic Seaboard or in the Northwestern States, or any intermediate point east of and including Buffalo, generally paid the same rates for transportation upon the lakes, whether they were shipped from either Cleveland, Sandusky or Toledo. That previous to the 8th day of July, 1881, there was an active competition between the aforesaid Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the aforesaid Cincinnati, Hamilton and Dayton Railroad Company in respect to the said transportation business from Cincinnati to points upon Lake Erie, and great rivalry existed as to the obtaining and conducting of such transportation business. That the said railroad companies respectively connected the said city of Cincinnati with the ports of Cleveland and Toledo on Lake Erie."

The Cleveland, Columbus Cincinnati and Indianapolis Railway and the Cincinnati, Hamilton and Dayton Railroad, with their leased lines, constitute two great arteries of trade, both commencing on the Ohio river at Cincinnati, meeting at Dayton, and extending thence to Lake Erie, one terminating at Cleveland, and the other at Toledo. The Attorney General says, and the record supports the statement, that these roads are "for sixty miles lying parallel and near to each other." That

they are, indeed, in the largest sense, parallel and competing roads, seems to be beyond dispute, and it may be fairly inferred from the record that a leading object in making the consolidation was to destroy that competition. That being true, the lines of these roads are not, in my judgment, "so constructed as to admit the passage of burden or passenger cars over two or more of such roads continuously," within the proper meaning of section 3379. That the mere physical ability to pass cars from one road to the other satisfies the statute, is a construction of it which is wholly inadmissible, for the provision requiring such connection would be without meaning. In imposing that restriction upon consolidation, the Legislature intended, not merely that the physical fact should exist, but that such consolidation should only be made for the very purpose of passing freight and passengers over both lines, or some material parts thereof, not necessarily in a direct or straight line, but *continuously*.

Counsel for the defendants insist that in construing statutes, regard must be had to the words. No doubt that is true; but it does not follow that regard is to be had to nothing else. Mr. Bishop says that courts "do not close their eyes to what they know of the history of the country and of the law, of the condition of the law at a particular time, of the public necessities felt, and other like things." *Bishop's Stat. Cr.* § 77. In *Logan v. Courtown*, 13 Beav. 22, 29, it was said that in construing a statute, regard must be had to "the words in which it is expressed, applied to the facts existing at the time." In *Brewer v. Blougher*, 14 Peters, 178, 198, Taney, C. J., said: "It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it." *Cooley's Con. L.* (4th ed.) 79; *Maxwell on Stats.* 16-25.

Having regard to the language of this statute, in the light of such aids as are here indicated, I am satisfied the legislature never intended that railroads situated as these are should be regarded as constructed for the carriage of freight and passengers *continuously*, in the manner contemplated by the section. Indeed, each of these consolidating companies had a line for the carriage of freight and passengers from Cincinnati to Lake Erie, "continuously, without break or interruption," and

for this reason the companies are not within the section in question. An examination of the provisions relating to the power of railroad companies to lease, does not lead us to a different conclusion. True, by the act of 1851, it was not provided in express words that the fact that the lines of two companies were parallel and competing should be a bar to a lease by one to the other, or to a consolidation of the companies; nor was there any such express provision in the act of 1852 (3 Curwen, 1884), or the act of 1869 (3 Saylor, 1760), with respect to leasing. Express provision, however, prohibiting one company from leasing to another where their lines were competing, was made by the act of 1873 (4 Saylor, 2950), and that provision was carried into the Rev. Stats. § 3300. From the absence of any such express prohibition with respect to consolidation, it is argued that here is a legislative expression that the fact that lines are competing is no objection to consolidation. But that conclusion, in my judgment, is altogether erroneous. By the act of 1852 (3 Curwen, 1877), consolidation was provided for in section 21, and leasing in section 24. When section 24 was repealed and re-enacted with certain changes in 1869, it was left in the respect mentioned, unchanged, and such prohibition was introduced, as we have seen, in 1873, when the section was amended. Perhaps this latter amendment was introduced by reason of some abuse which had no direct relation to consolidation, and hence the propriety of amending the section on that subject was not considered. But, however this may be, it does not follow that such change in the language of the act worked any radical change in the law. The presumption, as we have seen, is the other way, unless the purpose to require a change in the construction is clear. Notwithstanding the act of 1873, the question still is as to the fair interpretation of the section relating to consolidation previous to that time, which section is still in force in substantially the same form. Rev. Stats § 3300. That it does not authorize a consolidation of lines bearing to each other the relation borne by these roads, is a proposition to which I fully assent.

Entertaining these views, the question how far this consolidation may be affected by the clause in the act of 1873, incorporated into section 3300 of the Revised Statutes, is not with me a vital one. But the policy of the State, as declared in that enactment, cannot be in doubt. Since 1873, at least, there can be no lease where the lines of the lessor and lessee are competing, and it is admitted that if there can be no lease, there can be no consolidation of such lines leased since then. The rule up-

on the subject may be more rigid since 1873 than it was under the former legislation. I do not think it is necessary to determine how that was, nor is it necessary to express any further opinion upon the question how far section 3300 might be regarded in determining this cause.

A fatal defect in the organization of this company is found in the fact that under Rev. Stats. § 3381, the directors of the consolidating companies must set forth in their joint agreement the places of residence of the new directors, as well as their number. This provision of the statute has not been complied with. There is no designation of any such place of residence. We are not to speculate as to the propriety of this provision, nor as to the manner it became incorporated into the statutes in its present form. It is sufficient to say the provision is in no sense directory, and that a compliance with it is indispensable. *Atlantic, etc. R. Co. v. Sullivan*, 5 Ohio St. 276; *The State v. Lee*, 21 Ohio St. 662; *Raccoon Co. v. Eagle*. *The State v. Cen. O. Association*, 29 Ohio St. 238, 399; *People v. Chambers*, 42 California, 201.

Judgment of ouster.

All the judges concurred with the Chief Justice as to the third proposition of the syllabus. White and McIlvaine, J. J., concurred with him as to the first point, but not as to the second; and Johnson and Longworth, J. J., concurred with him as to the second, but not as to the first point.

[This case will appear in 37 O. S.]

Separate opinions by Johnson and Longworth, J. J., in this case, will appear next week.—EDITORS LAW JOURNAL.

SUPREME COURT RECORD.

[New cases filed since last report, up to March 7, 1882.]

Mo. 1067. *William McHugh v. The State of Ohio*. Error to the Court of Common Pleas of Hamilton County. W. H. & R. C. Pugh and E. P. Dustin for plaintiff; General Geo. K. Nasir for the State.

1068. *Amos Ainsworth v. The State of Ohio*. Error to the Court of Common Pleas of Van Wert County. I. N. Alexander for plaintiff; General Geo. K. Nash for defendant.

1069. *City of Tiffin v. Resin W. Shawhan*. Error to the District Court of Seneca County. Perry M. Adams for plaintiff; N. L. Brewer for defendant.

1070. *S. O. Lattimer et al. v. A. B. Reed*. Error to the District Court of Ashtabula County. S. A. Northway for plaintiffs; N. L. Chaffee for defendant.

1071. *James P. Gray v. Benjamin M. J. Pratt et al*. Error to the District Court of Hamilton County. Taft & Lloyd for plaintiff; Wm. Disney for defendants.

Ohio Law Journal.

COLUMBUS, OHIO, : : MARCH 16, 1882.

THE Supreme Court made no report of cases disposed of during the past week.

NEW LAW MAGAZINE.

The *American Law Magazine*, published at 46 & 48 Clark St. Chicago, Ill., is a new monthly candidate for the honors and emoluments sometimes visited upon law journals. It is under the direct editorial care of J. B. Martindale who is now assisted by a corps of twenty-seven, able-bodied gentlemen in various states with eleven states to hear from. The first number is full of good reading matter.

NEW LAW FIRM.

The late law firm of Banning & Davidson of Cincinnati, dismembered by the untimely death of General Banning, has been reorganized, and is now under the firm name of "Davidson, Groesbeck, Conway & Gabler." Mr. Davidson is well and favorably known to our readers. Of the new members, an exchange has the following:

"Mr. Groesbeck is the son of Hon. Wm. S. Groesbeck, is now twenty-eight years of age; a graduate of Princeton College and of the Cambridge Law School; has until recently been travelling abroad but has now settled to hard work and will make his mark. Mr. Conway was educated under the care of Bishop McKale of Ireland, and takes charge of the probate business of the firm; while Mr. Gabler is a graduate of Bethany College, and will look after the insurance cases on the docket of the firm. These gentlemen are all capable of hard and effective work and will achieve success."

PERSONAL MENTION.

A Judge with a Backbone.—In this age of greed for office, and of fawning and temporizing to secure the support of powerful and influential persons or classes, the discovery of a man fearless and true when first tried in the harness of a judicial position, gives a sensation of genuine pleasure. There are so many ways in which a weak and vacillating judge can evade the full discharge of his duties, by ambiguous charges; by deferring action upon important cases submitted; by avoiding the main question and rul-

ing upon side issues instead; by quashing indictments which contain an uncrossed "t" or an undotted "i"; to say nothing of plain bull-headed disregard of all law or justice in matters where discretion gives full play to fell design; there are so many of these cases, we say, that the election of a judge is like an investment in a lottery, so often (alas!) unsuccessful as to prizes that an undoubted good drawing is productive of real satisfaction and deserved self gratulation. We are impelled to these remarks (which are local, and have no antithetical reference), by the undoubted ability and firmness displayed by His Honor, Judge Wylie, of the Franklin County Common Pleas. It is a matter of common remark among law-respecting people, that crime will henceforth have but a slight chance to escape its proper reward in this county, and that public boasts of ability to buy courts, prosecuting attorneys and grand juries will no longer be attended with unblushing and defiant violations of law, and the constant and repeated failure to indict or punish the persons so boastful and law-defying. We do not pretend to locate the reason of, or the responsibility for the fact, but it is well known that palpable and flagrant violations of law, affecting the health and comfort of thousands of our citizens, have been perpetrated and boasted of for a dozen years past in the face of all effort to punish the same.

We venture the prediction that when these same law-breakers come before Judge Wylie, there will be occurrences profoundly astonishing to their sense of fancied security.

JURY TRIALS.

They are indeed becoming a farce if not so already. Inherently, trial by jury has from deep antiquity received the endorsement of the wisest of the age, and it will be difficult to deny that if fairly tried it is the safest guard against the centralizing tendency of power.

Fair minded men of reasonable intelligence actuated by the ordinary impulses to do right, taken by lot and almost by accident from the ranks of the industrious, economical, moral classes as a rule is as safe a guard over the property, character, liberty and life of a people as can well be devised. The trouble with juries and the inefficiency of their actions may be traced to the bold and undisguised usurpation of the judges of courts where juries are employed.

Gradually and imperceptibly as the silent uprising of the coral reef, common pleas judges have

absorbed the high and independent power and duty of juries, and centering in themselves the functions of both judge and jury, have established a tyrannical power in the person of the judge, the most oppressive and dangerous exercise in a free land, and that would have met with resistance even to arms in the far off time of King John.

This power must be curbed, and juries by force of public sentiment made to understand that they are not mere automatons for the judge to direct in the determination of the facts as well as the law, and it is time the people, the press, and the bar, use their power to mould the true relations between the judge and jury as co-elements in the constitution of our courts, and firmly establish the proud and independent functions of twelve intelligent freemen when impanneled as a jury.

JOHN W. CANARY.

BOWLING GREEN, O., March 9, 1882.

ADMITTED TO PRACTICE.

Fifteen applicants for admission to the Bar, of this State, were before the Supreme Court last week. The following obtained certificates:

Theodore Alvord, Conneaut.
Curtis E. McBride, Mansfield.
John Bender, Fostoria.
Curtis V. McBride, Mansfield.
Joseph Chaney, Newark.
George W. Fluckey, Mt. Gilead.
Carl A. Seiders, Tiffin.
O. W. Bair, Troy.
W. R. Sanborn, Piqua.
John A. Qualy, Columbus.
Adolph Goldfredrick, Circleville.
Andrew J. McClure, Kalida.

LXVTH GENERAL ASSEMBLY OF OHIO.

SYNOPSIS OF LAWS PASSED THIS SESSION.

March 2, 1882.

House Bill No. 120. To amend section 3786 of the Revised Statutes of Ohio authorizing trustees of religious denominations, on the parish or congregation becoming extinct, to take possession of the church property, and to lease, sell, invest or otherwise dispose of the same.

H. B. 46. To amend section 4999 of the Revised Statutes to read as follows:

Section 4999. If the judge of a court having but one judge, or if a quorum of the judges of any court having two or more judges, fail to attend at the time and place appointed for holding the court, or if, after the calling of the court, the judge, or a quorum of the judges are unable, on account of sickness, or from any other cause, to attend the daily sessions thereof, the sheriff shall adjourn the court from day to day, until the single judge attend or a quorum is convened, but if the judge or judges be not present within two days after the first day of the term, or if, after the court is called, the judge or judges are unable, on account of sickness, or from any other cause, to be present for ten days, the court shall stand adjourned for the term.

H. B. 82. To regulate the construction, enlargement, changes in, conduct and management of water works

in cities having a population exceeding eight thousand and not exceeding ten thousand, according to the Federal census of 1880, or in July of any year.

H. B. 182. An act to authorize the trustees of Miami township in Logan County, to levy a tax on the Quincy precinct of said township, and issue bonds for the purchase of cemetery grounds and the improvement thereof.

H. B. 40. To amend section 5164 of the Revised Statutes to read as follows:

March 2, 1882.

utes to read as follows:

Section 5164. The trustees of each township and the councilmen of each ward, shall, on the second Tuesday of October, annually, select of good, judicious persons having the qualifications of an elector, and not exempt by law from serving as jurors, the number of persons designated in the notice to be returned for jurors therefrom, and shall make a list thereof, and deliver the same to the judge of election, who returns to the clerk of the court, the poll-book of election, and such judge of election shall deliver the list to the clerk at the time he returns the poll-book; and in selecting the jurors, if any person shall attempt, by request, or suggestion, to influence said officers, or any of them, to select or not select himself, or any other person or persons as aforesaid, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, before any court of competent jurisdiction, shall be fined in any sum not exceeding fifty dollars, or imprisoned in the county jail not more than ten days or both, in the discretion of the court.

H. B. 161. Making appropriations for the last three quarters of the Fiscal year ending November 15th, 1882, and the first quarter of the fiscal year ending February 15th, 1883.

H. B. 41. Authorizing the Commissioners of Lawrence County to levy an additional tax for certain purposes.

H. B. 80. To amend section 3977 of the Revised Statutes to read as follows:

Section 3977. The prosecuting attorney of the proper county, or in case of a city district, the city solicitor shall prosecute all actions which, by this title, may be brought against any member or officer of a school board, in his individual capacity, and shall act in his official capacity as the legal counsel of such boards or officers in all civil actions brought by or against them in their corporate or official capacity, but no prosecuting attorney or city solicitor shall be a member of the board of education; provided, that in counties having a county solicitor, such officer shall prosecute all actions which may be brought against any member or officer of a school board in his individual capacity, and shall do and perform all the duties herein required of the prosecuting attorney, as to schools, school boards, and officers of schools of the county, outside of said city; but for such services he shall receive additional compensation.

H. B. 145. Authorizing the city of Ironton to issue bonds, borrow money and levy a tax for the purpose of defraying the expenses incurred in suppressing the small pox.

H. B. 148. To amend section 5063 of the Revised Statutes to read as follows:

Section 5063. Where an heir or a devisee of a deceased person is a necessary party, and it appears by affidavit that his name and residence are unknown to the plaintiff, proceedings against him may be had without naming him, and the court, or a judge thereof, shall make an order respecting the publication of notice, but the order shall require not less than six weeks publication.

H. B. 223. To amend section 6046 of the Revised Statutes to read as follows:

Section 6046. Before receiving said inventory by the probate court, the executor or administrator shall take and subscribe an oath or affirmation before the probate judge or his deputy, a justice of the peace, or other officer authorized to administer oaths required or authorized by law, stating that such inventory is in all respects just and true; that it contains a true statement of all the estate and property of the deceased which has come to the knowledge of such executor or administrator, and particularly of all money, bank bills, or other circulating medium belonging to the deceased, and of all just claims of the deceased against such executor or administrator, or other persons, according to the best of his knowledge. Such oath shall be endorsed upon or annexed to the inventory.

H. B. 106. To authorize the village of Milford, Clermont County, to transfer certain funds.

CIVIL RIGHTS.

UNITED STATES

v.

JOHN M. BUNTON.

JUDGE BAXTER'S CHARGE TO THE JURY.

The prosecution was instituted against defendant as Superintendent of a District School in Clermont County, for refusing to admit the son of a colored man to the school, which is attended by white children, the defendant claiming that there was a school for colored children in the vicinity, accessible to the boy, and to which he should be sent. The case was tried last week before Judge Baxter, at Cincinnati, who charged the jury as follows:

GENTLEMEN OF THE JURY—It is a great relief to a court, and a great relief to a jury, to have a case tried by counsel who understand what the controlling question is and who are frank enough to move right up to the question and present that case. Upon that the decision of the jury turns, without making it necessary for the court to go back, as it were, and traverse all the law in order to show you what the ruling question in controversy is. If this case had been met in that spirit we would have been through it before dinner, but it is a very small case and in a very narrow compass. There is really but one question for the jury, which I will point out after a while.

A good deal of discussion has been gone into, and a good many books have been read in order to satisfy the court, for it was addressed to the court and properly to the court, as it is a question which the court has to decide and not the jury, that there must be a criminal intent to constitute a crime. In the broad sense in which the books intend it, that proposition is true. But what constitutes a criminal intent in one case is very different from what it is in another case. A decision is read here by Judge Rives, of Virginia. That case was upon the trial of a juror commissioner, who was indicted because he refused as jurors—he excluded from the jury box—two colored men because or on account of their color, the law denouncing that act as a crime, and authorizing parties to be prosecuted who did that. Now you will see that the essence of that crime consisted not in his excluding the jurors—I mean persons from the jury-box—but for doing it on account of their color. The exclusion of colored men from the jury-box might have been because they were regarded as incompetent to serve as jurors, as not having sufficient intelligence, or for some other good and reasonable cause. He could not be indicted for that; but if he did it simply and solely on the ground that they were colored persons, then the law applied, and as in that particular instance the evidence consisted in the motive—not in the exclusion of the jurors, but in the motive which in-

duced him to exclude the jurors—of course the court was bound to pass upon the fact whether he did exclude them from that motive or some other motive.

Well, again, in another case, a man is indicted for passing counterfeit money. The statute, I believe, in all cases speaks of a man passing it knowing it to be counterfeit, because any of us may pass a counterfeit bill inadvertently and without any knowledge of the fact. In that case the crime consists not simply in the passage of the bill or offering it in payment to some one, but in the passage of the bill with the knowledge that it was counterfeit. Then the party can not be convicted unless there is proof of what the law, the books, call the *scienter*—that is, the knowledge—and that is the proper inquiry to be made in case of that kind. So in an indictment for forgery. The mere fact that I sit down here and draw a note for a thousand dollars, and sign A. B.'s name to it, is not a criminal offense of itself; and the law says, "If done with intent to defraud," if used with the knowledge of the fact that it was spurious—the knowledge or the intent, in that particular instance, is a necessary element to constitute the crime, and in that instance the knowledge must be proven.

Now we will come down to this case. I am cited to a great many other cases of similar character, and in the discussion upon the books, the author is treating upon some particular proposition, and his language is applicable to that proposition, and hence when you turn over very often a page or two forward or a little back you find something to the unthinking mind, whose business it has not been to study law or to discriminate, that seems apparently in conflict with this proposition, but when you look to the facts and the difference in principle they are harmonious, and they are both correct. The crime in this case is, after the slaves were emancipated by a military force and through an amendment of the Constitution of the United States they were made citizens; they were invested with all the rights of citizenship. They have, under the Constitution, the same rights precisely as you and I have, but being an uneducated race just withdrawn from under the yoke of bondage and turned loose upon the world as full-fledged citizens of the United States, the Government, or a majority of the people of the United States who did this thing, felt that it was their duty to throw around the ignorant slave such protection as would be sufficient to guarantee to him the rights with which the Constitution has invested him; because a right, although it be a constitutional right, unless there is some means provided by which to protect that right and protect the parties in the exercise of that right, is entirely valueless. Several provisions of law have been made in order to give this protection. Among others it has been enacted that every person who, under color of any law, statute, ordinance, regulation or custom, deprives a person

on account of his color from his rights, is indictable and punishable in this court.

Now, the mere fact that this defendant excluded this colored boy from the privileges of his school would not constitute an offense. There must be more than that. He must have excluded him from his school, and he must have done that under some color of law, or statute, or ordinance, or regulation, or custom of the State. It requires an exclusion, and also that that exclusion should be for the reason which the law gives, on account of his color, and the person who thus excludes must be acting, or claiming to act, under some authority of law of the State, local law, custom, regulation, or statute or ordinance. If, therefore, this defendant did exclude this colored boy from his school, if this colored boy was a resident of the district, and if he had a right to go to that school, in reference to which I will instruct you directly, and if this defendant excluded him from the school, claiming to do so under the authority of the statute which provided for a separate school for colored people, or under some regulation, or custom, or ordinance of the State, and excluded him because he was a colored boy, or for some other reason—he might have been spiteful towards him, and exclude him for some other reason—if he excluded him under color of authority, and because he was a colored boy, then the court instructs you that he would be guilty, and you ought to find him guilty, unless you should find in his favor upon the question of fact, which I would bring to your attention, but which the counsel for the defense did not discuss. This only question in the case has not been discussed.

Now, referring to some portions of the argument, and the positions assumed by counsel in this connection, he proved by four witnesses that defendant is a man of good character and a law-abiding citizen. The law presumed that before he introduced the proof, and the proof only confirms that proposition. And then he reads authorities to the court in order to inform the court what the law is upon that question! Well, the authorities read are all correct enough, but let us see if they have any application to this case. When a proposition of law is announced that is correct, it means that it is correct when there is anything for it to operate upon, when it is applicable to the case that is under trial. The only thing which this defendant is accused of doing is that he excluded this boy from the school, and he did it under the color of the statute relating to the subject, and did it because he was a colored boy. The defendant is introduced as a witness himself, and that is his statement—that he thought the boy had been provided for at another school; that it was his right to apply at the other school; that he had no right to come to his school; that the other school had been provided for colored children, and money set apart for that purpose. In other words, he admits every fact necessary to constitute this case. Now, doesn't the jury, in the exercise of its own good sense, see at once that good character

has nothing to do with the proposition? If the proof is plain and indisputable that a man did do a particular act, if the party accused comes into the court and admits the fact that he did do a particular act—that is, that he did exclude this person; that he did do it under color of that law which has provided another place for them to go to, and that he did do it upon that ground; that he had not been employed to teach colored people, what use could you make of the fact that he was a man of good character—I mean in passing upon the facts which constitute that part of the case? He certainly is a man of good character, but if he admits the offense, there is nothing for this evidence to operate upon. And the court instructs you that good character, in this particular case, very proper and influential in proper cases, has no application, no bearing, and is entitled to no consideration at the hands of the jury. If the defendant were to deny the facts alleged, if he would say the testimony on the part of the prosecution or Government was not true, if he were to raise an issue between himself and the other witnesses, or even stand off and deny the truth of the indictment, then the jury, in passing upon the fact whether he was guilty of the particular matters alleged against him, or not guilty, would very properly be authorized to take into consideration that he was a man of truth, a man of veracity, a good citizen and a law-abiding man; but when they are called upon, first, to decide whether he excluded this colored boy; secondly, whether he did it under color of authority, and thirdly, whether he did it because he was a colored boy, and the defendant, himself, upon his oath, who is examined as a witness in his own behalf, admits these particular allegations are true, the court instructs you that the question of good character and law-abiding citizenship has nothing to do with it.

Now, the same remark may be made in reference to his motive. It is proper for you to inquire whether he was moved to exclude the boy on account of his color, and whether he assumed the right to do that, to exclude the boy under any authority of the State Statute, custom, regulation or ordinance. You have a right to look at his motives in that particular, and if you find that he had another motive than that stated in the statute, why, then the Federal Courts would have no jurisdiction over the question. They could not try him for a bare assault and battery. They could not try him for a simple denial of a right unless it was a right arising under the Constitution and the laws of the United States, and unless that right was denied by color of authority, and because the party was a negro. In that respect you have a right to look at his motives, but if he has admitted that it was done on that ground, why, then you have no inquiry into his motives at all; he himself admits the motive.

I have stated to you, gentlemen of the jury, that under the Constitution and laws the negro has the same rights as the white man, precisely

the same rights in all respects. He is subject to the same obligations, duties and liabilities, and that right has been secured by the amendments to the Constitution. This was a public school, and whether this negro, the father of the boy that was excluded, pay much or little tax, he is bound to contribute to the support and maintenance of that public school; and doing that, he has a right to have his children educated at the public expense in the same way and to the same extent that white children are educated, no more and no less. The Legislature of Ohio has authorized the establishment of public schools; that is to say, they have authorized the classification of these school children, and have authorized the negroes to be educated separately, in one school, separately from the white children, and the white children separately from the negro. Now, that is no wrong to the negro. The legislature has a right to do that. If you find upon the facts of this case that such school had been provided, which afforded like facilities as the one to which he went and claimed admission, reasonably accessible to him, not exactly—I don't put it upon the ground of exactly as accessible, but if the colored school was established in good faith, supplied with a competent teacher, corresponding in a reasonable degree with the qualifications of the white teachers of the country, and reasonably accessible to this negro, it was his duty to have gone to the colored school, and if he refused to go there, and claimed admission into the white school and was excluded he has nothing in law to complain of. But if, as has been contended, and this is the question of fact that has not been discussed—at least it has only been alluded to—if you find as a matter of fact, and that is the fact that you will pass upon, that this colored school was so remote—too remote for the child of this black man to attend, without oppression, and without going over unreasonable and unusual distances; that the School Board or Trustees of the District—Trustees, whoever they may be, whose duty it was to provide these schools, had placed this negro at a disadvantage with his white neighbor—material disadvantage—had required of him, in order to get his education, more than they had required of others; to travel over this greater distance, which was unusual, they had not provided for him the same accommodation, the same facilities, the same conveniences, or something approximating them, that he could obtain in his home school, if I may so term it, the school nearer to him, then, and in that event he had a right to go to this white school; for if the law is not enforced in that way, you will see at once that by this claim of right to classify or send the negro to one place and the white man to another, or provide accommodations or educational facilities for the white man that you don't give to the negro, the inequalities and the injustice and the wrong that are inflicted upon the negro, and the violation of that constitutional amendment which was intended to give him protection. Now that is the question of fact that you are to determine, and if

you find that that school was sufficiently near home that it was well appointed, well provided with teachers, reasonably accessible, the court instructs you that this defendant would not be guilty; but if on the other hand you find the reverse, then the court instructs you that he had a right to enter this white school.

Now, there must be an intent. I told you at the outset there must be an intent to constitute a crime. But the position of counsel might mislead you. The intent necessary to constitute this crime is: Did the defendant intend to exclude him from the school? That is the intent? Did he intend to do that? The fact that he supposed at the time that he had a legal right to do it, the fact that he did not know what the courts would hold, how they would construe this matter, or, in other words, the fact that he did not understand the law of the case, is not an excuse. If he intended to do the acts which in law constitute the offense, then that is the only intention which the law demands in order to a conviction. Counsel said in his remarks to the jury that now, ever since the decision which was made in the civil suit between these parties, tried before me here some time ago, that if the teacher was to exclude the colored boy under the same circumstances, he would be guilty. Gentlemen, the statutes of Congress don't change according to the decisions of courts. It is a new idea that the law is one way until the court makes a decision in reference to a matter of this sort, and then becomes another way after the decision is made—that is, that the statute has a different and more rigid effect now, since the decision made six months ago, than it had before this decision was made. If it was possible to give it such a construction, and there is no authority for it, that construction alone would in legal effect abolish the amendment to the Constitution. The law of the case would depend not upon a judicial construction to be made by the judges, but it would be made to depend upon the opinion which the parties themselves might entertain of the law, and one man who understood it correctly would be guilty of a crime, whereas another man who did not understand it, but doing the same thing, would be innocent. Now, that ain't the law! The law assumes that every one knows what the law is and is bound at his own peril, in criminal and in civil cases, to know what the law is. It is true they don't all know it, but they are all bound to know it. The law prescribes the rule, publishes it, sends it forth to the country, and they are bound to take cognizance of the law, and it is not a flexible thing, that is one way to-day, and is another way six months afterwards, because the court may happen to have given a different construction. The counsel admits to you that my instructions in the other case were correct, and I think they were correct, and they are exactly the instructions that I give you here now. If they were correct, it was because I construed the law as Congress intended it to be construed, as it should have been construed, as it ought to be adminis-

tered, not as to what it shall be in the future, but what it has been in the past, been so since the time of the enactment.

Well, another position is assumed, that this defendant consulted counsel, and counsel advised him that the law was different from what this court instructs you that it is. Well, gentlemen, the legal fraternity to which I have belonged for forty-one years contains a good many sensible and good useful men; contains a great many men competent to advise, and honest enough to give correct counsel; but then it contains a great many more charlatans, superficial lawyers, honest or dishonest, as the case may be, and I think I may say that my observations in courts for forty-one years leads me to believe that at least one half of the litigation that we are troubled with in the courts, arises from the misadvice of counsel. Nevertheless the law, in its tenderness, in some respects gives force and effect to the advice of counsel. If A has B arrested upon the charge of larceny, and B is tried and acquitted, and B then sues A for what is termed a malicious prosecution, that is for prosecuting him when he was innocent, and without sufficient probable cause to justify the prosecution, A, the defendant in that civil suit, may show in his defense that he acted upon sufficient cause and in good faith, and in an action of that kind, if A can show that he made a fair presentation of his case to an attorney in good standing, and that counsel advised him that it was sufficient ground for prosecution, and that he thereupon, acting in good faith upon the advice of counsel, instituted the prosecution, why, that would be a good defense. But that has not been carried into the criminal law. We don't seem to need it now. We don't seem to need defenses of that kind. They have got plenty of other defenses available. But if it became necessary, a man might defend for murder, or assault and battery, or anything else, for I fancy that any one evilly inclined, could find in Cincinnati or anywhere else in this broad country, some man to advise him to do whatever he wanted to do. That is the rule which some counsel act upon. They generally find out what a man wants to be advised, and then they advise him; and he is the man that pleases him. Now, it may be that this defendant, and I expect he did, advised with counsel, and I expect his counsel instructed him that he had a right to exclude this negro from the school, and I take it, am willing to concede, that he acted in the matter in the utmost good faith; that he thought he was doing what he had a right to do; but the court charges you, gentlemen, that notwithstanding all of that, if he did what the act of Congress forbids him to do, and did it under color of authority, and because this boy was a colored boy, that it would be no excuse; he would still be guilty. It would be a matter to address itself very strongly to the consideration of the court. The punishment prescribed by the statute is that the court may inflict a thousand dollars fine and twelve months imprisonment; and in a proper case this court

would do that. The court can not go beyond that in any case; but the court is not bound to do that; it is bound to exercise its own judgment in a particular case. It may fine as low as a penny, or imprisonment for twenty minutes, or either one. It is a matter within the discretion of the court. There is no minimum of punishment, but there is a maximum, beyond which the court can not go; and we are, gentlemen, all under obligations to avoid, as far as possible, anything like personal feeling, any personal interest. We are under oath both the court and jury, to administer the law just as we find it. The court is to determine the law and the jury is to pass upon the fact.

Now the issue, and the only issue, is, whether this colored school that had been provided, and which the statute had authority to provide, was reasonably accessible, and gave to this boy the same facilities, educational facilities that he could have obtained at the other, or something approaching it. If it did, then this defendant is not guilty; if it did not, then the court instructs you that, upon your finding that fact, he would be guilty as he is charged in the indictment. Take the case gentlemen.

The jury disagreed, and were discharged.

Channing Richards, for the Government.

John Johnston and H. J. Buntin, for defendant.

RAILROAD COMPANY—DAMAGES—EMPLOYEE—REASONABLE OR UNREASONABLE ORDERS.

SUPREME COURT OF OHIO.

PITTSBURGH, CINCINNATI & ST. LOUIS RAILWAY COMPANY

v.

GEORGE HENDERSON.

February 28, 1882.

1. Where the superintendent of a railroad company has made an order as to the management of a particular train, which order will be reasonable or unreasonable according to the circumstances under which it is to be enforced, the question whether in any particular case such order is to be deemed reasonable or unreasonable is a question of mixed law and fact, to be determined by the jury under proper instructions.

2. Where an action is brought against a railroad company by one of its employees to recover damages for personal injuries sustained by the enforcement of an order made by the superintendent of the company as to the management of a particular train, which order was unreasonable and the enforcement of the same was dangerous to such employee, the fact that the negligence of a fellow servant of the injured person, while executing such order, contributed in producing the injury, affords no defense to the action.

Error to the District Court of Harrison County.

Henderson brought suit in the Court of Common Pleas of Harrison County against the Pittsburgh, Cincinnati & St. Louis Railway Company. He was a laborer in the employ of the company upon a construction train which was

on the main track of the railroad, in a deep rock cut, upon a heavy curve in the road. While he and the other laborers were at work loading the train with gravel, a freight train which was on its regular time was run into the construction train without warning of any sort, and by the wreck which resulted from the collision, Henderson was driven against the rocks, two or three of his ribs were broken, his shoulder was dislocated, and he was permanently injured. The action was brought to recover damages for the injuries, and in the court of common pleas there was a verdict and judgment in his favor for \$3,000, which judgment was affirmed in the district court, and this petition in error was filed to reverse the original judgment as well as the judgment of affirmance. The record contains all the evidence.

Construction trains have no place on the schedule or time table, and by the printed rules of the company it is required that they shall be kept out of the way of all regular trains, freight as well as passenger, clearing their time at least ten minutes, and it is the duty of the conductor of the construction train to observe the time of all trains and obey the rule. This rule, however, may be suspended as to freight trains by special order of the superintendent of the railroad company, whenever he sees fit to do so, in which case it is the duty of the conductor of the construction train, where such train is being loaded on the main track, to keep the train in its place and send a man with a proper signal to notify approaching freight trains.

In this instance the superintendent had made such special order, and the conductor of the construction train, keeping his train on the track, had sent a flagman to notify the approaching freight train; but the flagman performed his duty so negligently and improperly that the engineer of the freight train understood his acts as an order to go ahead and not stop. The engineer says the flagman stood several yards from the railroad track, holding the flag down at his side with one hand and making motion with the other as for a forward movement. In this way the injury was occasioned, without any negligence on the part of the plaintiff. It would have taken six minutes to move the construction train to a side track from the place where it stood on the main track.

Barrett was superintendent of the company. He testified: "There are general printed rules for all trains, made in order to promote the safety of persons and property. I establish these printed rules. I am the superior officer for that purpose on this division. I give special orders and private instructions, as I think necessary, to annul or disregard the general rules. * * * They are not printed. * * * Construction trains cannot occupy the main track without special instructions. It is the duty of the conductors of construction trains to protect their trains. I gave special order, which annulled the general rule as to construction trains, allowing them to stand on the track until the arrival of

freight trains, by sending back a flagman to notify approaching trains. I give special orders to construction trains where to work, and direct them by special orders from time to time, by telegram or otherwise."

Lowen was boss of the laborers employed on the construction train. He hired and discharged the men and regulated the time and manner of working. He had authority to require that the train should be moved, as he might direct, with reference to the work, but it was no part of his duty to observe the time of approaching trains, that matter being confided exclusively to the conductor. He was in the caboose until the freight train was within a few feet of the construction train, and barely escaped serious injury, but several persons beside Henderson were injured.

In the amended petition the negligence of the superintendent, "boss," and the conductor of the construction train, is stated, and the answer is a denial.

J. Dunbar, for plaintiff in error.

The duty implied as incident to the employment, and the question whether the special order was reasonable, were questions of law. 5 Ohio St. 567; 43 Ill. 421. The exception to the charge was sufficient. 10 Ohio St. 226; 29 Ohio St. 452; 32 Ohio St. 415.

J. M. Estep, for defendant in error.

Negligence is for the jury. 8 Ohio St. 580; 13 Ohio St. 66; 23 Ohio St. 10; 24 Ohio St. 639, 668; 28 Ohio St. 23; 31 Ohio St. 480; 32 Ohio St. 66; 35 N. Y. 10; 58 N. Y. 455; 77 N. Y. 72; Shearman & R. on Neg. § 11. Rules must be reasonable. Shearman & R. on Neg. § 93; 36 Ohio St. 226; Negligence complained of is negligence of Company. Shearman & R. on Neg. § 89; 33 Ohio St. 468; 73 N. Y. 40; 81 N. Y. 206; 42 Md. 117, 136; 6 Bing. 716. Employee takes no risk of negligence of company. 16; 3 Ohio St. 201; 31 Ohio St. 287; 17 Ohio St. 197; 36 Ohio St. 221; Shearman & R. on Neg. §§ 5, 10, 89; 73 N. Y. 40; 53 N. Y. 553. Exceptions to charge in gross and hence insufficient. 25 Ohio St. 584; 30 Ohio St. 105; 32 Ohio St. 77; 21 Wall. 158.

OKEY, C. J.

Where a servant sustains injury by the negligence of his master, the master is liable in an action by the servant for damages. A breach of duty by the master is not one of the risks which one assumes in entering upon the employment of another. This breach of duty may consist in employing other servants who are incompetent, in providing unsafe machinery and structures, in failing to notify the servant of peculiar dangers known to himself but not to the servant, or in needlessly placing the servant in a place of danger.

As corporations act only through agents, it sometimes becomes important to determine what persons stand in such relation to it as that their negligence shall be deemed the negligence of the

corporation, or, as sometimes expressed, who is to be regarded as merely a servant of the corporation, and who is in legal effect the master. Upon this subject the cases are by no means in harmony [Pierce on Rail. (ed. of 1881). 367; 2 Thompson on Neg. Ch. XX.; 11 Reporter, 42, 207, 591; 21 Am. L. Reg. 76]; but it is unnecessary to enter upon any extended examination of them. No doubt can be entertained that one standing in the relation to the company sustained by Barrett, being the superintendent of the company, and clothed with power, at his own discretion, to make and suspend rules to regulate the running of all the trains on the road, is to be regarded, in a case of this sort, as in legal effect the master. And where one so in legal effect master, makes a special order with respect to the management of a particular train, which is, under the circumstances, unreasonable, and by the execution of such order a servant of the corporation, himself without fault, is injured, it will be no answer to the action of the injured party against the corporation to say, that the immediate cause of the injury was the negligence of a fellow servant of such injured party in the execution of the unreasonable order. Chicago etc. R. Co. v. McLallen, 84 Ill. 109; Chicago, etc. R. Co. v. Moranda, 93 Ill. 302; Hough v. Railway Co. 100 U. S. 213; Fuller v. Jewett, 80 N. Y. 46; Smith v. Oxford Iron Co. 42 N. J. L. 467; Ohio & M. R. Co. v. Collarn, 73 Ind. 261; Patterson v. Pittsburgh, etc. R. Co. 76 Pa. St. 389; Cumberland, etc. R. Co. v. The State, 44 Md. 283; Ford v. Fitchburg etc. R. Co. 110 Mass. 240; Berea Stone Co. v. Kraft, 31 Ohio St. 287; Lake Shore, etc. R. Co. v. Lavalley, 36 Ohio St. 221.

Whether a rule of a railroad company is or is not a reasonable rule, is in many cases a question of law; but in this case it cannot be affirmed as a matter of law that the special order made by superintendent Barrett was reasonable. On the contrary, whether such order was reasonable or unreasonable was a question of mixed law and fact proper for the determination of the jury, in view of the circumstances under which the order was to be executed, and upon proper instructions as to the law. The jury found that the order was unreasonable, under the circumstances, and we are not prepared to say that the finding was wrong.

Objection is made that the court permitted the petition to be amended after the evidence was closed, and also permitted the jury, after the verdict was announced, to retire for the purpose of correcting it. But these matters rested in the discretion of the court, which seems to have been exercised in furtherance of justice. And as to the request to charge and the charge given to the jury, the exception was general and not specific, and, looking to the whole record, we cannot say the action of the court was so prejudicial to the company, in any respect, as to afford ground of reversal.

Judgment affirmed.

[This case will appear in 37 O. S.]

SUBTERRANEAN RIGHTS OF WAY.

SUPREME COURT OF OHIO.

S. W. POMEROY

v.

BUCKEYE SALT COMPANY.

Feb. 28, 1882.

1. The general rules of law which govern the rights and obligations of the owners of dominant and servient estates, apply as well to subterranean rights of way as to those upon the surface.

2. The owner of coal lands, through which another has a right of way, by subterranean entry, to reach coal mines in an adjoining tract, may lawfully construct an entry crossing such right of way, provided; it be done without destroying or substantially interfering with the use thereof.

Error to the District Court of Meigs County.

E. A. Guthrie, for plaintiff in error.

John Cartwright and Grosvenor & Vorhes, for defendant in error.

LONGWORTH, J.:

In the year 1869 Valentine B. Horton and Charles W. Dabney owned in fee a tract of land containing 43 acres, rectangular in shape, near the Ohio River, in the city of Pomeroy. This tract fronted southwardly toward the river and on the north adjoined a 300 acre tract of coal land afterwards purchased by the plaintiff in error. They also owned a coal landing, or platform, known as the "Goulding Platform," adjoining this 43 acre tract at its southeast corner. The furnace of the Buckeye Salt Co., defendant in error, was near the southwest corner of the tract. Under the surface of this land extended a vein of coal, outcropping across the northeast corner and along the cliffs of the south front. A long disused entry, or passage way, extended from the Goulding platform through the coal vein northwardly to certain deserted workings, or coal veins, in the northeasterly portion of the tract. These workings had caved in and the entry had become partially or entirely filled up, so as to be impassible unless cleared.

In the year mentioned Horton and Dabney conveyed to defendant this tract in fee; the deed, however, containing this reservation:

"Saving and excepting a right of way from what is known as the Goulding platform, on lots numbered 279, 280, 281, and contiguous lots, by an entry to the north and east sides of the tract hereby granted, and the right to make such ways and roads and keep them in repair, for the transportation of coal and salt, as may be deemed necessary and expedient by the grantors, their heirs and assigns."

Pomeroy, having become the owner of the 300 acre tract on the north, purchased from Horton and the heirs of Dabney, the Goulding platform, together with the rights of way so secured by them, for the purpose of obtaining an entrance to the coal veins in his 300 acre tract.

Beginning at the platform he opened and cleared the old entry half way across the tract, until he came to the deserted workings. From

this point the evidence shows it to have been impracticable to proceed further to the north, the standing coal necessary to support the passage way having been exhausted. Near this point, however, was discovered another deserted entry running west. This entry he cleared and followed to the centre of the tract, the first point where he found standing coal sufficient to support a new entry. Through this standing coal he drove a new entry and windway for ventilation due north into his own land.

The defendant purchased the 43 acre tract for the purpose of mining coal therein, to use in its salt furnace. For this purpose it had driven an entry and windway northwardly through the western portion of its land to a point about three-fourths of the way across the tract. Thence it proposes to drive its entry at right angles eastwardly through and across the entry of plaintiff, and at the same level, for the avowed purpose of reaching the remaining coal in the northeast portion of its tract, and possibly with the further object of obtaining coal from lands lying to the east of the same.

To prevent this action the plaintiff brought suit in the Common Pleas Court of Meigs County, praying for an injunction to prevent defendant from "penetrating and breaking the walls of said way and entry and from crossing the way and entry of plaintiff."

The case was fully tried on appeal in the district court and the petition was dismissed. This decision we are now called upon to review.

The defendant maintains that it has the right to cross the plaintiff's entry and windway for several reasons which we shall now consider:

1. It is urged that the right reserved by Horton and Dabney in their deed to the defendant was not assignable, and *Boatman v. Lasley*, 23 Ohio St. 614, is relied on. In that case this court decided that a right of way *in gross* is a right personal to the grantee and cannot be made assignable or inheritable by any words in the deed by which it is granted. This is undoubtedly the law. In the case at bar, however, the right of way was not *in gross*, but was *appurtenant* to the land known as the Goulding platform, the conveyance of which to Pomeroy, together with the right of way appurtenant thereto, was effectual to pass title.

2. Defendant insists that, by the terms of the deed from Horton and Dabney, nothing more was reserved than a right to an entry extending from the platform in a direction due north, along the easterly side of the tract; and that, by going west to the centre of the tract and there driving his entry north, the plaintiff has exceeded the right granted him and has cut off the defendant's approach to its coal fields in the northeast quarter of its land, unless it is permitted to cross his entry. We are not prepared to say that in driving his entry as he did Pomeroy was a trespasser. Although doubtless it was possible to extend the entry due north through the deserted mines to the north and east sides of the tract, yet it clearly appears from the evi-

dence that such a course was not reasonable or practicable, and it does not appear that Pomeroy went any further to the west than was absolutely necessary to find standing coal sufficient to support his entry. This we think, under the terms of the reservation, he had a right to do. Had we any doubt upon this subject, however, such doubt would be set at rest by considering the subsequent action of the parties.

It seems to have been conceded by Pomeroy that the coal taken from his new entry belonged not to him but to the Salt Co., and he therefore proposed to pay the company at the rate of three quarters of a cent per bushel, measured in the solid, for all coal so taken out by him. This proposition, by its terms referred only to coal taken from the *solid vein* and not to such loose coal as might be found in clearing up the old entries or in the deserted workings. The proposition was, by a vote of defendant's directors, formally accepted on the 24th of April, 1874, and an agreement in writing was entered into four days later, which, after reciting the conveyance from Horton and the heirs of Dabney to Pomeroy, reads as follows:

"And whereas, in the prosecution of the right so acquired, the said Samuel Wyllys Pomeroy, in driving his entry, passes through coal which he concedes is the property of the Buckeye Salt Company: now, therefore, the said company agrees to receive, as full compensation therefor, and the said Samuel Wyllys Pomeroy to pay, to the said company, for the coal removed by him in the prosecution of his said right of way, a royalty of three-fourths of a cent a bushel.

"It is also mutually agreed by the said parties that the coal so removed shall be estimated by measurement of the space occupied by the same before removal, by competent mining engineers, who shall make due allowance for customary waste in mining, slack, etc., on which no royalty is accustomed to be paid."

The evidence shows that Pomeroy paid royalty from time to time, on all the coal taken out by him in driving his entry and windway through the standing coal according to the terms of this contract; and that all this coal as taken out was purchased from him by the Salt Co.

Under this state of facts we do not think that defendant is in a position to question plaintiff's right to locate his entry as he did.

3. Under this state of facts the question arising for decision is, whether defendant has the right to cross the plaintiff's entry, at the same level, by an entry of its own. It is clear from the facts proved that to cross at any other level above or underneath plaintiff's entry would be impossible.

We do not think that there exists any difficulty in ascertaining the principles of law which govern the case. It having been established that Pomeroy has a right to the use of his entry as located and constructed, it is clear that defendant should not be permitted to do any act whereby such right will be destroyed or substantially interfered with. It is also clear that

the Salt Co., being the owner of the land, subject only to the easement, has the right to the use thereof in any manner not inconsistent with the easement reserved. If then it is possible for it to cross the entry of plaintiff in the manner proposed, without destroying or substantially interfering with his use of the same, its right to do so is beyond question; and, if such right exists, we cannot see that the defendant's reason for making the crossing, whether for the purpose of mining coal in its own tract or of obtaining coal from lands lying to the east, is a subject for the court's consideration. These are the principles applicable to rights of way upon the earth's surface and we are not aware that they lose their application where such rights of way happen to be underground.

It is claimed by plaintiff that it is impossible to cross his entry, by another entry at the same level, without rendering his right of way useless and the working of his veins impracticable; for the reason that the necessary breaking of the continuity of his entry and windway will destroy the draft of air, by which his veins are ventilated, and without which it is absolutely impossible to work them. He also says that the danger of collision between trains at the crossing would be very great, owing to the darkness of the entries and the impossibility of discerning the approach of a crossing train until the moment of contact. On the other hand it is claimed that these are not necessary consequences of the proposed crossing; but, on the other hand, that, if the openings in the walls of plaintiff's entry and windway are closed with air-tight doors, which shall only be opened to admit the passage of trains, and then closed, the ventilation will not be interfered with, at least to any material degree; and that, by having a watchman constantly stationed at the point of crossing, all danger of collision will be avoided.

In support of these several claims a large amount of testimony has been taken, all of which is before us, and all of which we have examined with care.

We are satisfied that the crossing of the entries, if properly made by defendant, all reasonable means being used by it to prevent injury to plaintiff's right of way, such as have been referred to, his use of his entry will not be seriously affected.

It will be observed that no charge is made that defendant proposes to cross plaintiff's entry in an improper manner; on the contrary the only claim of threatened injury is that defendant proposes to make the crossing. This crossing we think, as before said, the defendant has the right to make, provided it protects plaintiff, at its own expense, from all possible injury; and we have no reason to suppose that it intends to do otherwise. These being the issues before the district court we think that court was right in dismissing plaintiff's petition and refusing an injunction. No injury was threatened. Should the defendant, in effecting such crossing, fail to use all proper means to protect the rights of

plaintiff, or at any time fail to provide the same, the courts are open to hear the complaint. Indeed we see no reason to doubt the power of the court to enforce all reasonable conditions on the part of defendant, by mandatory injunction even after the crossing has been completed and the new entry used.

Judgment affirmed.

Johnson, J., did not sit in above case.

[This case will appear in 37 O. S.]

REAL ESTATE—ADMINISTRATOR'S SALE TO PAY DEBTS—FORMER SALE BY HEIR AT PRIVATE SALE— EFFECT OF.

SUPREME COURT OF OHIO.

MARY SIDENER

v.

JAMES E. HAWES, ADM'R, ET AL.

February 28, 1882.

1. The creditors of an estate are entitled to have the same settled in due course of administration, and in case of a sale of real estate to pay debts, that it be made by order of a competent court. It is no bar to an action by an administrator to sell land to pay debts, that the heir has, without an order of court, sold the same at private sale and applied the proceeds in satisfaction of preferred claims.

2. An order of sale of real estate to pay debts, made by the court of common pleas on a petition which states facts sufficient to warrant such an order, will not be reversed for want of a journal entry showing that the facts stated in the petition were found to be true. In such a case the reviewing court will presume that the judgment was founded on proper proof.

3. If an heir, to whom lands descend subject to the debts of his ancestor, sells the same with covenants of general warranty at private sale, without administration on his ancestor's estate, to a *bona fide* purchaser who applies the purchase money to discharge liens thereon created by the ancestor, and to the payment of preferred claims, such purchaser is in equity entitled, in the distribution of the purchase money, to be subrogated to the rights and equities of the holders of such claims.

4. In a proceeding to sell land to pay judgment creditors pending in the court of common pleas, it is competent for the heir, who still retains an interest in the subject matter, by cross-petition to attack such judgments on the ground of fraud.

5. A sale of the real estate by the heir with covenants of general warranty, before the commencement of proceedings to sell the same to pay debts, where the purchase money is applied to the payment of preferred claims thereon, does not thereby divest himself of such an interest in the subject matter, so as to defeat his right to file such cross-petition, and to protect his vendees.

6. If the allegations of the cross-petition implicate the administrator, as well as the judgment creditors in fraudulently obtaining such judgments, they are as against the heir, united in interest as to the subject matter of the controversy.

7. On error by the heir to reverse a judgment dismissing such cross-petition, service upon the administrator within the time fixed for the commencement of such proceedings, saves the action as to his co-defendants so united in interest, though not served within that time.

Error to the District Court of Greene County.

The following is a statement of facts so far as is necessary to present the points decided.

James E. Hawes, as administrator of Daniel Sidener, filed a petition in the Court of Common Pleas of Greene County, to sell lands to pay debts

of his intestate. Mary Sidener, who was sole heir, Clements and Wetherholts and William Law, her vendees were the defendants. He alleges that Daniel Sidener died in 1864, having neither widow nor children, nor any personal assets, but seized in fee of the land sought to be sold, lying in Greene County, to pay about \$800 debts of the intestate.

It is averred, that said Mary Sidener, sister and sole heir of deceased, sold said land in 1875, to defendants, Clements and Wetherholts, and that she, with one Jane Sidener, her mother, conveyed the same by deed of general warranty, and that Clements and Wetherholts sold and conveyed the same to defendant, William Law, who is in possession under the title so derived.

The prayer is, "that the several rights, liens &c. of the above defendants be adjusted &c.; and that your petitioner may be ordered to sell real estate, and for such other relief as the facts proven may at the hearing of this cause warrant and justify."

The defendants answered separately. Mary Sidener admits that she is sole heir, and states that Daniel Sidener, at the time of his death, resided in Fayette County, Kentucky, but died in Greene County while there on a visit, that letters of administration, on his estate, were granted by the County Court of Fayette County to one Kauffman who discharged his duties and made full settlement of said estate in said court, that in 1865, he with this defendant, came to Ohio, and contracted to sell said land to Clements and Wetherholts, for \$1,800, which was paid as follows, \$1,185 to satisfy a purchase money mortgage, made by Daniel Sidener, and the balance was used to defray certain debts which by law are preferred. She also sets up the fact, that Daniel Sidener was indebted to her some \$1,200. the purchase money of land she sold to him in Kentucky. Her prayer is that the petition be dismissed.

A demurrer to this answer was sustained.

Clements and Wetherholts filed an answer and cross-petition, claiming to be *bona fide* purchasers of said land, and averred that they applied the purchase money to the discharge of said mortgage, the payment of taxes, funeral expenses and other preferred debts. They insist on the validity of their title, and admit the sale to Law who is in possession.

Their prayer is, that plaintiff be denied the relief he asks, that the title derived from Mary Sidener be declared valid, and that they have such other relief as in equity they are entitled to.

William Law sets up his title and possession in good faith, and that he has made permanent and valuable improvements worth \$650, and prays for proper relief.

At the November term, 1869, the cause came on for hearing on the petition and said answers and cross-petitions, and the court found that none of them constituted a defense to the action, and proceeded to order a sale of the real estate. At the same time, all questions concerning distri-

bution of the proceeds of sale, and all issues that may be raised on the cross-petitions, were reserved for further consideration, with leave to plaintiff to reply thereto.

Replies were filed putting in the issue the claims of Clements and Wetherholts, and William Law, and of Mary Sidener.

Such proceedings were had under the order of sale, that the land was sold to said Law for \$2,132.52. The sale was confirmed January 4, 1871, and the administrator was ordered to make him a deed, but no order was made respecting the disposition of the purchase money.

February 4, 1872, Mary Sidener, by leave, filed an amended answer and cross-petition. She states that Daniel Sidener died November 13th, 1864, while on a visit to a family of his manumitted slaves, whom he had settled in Greene County. The family consisted of the mother and two minor children, *John and Mary Sidener, jr.* She relates the settlement of the estate of Daniel Sidener in Fayette County, Kentucky, with full knowledge of said children, and alleges that neither of these minor children had any claims against the same, and yet they are the only parties that are making claims against the estate, and that it was at their instance that plaintiff was appointed administrator in Greene County. She charges that these children have fraudulently conspired with others unknown, to cheat and defraud said estate, and have presented false and fraudulent claims against the same for services to said Daniel Sidener, and that plaintiff well knowing their fraudulent character, by carelessness and negligence, has suffered them to be referred to arbitrators, and to be determined on false and *ex parte* evidence, all for the purpose of defrauding said estate, by means of which neglect and carelessness, the claim of John Sidener for \$750 has become a judgment of the court which he has assigned to John Little without consideration.

A second defense is, in substance, the same as the original answer and cross-petition as to the full settlement of the estate under the Kentucky administration.

The prayer is, that said John Sidener and his assignee, John Little, and Mary Sidener, jr., be made defendants, the judgment against said estate, in favor of John and Mary, be set aside, and for all other proper relief.

On the 20th of February, 1871, said John Sidener, John Little and Mary Sidener, jr., filed a joint demurrer to said answer and cross-petition, on the ground that it did not state facts sufficient to entitle said Mary Sidener to the relief prayed for, nor to constitute a cause of action against them, and on the further ground that there was a misjoinder of causes of action.

The plaintiff neither demurred nor replied, and as to him, this answer and cross-petition stands as upon default.

On the day this demurrer was filed, it was submitted to the court and sustained, and thereupon judgment was rendered against Mary Sidener and in favor of plaintiff, for all the costs made by

population of less than 50,000, was the county seat of Wayne county, in which was elected annually a city treasurer, who was *ex officio* treasurer of the city school district, and whose duty it was to receive from the county treasurer all moneys belonging to the city and school district, and disburse the same according to law.

Between the date of the bond and the commencement of Koch's term of office, to wit: on the 2d of April, 1870, the General Assembly passed an act (67 Ohio L. 32), providing among other things, "that in cities of first and second class, having a population of less than 50,000, embracing a county seat, no election for city treasurer shall be held, but the county treasurer shall in such cases, act as city treasurer etc."

Hence, it is contended by plaintiffs in error, that as sureties for Koch as treasurer of the county as aforesaid, they are not liable on their bond, for any failure on the part of their principal "to pay over according to law," monies which came into his hands for the use of said city or school district.

This duty is within the very letter of the bond, and, in contemplation of law, must be regarded as within its intent and meaning as understood by the parties at the time of its execution. The power of the legislature to modify the duties of the officer during his term cannot be doubted, and the exercise of such power must have been within the contemplation of the parties at the time the bond was executed, "according to law," embraces statute law in force during the term of office, whether passed before or after the execution of the bond. *King, Carey & Howe v. Nichols*, 16 Ohio St. 80, approved and followed.

Judgment affirmed.

[This case will appear in 37 O. S.]

SURETIES OF PUBLIC OFFICER.

SUPREME COURT OF OHIO.

THE STATE OF OHIO, ON RELATION OF ARCHIBALD
DAWSON AND OTHERS,

v.

BOARD OF EDUCATION OF WOOSTER.

March 21, 1882.

A special act taking effect on the day of its passage, required the board of education of a city to release the sureties of a county treasurer from liability for school funds of the board, which came to the hands of the treasurer for disbursement, but the release was not to be made until the question whether the sureties should be released was determined in favor of the release by a majority of all the votes cast in such city at the then next April election. Held, that the act is not in conflict with the Constitution; and the fact that judgment had been rendered against the sureties for the amount of such funds, will make no difference. *Board of Education v. McLandborough*, 36 Ohio St. 227, followed.

Mandamus.

This is a proceeding in mandamus by Dawson and others, sureties of Jacob B. Koch, treasurer of Wayne County, to compel the Board of Education of Wooster, in that county, to release from liability to said board Archibald Dawson and

others, sureties as aforesaid, as to the amount found to be due to said board and unpaid, which sum forms part of the judgment in favor of the county commissioners of said county and against Dawson and the other sureties, which judgment was affirmed in the preceding case of *Dawson v. The State*, ante—.

These are the facts. At the March term, 1876, of the Court of Common Pleas of Wayne County, a judgment was rendered in favor of the County Commissioners of Wayne County, against Jacob B. Koch, treasurer of that county, and Dawson and others, his sureties, for \$26,210.23, based on the defalcation of Koch as such officer. It was found and adjudged in the case, that the amount due to Wayne County, the city of Wooster, and the board of education of the city, was \$58,680.77, while the amount in the treasury was only \$38,669.86, leaving a deficit of \$20,010.91, which with interest and penalty amounted to the sum for which judgment was rendered. The county commissioners gave Koch a receipt, at the settlement, for the sum so found in the treasury, and it is agreed that if the relators are entitled to a peremptory writ of mandamus requiring the Board of Education of Wooster to release the sureties as to any amount, such writ should require the release as to the sum of \$5,285.66, which is embraced in the judgment, according to the principle determined in *Commissioners v. Springfield*, 36 Ohio St. 643.

The relators claim they are entitled to have the release entered by authority of an act "for the relief of the sureties of Jacob B. Koch," etc. (74 Ohio L. 417.) That act took effect and was in force from and after March 20, 1877, the day of its passage. It provided that the county commissioners should release and cancel the judgment as to Dawson and the other sureties, but not as to Koch. Before making such release and cancellation, the commissioners were required to submit the question whether such act should be done to the electors of Wayne County at the April election, 1877, upon ten days notice published in one or more newspapers. Electors throughout the county were requested to vote as to the release of the amount due the county, and the ballots to be cast within the city were required to contain an expression, first, as to the release of the amount due the county; second, as to a release of the amount due the city; and, third, as to the release of the amount due the board of education of the city. And the act further provided, that "if a majority of all the electors of the city of Wooster, voting at said April election upon the second and third propositions, or either of them, as herein specified, shall vote 'yes,' then the board of education and city council of the city of Wooster shall each respectively release all the sureties on the bond of the said Jacob B. Koch * * * from all liability for the payment of any sum or sums of money due to the board of education or the city of Wooster on account of such suretyship."

A majority of the votes cast at the aforesaid election was in favor of such release as to the

amount due to the board of education; but the board of education refused to make or enter such release, and this proceeding by mandamus is to compel the board to perform that service.

Lynch, Day and Lynch, for relators.

The law was not invalid because the release was not to be entered until it was shown that a majority of those voting at the April election were in favor of such release. 1 Ohio St. 77; 1 Ohio St. 105; 2 Ohio St. 607; 2 Ohio St. 647; 5 Ohio St. 497; 8 Ohio St. 564; 26 Ohio St. 618; 36 N. J. 72; 108 Mass. 27; 42 Md. 71; 13 Grat. 90; 26 Vt. 365; 72 Pa. St. 491; 42 Conn. 364; 10 Foster, 279.

W. J. Gilmore, J. McSweeney, sr. and J. McSweeney, jr., for the defendant.

As to 1st point of *per curiam*, Ram. on judgment, 17; Rev. Stats. § 1126; 2 Bl. Com. 137; Acheson v. Miller, 2 Ohio St. 203. As to the 2d point, Goodale v. Fennell, 27 Ohio St. 426. As to the 3d point, Rev. Stats. § 1080. As to the 4th point, Kelly v. The State, 6 Ohio St. 269; Lehman v. McBride, 15 Ohio St. 573; *Ex parte Hagan*, 25 Ohio St. 426. As to the statutes to require a preliminary vote, 2 Ohio St. 607; 8 Ohio St. 564; 1 Ohio St. 105; 26 Ohio St. 618. In all these cases the thing to be done was prospective.

BY THE COURT.

Several objections are urged against the allowance of the peremptory writ:

1. The legislature is prohibited by the constitution, Art. 1, § 19, from passing an act to require the release of the amount due the board of education, which is passed into judgment.

2. The act is retroactive and impairs the obligation of a contract, and hence is prohibited by the const. Art. 2, § 28.

3. The money directed to be released is a trust fund, under the const., Art. 6, §§ 1 and 2; and the general assembly had no such power with respect to it.

4. The act has a general subject matter, but being special, it is in conflict with the const. Art. 2, § 26.

In answer to this contention it is sufficient to say that the objections are not well taken, and that the case is not distinguishable in principle from Board of Education v. McLandsborough, 36 Ohio St. 227. And see State ex rel., Corry v. Hoffman, 35 Ohio St. 435; Nelson v. Milford, 7 Pick. 18; The State v. Hammonton, 38 N. J. L. 430. The only question before us is as to the legislative power, and that being resolved in favor of its existence, the responsibility as well as the power, with respect to such legislation, must rest with the general assembly.

Peremptory writ awarded, requiring a release as to \$5,285.66.

[This case will appear in 37 O. S.]

ACCOMMODATION INDORSER—COLLATERAL SECURITY.

SUPREME COURT OF OHIO.

PITTS, GRAHAM & Co.

v.
CHRISTIAN FOGLESONG.

March 21, 1882.

One not induced by fraud who indorses a negotiable promissory note owned by another, for his accommodation, without restriction as to its use, is liable to an indorsee who receives it in good faith from the owner, before due, as collateral security for an antecedent debt of such owner, although there be no other consideration for giving such collateral. *Roxborough v. Messick*, 6 Ohio St. 448, distinguished.

Error to the District Court of Fairfield County.

On January 18, 1872, Creed Bros. of Lancaster, Ohio, being indebted to Pitts, Graham & Co., of Baltimore Md., in the sum of \$864.48, executed and delivered to them, payable to their order, two promissory notes of that date, each for \$432.24, one due in sixty and the other in ninety days after date. At the same time Creed Bros. were owners of a promissory note for \$850, dated August 10, 1871, due two years after date, with interest from date, executed by Charles Becker, and payable to William Keller, or order. This note had been indorsed by Keller "without recourse," and in March, 1872, and previous to the 18th of that month, it was indorsed by Fogle-song, for the accommodation of Creed Bros., at the request of their father, and without restriction as to the manner in which the note should be used.

On March 13, 1872, Creed Bros. seeing that they would be unable to make payment in full of their note for \$432.24, falling due in that month, applied to Pitts, Graham & Co. for an extension of time as to part of it. They proposed to make to Pitts, Graham & Co. a payment on the note, and informed them that they owned the Becker note, and desired to forward it to them so that they could have it discounted, apply the proceeds in satisfaction of such indebtedness, and send to them (Creed Bros.) the balance. This proposition was assented to by Pitts, Graham & Co., and in pursuance of an agreement between them and Creed Bros., the latter, on March 19, 1872, sent to them \$232.24 in cash and their note of that date for \$200, payable to the order of Pitts, Graham & Co. on April 18, 1872, which cash and note equalled the note so falling due in March, and Creed Bros. also sent to Pitts, Graham & Co. the Becker note, which cash and notes were received by the latter by due course of mail. Pitts, Graham & Co. having failed to procure a discount of the Becker note, informed Creed Bros. of the fact, and they, on April 8, 1872, wrote to Pitts, Graham & Co. as follows: "We wish you to hold (the Becker note) in protection to yourselves and us until you hear from us." In reply to this, on April 20, 1872, Pitts, Graham & Co. acknowledged receipt of the letter, and said:

"We will hold the note as collateral security for your notes to us." And there was no objection at any time from Creed Bros. or Foglesong that the Becker note should be so held.

Creed Bros. failed, without paying any part of their remaining indebtedness to Pitts, Graham & Co., and the latter demanded payment of the Becker note when it became due and gave notice of non-payment to Foglesong, and subsequently brought suit against Foglesong in the Court of Common Pleas of Fairfield County. In that court it was found that the amount of the Becker note exceeded the indebtedness of Creed Bros. to Pitts, Graham & Co., and judgment was rendered in favor of the latter, and against Foglesong, for \$799.50 the amount of such indebtedness. That judgment was reversed in the district court, and this petition in error was filed in this court to reverse the judgment of reversal.

John S. Brasee, for plaintiffs in error.

"It is universally conceded that the holder of an accommodation note, without restriction as to the mode of using it, may transfer it, either in payment or as collateral security for an antecedent debt, and the maker will have no defense." 1 Parsons on Bills and N. 226; Rutland Bank v. Buck, 5 Wend. 66; Grandin v. Le Roy, 2 Paige, 509; Lathrop v. Morris 5 Sand. 7; Mohawk Bank v. Corey, 1 Hill, 513; Mathews v. Rutherford, 7 La Ann. 225; Appleton v. Donaldson, 3 Pa. St. 386; Boyd v. Cummings, 17 N. Y. 161; DeZeng v. Fyfe, 1 Bosw. 335; Robbins v. Richardson, 2 Bosw. 248; Kirabro v. Lytle, 10 Xerg. 427; Lord v. Ocean Bank, 20 Pa. St. 384; 12 S. & R. 382; 3 Barr, 381. And this is not inconsistent with Roxborough v. Messick, 6 Ohio St. 448, or Kingland v. Pryor, 33 Ohio St. 19.

K. Fritter, for defendant in error.

It is stated in the note sued on that it is secured by mortgage, and hence Pitts, Graham & Co. were not protected against defense that the note as to Foglesong was without consideration. Baily v. Smith, 14 Ohio St. 396. The note was indorsed to enable the parties to procure discount of the same, and hence Foglesong is not liable to persons who assume to hold it as collateral security. Stone v. Vance, 6 Ohio 246; Williams v. Bosson, 11 Ohio, 62; Knox Co. Bank, v. Lloyd 18 Ohio St. 353. Regarded as collateral security it was taken without any extension of time or other consideration, and hence, as against Foglesong is no more enforceable in favor of Pitts, Graham & Co. then it would be in favor of Creed Bros. Roxborough v. Messick, 6 Ohio St. 448; Quebec Bank v. Weyand, 2 Cin. Sup. Ct. 538.

OKEY, C. J.

Where one not induced by fraud indorses a negotiable promissory note for the accommodation of another, without restriction as to the use which may be made of the note, a third person who receives it before due as collateral security for a debt to become due from the person for whom the indorsement was made, and subsequently prosecutes an action against such indor-

ser, will not be affected, with respect to his right to recover, by the fact that such defendant is an accommodation indorser. The obligation of the indorser in such case is the same, whether the indorsement was for value received or for accommodation. Stone v. Vance, 6 Ohio 246; Riley v. Johnson, 8 Ohio 526; Williams v. Bosson, 11 Ohio 62; Clinton Bank v. Ayers, 16 Ohio 282; Portage Co. Bank v. Lane, 8 Ohio St. 405; Erwin v. Shaffer, 9 Ohio St. 43; Knox Co. Bank v. Lloyd, 18 Ohio St. 353; Kingland v. Pryor, 33 Ohio St. 19; First National Bank v. Fowler, 36 Ohio St. 524. And see Jackson v. Bank, 42 N. J. L. 177.

The question in this case is, therefore, as to the liability of Foglesong upon his indorsement, in view of the fact that the note so indorsed was transferred by Creed Bros. as collateral security for the payment of notes to become due from them to Pitts, Graham & Co., no express agreement having been made by the latter for an extension of time or other favor with respect to the notes made by Creed Bros.

In Roxborough v. Messick, 6 Ohio St. 448, it was held: "Where the note of a third person is transferred bona fide before due, as collateral security, and for value, such as in consideration of a loan or advancement, or a stipulation, express or implied, of further time to pay a pre-existing debt, or in consideration of a change of securities of a pre-existing debt, or the like, the holder of such collateral will be protected from infirmities affecting the instrument before it was thus transferred." And see 1 Daniel's Neg. Insts. § 830.

Here there was no consent on the part of Pitts, Graham & Co. to the extension of time as to any part of the debt, until their debtors proposed to place in their hands the Becker note, and it is a presumption which is by no means unreasonable that obtaining possession of that note was with them an essential part of the arrangement by which the time was extended. True, they had been unable to dispose of the note in the manner intended, though it does not appear that they had abandoned hope of disposing of it substantially in the same way. It is certain that they did not return it to Creed Bros., but retained possession, and it is not probable they would have consented to part with possession before they were paid. That they only agreed not to dispose of the note in view of the agreement that they should hold it as collateral security, and that this is in harmony with the original purpose of the parties, is by no means improbable. Moreover, they did in fact wait until the Becker note became due, retaining it in the meantime; and they demanded payment of the maker, at the maturity of the note, and gave notice of non payment to Foglesong, the indorser, and then brought suit, the debt from Creed Bros. remaining unpaid. But whether or not it is to be fairly inferred from these facts that time was given to Creed Bros. in consideration of the security afforded by the Becker note, within the rule so stated in Roxborough v. Messick, is a question not entirely free from diffi-

culty, and it is unnecessary to express any definite opinion upon it.

The defendant's counsel insists that the case falls within the second proposition decided in *Roxborough v. Messick*, and hence that Pitts, Graham & Co. were not entitled to recover. That proposition is as follows: "When a debt is created, without any stipulation for further security, and the debtor afterward, without any obligation to do so, voluntarily transfers a negotiable instrument, to secure the pre-existing debt, and both parties are left in respect to the pre-existing debt, in *statu quo*, no new consideration, stipulation for delay, or credit being given, or right parted with, by the creditor, he is not a holder of the collateral for value, in the usual course of trade, and receives it subject to all the equities existing against it at the time of the transfer."

We are by no means disposed to question the proposition so decided. While it is not concurred in by some judges for whose opinions we have great respect (*Railroad Company v. National Bank*, 102 U. S. 14; *Poirior v. Morris*, 2 E. & B. 89; *Currie v. Misa*, L. R. 10 Ex. 153; 1 App. Cas. 554; 14 Am. L. Rev. 481), its correctness has been repeatedly recognized in this court and elsewhere. *Hatch v. Langlon*, 7 Ohio St. 248, 255; *Gebhart v. Sorrels*, 9 Ohio St. 461, 466; *Cleveland v. State Bank*, 19 Ohio St. 145, 150; *Copeland v. Manton*, 22 Ohio St. 398, 402; 14 Am. L. Rev. 485.

But the principle so stated in *Roxborough v. Messick*, is not applicable to this case, and hence cannot control it. The same rule prevails in *Pennsylvania* (*Petrie v. Clark*, 11 S. & R. 377; *Royer v. Keystone Bank*, *Cummings v. Boyd*, 83 Pa. St. 248, 372), and yet in *Lord v. Ocean Bank*, 20 Pa. St. 384, it was held that "the maker of an accommodation note cannot set up the want of consideration as a defense against it in the hands of a third person, though it be there merely as a collateral security for a debt of the payee." *Black, C. J.*, who delivered the opinion, fully recognized the rule applied in *Roxborough v. Messick*, and added: "But the maker of an accommodation note cannot set up the want of consideration as a defense against it in the hands of a third person, though it be there as a collateral security merely. He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend, must abide the consequence (12 S. & R. 382), and has no more right to complain, if his friend accommodates himself by pledging it for an old debt, than if he had used it in any other way." And the same thing had been asserted before, and was asserted afterward in the same court. *Appleton v. Donaldson*, 3 Barr, 381; *Work v. Kase*, 34 Pa. St. 138.

So, in New York the rule is as stated in the second proposition in *Roxborough v. Messick*, (14 Am. L. Rev. 485; *Duncomb v. N. Y. etc R. Co.* 84 N. Y. 190, 204), and yet in *Grocers' Bank v. Penfield*, 69 N. Y. 502, the court, fully recognizing that fact, hold: "Where a promissory note is made for the accommodation of the payee, but

without restriction as to its use, an indorsee taking it in good faith as collateral security for an antecedent debt of the payee and indorser, without other consideration, occupies the position of a holder for value, and can recover thereon against the maker. The precedent debt is a sufficient consideration for the transfer, and no new consideration need be shown. It is only where the note has been diverted from the purpose for which it was intended, by the payee, or where some other equity exists in favor of the maker, that it is necessary that the holder should have parted with value on the faith of the note, in order to enforce the same." And the same distinction had been asserted in that State previously, and has been re-asserted subsequently. *Schepp v. Carpenter*, 51 N. Y. 602; *Freund v. Bank*, 76 N. Y. 352.

Cases in support of the distinction here made are quite numerous. Many of them are collected in 14 Am. L. Rev. 486, 488; *Story on Prom. Notes* (7th ed.) 265, 266, note; *Maitland v. Citizens' Bank*, 40 Md. 540, 567; 9 Ohio St. 51. Indeed, the only case I have found which can be regarded as supporting a different view of the law upon this subject, is *Bramhall v. Beckett*, 31 Maine, 205 (cited in *Nutter v. Storer*, 48 Maine, 163); but in that case the distinction so well made in *Lord v. Ocean Bank*, *Grocers' Bank v. Penfield*, and other cases cited, is not alluded to by court or counsel.

A claim has been made that the language of the court in *Roxborough v. Messick* is broad enough to warrant the conclusion that *Foglesong* is exonerated from liability upon the mere ground that he was an accommodation indorser. But in that case it appeared that *Roxborough*, the maker of the notes, had a defense to them, and their transfer by *Wilcox*, the payee and indorser, as collateral security, was a fraud upon him. Of course the learned judge who delivered the opinion in that case never intended it to extend to a case arising on an accommodation indorsement of this character, and any general language he may have employed must be limited to cases like that which was then before the court.

Judgment reversed.

[This case will appear in 37 O. S.]

MUTUAL AID ASSOCIATIONS.

SUPREME COURT OF OHIO.

THE STATE EX REL. FIDELITY AID ASSOCIATION
v.
CHARLES H. MOORE, SUPERINTENDENT.

March 21, 1882.

1. A company of another State organized for "insuring lives on the plan of assessment upon surviving members," without limitation, does not come within the class of companies provided for in Section 8630 of the Revised Statutes. That section does not embrace companies insuring the lives of members for the benefit of others than their families and heirs.

2. The supplementary act of April 12, 1880 (77 O. L. 178), does not enlarge the class of companies provided for in said section, but merely prescribes the regulations un-

der which such companies, whether domestic or foreign, may do business in the State, and subjects them to additional supervision.

Mandamus.

This is an application by the State on the relation of the Fidelity Mutual Aid Association, a corporation organized under the laws of Pennsylvania, for a mandamus against Charles H. Moore, the Superintendent of Insurance of this State, to require him to issue a certificate to the relator, to the effect that it has complied with the laws of this State "regulating corporations, companies or associations organized for the mutual protection of its members within this State."

The relation shows that the relator was organized under section 37 of the act of the Legislature of Pennsylvania approved May 1st 1876, which is averred to be as follows: "Companies insuring lives on the plan of assessments upon surviving members may be organized in the same manner as provided in this act for the organization of mutual fire insurance companies, and the provisions of the act to which this is supplementary, shall not apply to said companies, and companies heretofore organized, if their business is transacted in accordance with the provisions of their respective charters, whether with or without capital stock, guarantee capital, or accumulated reserve, in lieu of capital stock; provided however that each of said companies shall be required to exhibit an annual statement to the insurance department which shall be published in the annual report of the insurance commissioner, of the amount, if any, of its capital stock; and also of all of its assets, assessments and liabilities, and to answer such interrogatories as the insurance commissioner may require, in order to ascertain its character and condition. For this purpose the said commissioner may at any time institute an examination of the affairs of any such company, as is provided in the case of mutual insurance companies, by the act to which this is supplemental; provided, also, that no part of such assessment upon surviving members shall be applied to any other purpose than the payment of death losses, unless the amount intended for other purposes is specially stated in the notice of such assessment and the object or objects for which it is intended; provided further, that all policies or certificates issued by said companies shall state that the company issuing the same, is not required by law to maintain the reserve which life insurance companies are required by the act to which it is a supplement."

The scheme and mode of doing business by the company is determined by its by-laws, a copy of which is annexed to the relation and which are averred to be still in force and to govern the condition of its membership. Article one is as follows: "The object of this association shall be to secure to those having an interest in the lives of deceased members, a specified sum of money by assessment on surviving members."

"Art. 17. An assignment of a membership

and policy of insurance shall be void unless assented to in writing by the president or treasurer of the association."

Bateman & Harper and E. B. Jewett for plaintiff.

George K. Nash, Attorney General, for defendant.

WITTS, J.

The relator is a life insurance company, organized under the laws of the State of Pennsylvania, and the question raised by the Attorney General on behalf of the defendant is, whether it is entitled to do business in this State without complying with section 3604 of the Revised Statutes.

The business of life insurance in this State is regulated by statute. These regulations are found in chapter 10 of the Revised Statutes, commencing with section 3587, and in certain amendatory acts.

The relator, from the nature of its organization, claims to be exempt from the operation of section 3604, and to be entitled to carry on business in the State under section 3630, and section 3630 a. of the supplementary act of April 12, 1880, 77 O. L. 181.

The character of the company or association authorized to do business under section 3630 is thus described in the section: "A company or association may be organized for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of such company or association, and may receive money, either by voluntary donation or contribution, or collect the same by assessment on its members, * * * ; and such association shall not be subject to the preceding sections of this chapter."

It is companies and associations of this character alone that are exempt from the operation of the preceding sections of the act, and this exemption is allowed on account of the limited nature of the life insurance they are authorized to assume, being confined to insurance for the benefit of the families and heirs of members.

The exemption is not enlarged by the supplementary act of April 12, 1880, already referred to. Section 3630 a. of that act only embraces companies or associations organized under the laws of this State "for the purpose of doing business under the provisions of section 3630, or for the purpose of doing such business as is contemplated by said section."

The object of the act is to prescribe the regulations under which such companies or associations may do business and to subject them to additional supervision.

Section 3630 a. of the supplementary act does not enlarge the class of companies or associations, but merely prescribes what such companies or associations, organized under the laws of any other State, shall be required to do before they are permitted to do business in this State. They are required to comply with the laws of this State regulating, like companies and associations or-

ganized in this State, and obtain from the superintendent of insurance a certificate of such compliance.

The statute under which the relator is organized and the by-laws under which its business is carried on, authorize it to engage in the business of "insuring lives on the plan of assessment upon surviving members," without other restrictions than that policy holders shall have an interest in the lives of members.

Companies of this State cannot engage in the business of life insurance thus unrestricted, under section 3630 of the Revised Statutes; nor can companies organized under section 3587 to insure lives "on the mutual or stock plan," without furnishing security for the assured, as provided in section 3593. The section last named relates to domestic companies organized under section 3587; but the equivalent provision applicable to similar companies of other States if found in section 3604.

The law of comity which the relator invokes in support of his application, is fully satisfied when foreign companies are permitted to do business in this State upon the terms prescribed for domestic companies.

The writ must therefore be refused.

Okey, C. J. did not sit in this case.

[This case will appear in 37 O. S.]

RECOVERY ON BOND GIVEN TO DISCHARGE WATERCRAFT.

SUPREME COURT OF OHIO.

JONATHAN HAMILTON

v.

JOHN P. MERRILL AND A. O. SHEPARD.

March 21, 1882.

1. No recovery can be had on a bond given to obtain the discharge of a watercraft, seized under the Watercraft Law of Ohio, in an action against such craft, on a cause of a maritime nature, which is within the exclusive admiralty jurisdiction of the United States Courts.

2. The fact that the owner of such craft, after the bond was given, defended the action against it, on the merits, without objecting to the jurisdiction of the court, does not estop him and his sureties from pleading such want of jurisdiction in an action against them on the bond. The General Buell v. Long, 18 Ohio St. 521, followed and approved.

Error to the District Court of Gallia County.

On the 8th of May, 1860, plaintiff commenced an action against the Steamboat R. B. Hamilton, under the Watercraft Law of Ohio, to recover damages for sinking the plaintiff's flat-boat while navigating the Ohio River.

Upon a warrant issued in that action the boat was seized by the sheriff. To obtain its discharge, the sheriff, as authorized by the 5th section of that law (1 S. & C. 254), took a bond from defendants in the usual form, and delivered the boat to the defendant, Merrill, as master thereof.

A final judgment was rendered in that action in favor of the plaintiff, but the boat was not forthcoming to satisfy the same; hence this action on the bond.

To the petition there was a demurrer on the ground that the state court had no jurisdiction *in rem* against the steamboat and, therefore, as the court had no jurisdiction of the action in which the bond was given, no action could be maintained on the bond. On error to this court, it was held, that the judgment in the action against the boat, will not be held void, in a collateral action on the bond, for want of jurisdiction, where it does not appear that the judgment was rendered on a maritime cause of action.

Inasmuch as the petition on the bond did not show the nature of the claim on which the vessel was seized, and as the watercraft law had been held valid as to claims not maritime, the court would, until the contrary was shown, presume in favor of the jurisdiction of the court making the seizure. The demurrer was therefore overruled. *Hamilton v. Merrill and Shepard*, 25 O. St. 11. The case was remanded to the common pleas, where an answer was filed alleging the maritime nature of the original cause of action and the absence of jurisdiction of the State court. It further averred that the sheriff, without authority of law, had seized the steamboat, and that the owner was compelled, in order to obtain the custody of his property, to give this bond.

The reply admits the maritime nature of the action, but in avoidance, alleges that the bond was taken by the sheriff at the request of the obligors, to obtain possession of the boat, and that Merrill was master and sole owner, and as such pleaded to that action in the name of the boat, and made defence to the merits without objection to the jurisdiction of the court, hence it is claimed that these defendants, Merrill and Shepard, are estopped from objecting to the jurisdiction of the court in the present action.

A demurrer to this reply has been sustained in the courts below, and the object of the present proceeding is to reverse these decisions.

Simeon Nash, for plaintiff in error.

T. W. Hampton and D. B. Hebard, for defendant in error.

JOHNSON, J.

It is conceded that the cause of action in which the steamboat was seized, to obtain the discharge of which this bond was given, was of a maritime nature, and within the exclusive cognizance of the United States Courts.

This being so, the State court had no jurisdiction to seize the property, and no authority of law to exact the bond for its release.

The sole question, therefore, is, are the obligors on the bond estopped to raise the question of jurisdiction, by reason of the facts stated in the reply.

The acts alleged, as creating an estoppel are, that Merrill, who was sole owner of the boat, defended on the merits in the action against the boat without objecting to the jurisdiction of the courts. These acts were all *after* the bond was given. How these after acts can vitalize a

bond which the court had no authority to exact, it is not easy to comprehend.

It was not a voluntary bond. It was given *in invitum*, to obtain the release of property. As the seizure of the property was void the bond falls with it. Giving it under such circumstances could not confer jurisdiction on the court, over the subject-matter of the seizure. *Homan v. Brinkerhoof*, 1 Denio 184; In the matter of *Faulkner*, 4 Hill 598.

The claim is, that Merrill by defending on the merits, in the original action, has waived his right to defend in this action on the bond, on the ground that the court was without jurisdiction to require it.

We regard this question as settled. The *Steamboat General Buell v. Long*, 18 O. St. 521.

That case arose before the decision in *The Bel-fast*, 7 Wallace 764, and other cases, which decided that our watercraft law, so far as it related to maritime causes, was unconstitutional and void.

The boat was seized for such a cause. The defence was upon the merits, in the courts below, without objection to the jurisdiction of the State court. After a petition in error had been filed in this court by the craft to reverse the judgment rendered on the merits, a new assignment of errors was allowed, and then for the first time want of jurisdiction was set up as a ground of reversal.

This court held, that a failure to plead to the jurisdiction of the court in the trial court, was no waiver of the objection where such want of jurisdiction appeared upon the record.

In the opinion, it is said that it was not a case where the court had jurisdiction over the subject-matter of the suit, and therefore differs from want of jurisdiction over the person, which was a personal privilege that could be waived.

If a defence on the merits in the original action, without objection to the jurisdiction, was not a waiver of the right, after final judgment, to assign it as error and obtain a reversal, for equally cogent reason will such a defence be no bar to an answer setting up want of such jurisdiction in an action on the bond. The right to do so is equally as clear, and the reasons in support of it, rest on stronger grounds than the right to assign it as error, after final judgment in the original action.

This conclusion is supported by *Vose v. Cockroft*, 44 N. Y. 415, which, like the present, was an action on a bond given to obtain the release of a vessel seized under the Watercraft Law of New York, which its own courts had pronounced unconstitutional in *The Josephine*, 39 N. Y. 19.

In *Vose v. Cockroft* the defence was upon the merits, as to the liability on the bond, but there was no plea to the jurisdiction, as there is in the present case. It was there held, that the proceeding under which the vessel was released, and the bond exacted to obtain such release, were void, and that the owner of the craft had the right to its possession, and a bond given to obtain such

possession was not voluntary, but was obtained by duress and illegal compulsion.

It was, however, held, that as no plea to the jurisdiction had been made in the trial court, and as the court of appeals had no authority on review, to consider questions not made and decided in the court in which the judgment was rendered, the obligors on the bond must be deemed to have waived such plea. Here, however, the want of jurisdiction was urged in the court below, first by demurrer, as appears in 25 O. St. 11, and again by answer, to which the reply under consideration was filed.

Counsel for plaintiff are mistaken in supposing that this reply is sanctioned by the decision of *Cockroft v. Vose*, 14 Wallace 5, or that the decision in that case conflicts with the holding of this court in the case of *The General Buell*. All that was there decided was, that the Supreme Court of the United States had no jurisdiction to review on error, under the 25th section of the judiciary Act, the decision in 44 N. Y. for the reason that it did not appear from the record that the decision of the State court was in favor of the validity of the New York Watercraft Law. Hence no Federal question was presented on the record and the writ of error was dismissed. The remarks of Mr. Justice Miller in dismissing the writ were simply to show that the State court had not decided that the State law was valid, but the contrary, and, therefore, that the case did not come within the provisions of the 25th section of the Judiciary Act.

Judgment affirmed.

[This case will appear in 37 O. S.]

Digest of Decisions.

PENNSYLVANIA.

(*Supreme Court.*)

ANGIER v. EATON, COLE & BURNHAM Co. January 2, 1882.

Evidence—Patent—Royalty.—Where the evidence is such that a court would not sustain a verdict that should find against it, it is not error for the court to practically rule that there was no disputed question of fact for the jury to determine, instead of submitting the evidence to the jury.

While the patent is apparently valid, and the licensee is enjoying the benefit of its supposed validity, he is bound to pay the stipulated royalty, and cannot set up as a defense the actual invalidity of the patent; but when, in addition to the invalidity of the patent, by reason of a prior outstanding patent for the same invention, it is shown that the owner of the prior patent is asserting his exclusive rights thereunder by supplying the market with the patented article, forbidding all interference on the part of others, etc., and the licensee under the invalid patent is deprived of the enjoyment of the monopoly for which he contracted, and in consideration of which he agreed to pay the royalty, he may defend on the ground of the actual failure of the consideration.

WILSON'S APPEAL. March 13, 1882.

Undue Influence.—Where the chief beneficiary in a will was the confidential adviser of the testator, and was the main instrument in procuring the preparation and execution of the will, he will be required to prove affirmatively the circumstances connected with the drawing of

the will, that the testator was laboring under no mistaken apprehension as to the value of his property and the amount he was giving his confidential adviser, and that such gift was the free, intelligent act of the testator.

The court below in this case granted an issue as to the question of undue influence, and refused an issue upon the question of testamentary incapacity.

Held, that the evidence upon the latter point amounted to more than a scintilla.

In a case where the person is of great age, suffering from severe illness affecting his brain and vital powers, and where an investigation of a charge of undue influence is admittedly essential, it is best not to limit the investigation to that one matter. Under such circumstances undue influence and mental incapacity are very closely interwoven.

KENTUCKY.

(Court of Appeals.)

FLEETWOOD v. COMMONWEALTH. January 5, 1882.

1. *Criminal Law*.—A peace officer has the right and it is his duty to arrest one who is committing a breach of the peace in his presence, and to use such force as may be necessary to effect the arrest.

2. If a person disturbing the peace resists a peace officer, and in so doing kills said officer, he is guilty of murder if he knew that the person attempting to make the arrest was an officer, and guilty of manslaughter if he did not know it.

3. The law of self-defense as applicable to rencounters between private persons, does not apply in such a case, unless the person resisting the arrest has reasonable grounds to believe, and does believe, that the officer is not acting in good faith in the attempt to arrest; but is using his official position to gratify personal feeling against the person sought to be arrested, and that by submitting to arrest he will be in danger of great bodily harm or of losing his life.

COLORADO.

(Supreme Court.)

FISHER v. HENRY. December Term, 1881.

Statute—Construction of.—Statutes which are remedial should be liberally construed, to the end that intention of their enactment may be made effectual. Everything is to be done in advancement of the remedy that can be consistently with any construction that can be put upon the statute.

THE PUEBLO & ARKANSAS VALLEY R. R. CO. v. TAYLOR ET AL. December, 1881.

1. *Public Policy—Covenant Void as Against*.—The condition in a covenant to a railroad company that the latter shall not build a side track to its main line in a given town, is against public policy, and void.

2. *Contract—Void Consideration*.—Such void condition being embodied in a contract of mutual promises which constitute mutual consideration, and not severable from its other portions, vitiates the entire contract and no recovery can be had upon any part thereof.

NEW YORK.

(Court of Appeals.)

THE PEOPLE v. O'CONNELL. January 17, 1882.

Insanity—Practice.—Where the defense of insanity is interposed, the burden of proof as to whether the acts complained of were committed by the prisoner and whether he was at the time in such condition of mind as to be responsible for them is upon the prosecutor. He is bound to satisfy the jury on the whole evidence that the prisoner was mentally responsible, as he has the affirmative of the issue to the end of the trial.

The legal presumption that every man is sane is sufficient to sustain the latter point until evidence to the contrary is given.

Where a point has already been charged in substance it is not error for the court to refuse to again charge it.

MEAD v. STRATTON ET AL. January 17, 1882.

Civil Damage Act.—Plaintiff's husband went to defendant's hotel, drank several times and became so intoxicated that he had to be helped into his buggy. He was found dead with his knee caught under the foot bar and his head between the wheel and the wagon so that it had been beaten by the spokes and otherwise injured. *Held*, That an action to recover for loss of support could be maintained; that the statute was designed to embrace all injuries produced by the intoxication and which legitimately resulted therefrom.

Defendant, S., managed the hotel and his wife owned it and lived there with her husband and attended to the domestic arrangements. The evidence tended to show that she knew that her husband sold intoxicating liquors. *Held*, That it was for the jury to determine whether she knew the building was used for such purposes; that it could not be said as matter of law that the husband was in possession and that the wife was relieved from liability as an owner who had no knowledge of the sale of liquors; that it was immaterial whether the strict relation of landlord and tenant existed between them if she permitted him to occupy, with knowledge that he was engaged in such sales, and that the fact that the ownership and possession commenced before the statute was passed did not relieve her from liability.

THOM. SWAN v. THE PEOPLE. December, 1881.

Abortion—Evidence.—Where an abortion is committed in one county and death results therefrom in another, an indictment therefor may be brought in the latter county.

On the trial of an indictment for abortion a witness was allowed to testify as to statements made in his presence, which gave him the impression that the prisoner had attempted to produce abortion on other occasions. *Held*, Error.

SUPREME COURT RECORD.

[New cases filed since last report, up to March 27, 1882.]

1085. The Delphos Paper Co. v. Ferdinand J. King. Error to the District Court of Van Wert County. Saltgaber & Glenn for plaintiff; Richie & Richie, H. G. Richie and James McKenzie for defendant.

1086. Isaac Burkhart v. Wesley Tenpenning. Error—Reserved in the District Court of Williams County. Kont, Newton & Pugsley for plaintiff.

1087. John Wagner v. New York Chicago & St. Louis Railway Co. Error to the District Court of Cuyahoga County. J. W. Heisley for plaintiff; Estep, Dickey & Squire for defendant.

1088. J. H. Devereux, Receiver v. Stella M. Hart. Error to the District Court of Trumbull County. Adams & Russell and L. C. Jones for plaintiff; Hutchins & Tuttle and Harrison for defendant.

1089. Louis Woodmansee v. Hannah Woodmansee et al. Error to the District Court of Belmont County. Wm. Okey and others for plaintiff; D. D. T. Cowen & Son for defendants.

1090. B. F. Stahl v. Silas Idleman. Error to the District Court of Marion County. B. F. Stahl for plaintiff.

1091. Catharine Meyers v. John J. Myers. Error to the District Court of Wood County. Cook & Troup for plaintiff; F. A. Baldwin for defendant.

SUPREME COURT ASSIGNMENT.

FOR ORAL ARGUMENT.

April 12th—No. 40. W. H. Crabill Ex'r v. Nancy Marsh. Error to the District Court of Clark County.

April 20th—Julius C. Bowen et al. v. C. L. Bowen et al. Error to the District Court of Washington County.

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

HON. JOHN W. OKRY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

Tuesday, March 28, 1882.

GENERAL DOCKET.

No. 54. Detroit Fire & Marine Ins. Co. v. Commercial Mutual Ins. Co. Error to the District Court of Cuyahoga County.

LONGWORTH, J., *Held*:

Where an insurance company, after having taken a risk and reinsured in another company to indemnify itself against loss on its policy, discharges its liability by the payment of a less sum than that for which the original insurance was effected, the sum so paid by it will be taken as the amount of damage sustained, and the measure of indemnity to be recovered from the reinsuring company; provided such sum is within the amount of the reinsurance policy, and does not exceed the amount of actual loss, and such policy contains no condition for *pro-rating* loss or limiting liability.

Judgment affirmed.

No. 55. Steubenville v. Culp. Error to the District Court of Jefferson County.

LONGWORTH, J., *Held*:

A police officer, suspended from office, by the mayor of a city, under the authority granted by secs. 121 and 211 of the Municipal Code (66 O. L. 170 and 184), is not entitled to wages during the period of such suspension, notwithstanding the council afterward declared the cause of suspension insufficient.

Judgment reversed.

No. 56. The Marietta & Cincinnati Railroad Company as reorganized v. The Western Union Telegraph Company et al. Error to the District Court of Hamilton County.

McILVAINE, J., *Held*:

1. A railroad company, having a line of telegraph poles and wire, granted to a telegraph company, the privilege of placing another wire on the poles "for general telegraphic correspondence," and of establishing telegraph stations at points along the line as it might think proper, but reserving to the grantor all local telegraph business, "it being understood and agreed between the parties," that the telegraph company should be entitled only to the business of sending such messages as might be received at any of its stations destined for stations on other telegraph lines connected at points where it had stations, or such messages as might be received from other lines connected at points where it had stations destined for its stations, or other lines connected at points where it had stations, with a further agreement for *pro-rating* as to business re-telegraphed between the parties:

Held, 1. The right acquired by the telegraph company in the business of the line, other than local business, was not exclusive. 2. The railroad company was not precluded from placing another wire upon its poles either for its own use or the use of another party.

2. Equity will not compel specific performance, where the benefits of the contract cannot be realized in accordance with its terms. Hence, where a railroad company, having a line of telegraph, grants the use of its poles to a telegraph company on certain conditions and stipulations in favor of the grantor, which are *ultra vires*, an injunction will not be granted whereby the grantor will be required to perform other stipulations made in consideration of such void stipulations.

Judgment reversed and petition dismissed.

White, J. concurred in the judgment on the ground stated in the second proposition.

No. 57. John Wagner v. The N. Y. C. & St. L. Railway Co. Error to the District Court of Cuyahoga County.

JOHNSON, J., *Held*:

1. In proceedings by a corporation to appropriate private property, there must be a judgment confirming the verdict of the jury, before the corporation is entitled, by a deposit of the amount of such verdict, to possession of the property appropriated.

2. It is within the appellate jurisdiction of the supreme court to allow a temporary injunction where it

appears that defendant is doing or threatens to do acts respecting the subject of an action pending, tending to render the judgment ineffectual. (*Yeoman v. Lealey*, 28 Ohio St. 416 followed and approved.)

3. So where the relief sought in the court below was an injunction which was refused, and on error to this court the judgment is reversed for such refusal, this court may, in the exercise of its appellate jurisdiction, proceed to render the judgment which the court below should have rendered.

Judgment reversed and injunction granted until final termination in the probate court of the proceedings there pending to appropriate a right of way over the plaintiff's property.

No. 58. The Scioto Valley Railway Co. v. David Lawrence et al. Error to the District Court of Scioto County.

WHITE, J., *Held*:

1. Where the construction of a railroad in a street of a city, will work material injury to the abutting property, such construction may be enjoined, at the suit of the owners, until the right to construct such road in the street shall first be acquired, under proceedings instituted against such owners as required by law for the appropriation of private property.

2. In such case it is immaterial whether the fee is vested in the city or in the abutting owners, so long as it is held upon the same defined uses. *Railway Co. v. Cumminsville*, (14 Ohio St. 524) approved and followed.

Judgment affirmed.

No. 59. Elizabeth Lafferty and others v. Willie Shinn and others. Error to the District Court of Adams County.

OKRY, C. J.

1. The provision in the code of civil procedure as revised in 1873, by which the period within which a proceeding in error may be commenced is reduced from three to two years (Code of 1853, § 523; 75 Ohio L. 808, § 20; Rev. Stats. § 6723), does not apply to judgments which have been rendered when the act of 1878 took effect, but by force of the act of 1886 (S. & S. 1) the period of three years, prescribed in section 523, governs as to those judgments.

2. Where a demurrer to an answer is sustained, but no judgment is rendered or order made which is definitive in its character until a subsequent term, the time within which a proceeding in error may be commenced by the defendant must be computed from the date of the final judgment or order.

3. Where an action is brought under the code of civil procedure for the partition of real estate, and the administrator of the ancestor from whom the estate descended to the persons asking for partition is made a defendant, and files an answer and cross-petition setting forth that it is necessary to sell such property for the purpose of paying the debts of such ancestor, and asking for an order of sale, such administrator is, upon proper showing, entitled to such order of sale, and statutes of limitations have no application in favor of such heirs. *Taylor v. Thorn*, 29 Ohio St. 569, followed.

Judgment reversed.

No. 60. Phoenix Insurance Co. v. Robinson Priest, administrator, &c. Error to the District Court of Ashland County. Judgment affirmed. There will be no further report.

No. 61. Edward A. Bratton v. Edward D. Dodge et al. Error to the District Court of Vinton County. Judgment reversed, and judgment rendered in favor of plaintiff in error, and cause remanded to the court of common pleas for an account. There will be no further report.

No. 62. The German and English Reformed Congregation of Zion's Church &c. v. The Evangelical Lutheran Church. Error to the District Court of Holmes County. Judgment of the district court reversed, and the court proceeding to render the judgment the district court should have rendered, order the appeal to be dismissed on authority of *Barger v. Cochran*, 15 Ohio St. 460. There will be no further report.

No. 63. Samuel Brown v. John R. Brown. Error to the District Court of Franklin County. Dismissed by plaintiff in error and at his costs.

MOTION DOCKET.

No. 64. Charles E. Fish v. City of Columbus. Motion to dismiss cause 583 on the General Docket. Motion sustained.

No. 65. John Wagner v. New York, Chicago and St. Louis Railway Co. Motion for injunction in cause No. 1057, on the General Docket. Motion disposed of by the disposition of the cause.

The court will take a recess on Saturday the 1st day of April next until Monday April 10th, hence there will be no examination of applicants for admission to the bar in April. [Rep.]

Ohio Law Journal.

COLUMBUS, OHIO, : : APRIL 6, 1882.

AS TO RIGHT OF OUTSIDE PARTIES TO EMPLOY COUNSEL IN BEHALF OF THE STATE IN CRIMINAL CASES.

ATHENS, O. March 31, 1882.

EDITORS OHIO LAW JOURNAL:

I have waited quietly to hear further from some one who sustained the ruling of the Court of Common Pleas in Vinton County, at its January term, in the case of *The State of Ohio v. G. Gilman*, in which the learned judge decided against the right of a prosecuting witness in a criminal case, to employ attorneys.

At the argument it was claimed that the Supreme Court of Ohio had decided the very question, and that it had held that the court had discretion to permit outside counsel to so appear, even though the court had already appointed an assistant.

The court in Vinton County held, that the court having assigned one attorney to assist the State, its power was exhausted, and that it would be error to allow another, even though requested by the prosecuting attorney, and no extra charge to the county was to be made.

Some one from Steubenville, and Prof Aldrich, of Columbus, *sustained* the court in Vinton with expressions of their opinion.

Having stated to the court in Vinton that the question had already been decided in Ohio, I have felt called upon to make diligent search for the opinions.

Judge Walker, of Logan County, has been kind enough to cite the case and I have it before me. The question was made in the case of *Bazil Bailey v. The State of Ohio*. Error to the Court of Common Pleas of Logan County, Ohio. It appears by the bill of exceptions in that case, filed in the Supreme Court, January 15, 1878, that on the trial of the defendant in the court of common pleas: "Thereupon, John A. Price, William H. Martin, W. W. Beatty and William Lawrence, attorneys of this court, but neither one of them being Prosecuting Attorney, nor assistant Prosecuting Attorney, nor in any manner appointed by the court or otherwise assistant Prosecuting Attorney, with consent and acquiescence of the said Duncan McLaughlin, Prosecuting Attorney, took part in, and aided in conducting the said trial, and in the examination and

cross-examination of witnesses who gave their testimony on the said trial, to all which participation and interference the defendant, by his counsel, then objected, and protested against the same. But the court overruled said objection and permitted said persons to participate in the trial of said case, and in the examination and cross-examination of the several witnesses who testified therein, to all of which, the defendant, by his counsel, then excepted."

Messrs. West, Walker & Kennedy, filed their motion in the Supreme Court for leave to file a petition in error, in said cause, to reverse the judgment and sentence of the common pleas. The assignment of error is as follows:

"The record shows that persons other than the Prosecuting Attorney, were permitted to obtrude themselves into, and to take part in the trial of said case against the protest of the prisoner."

Hon. Wm. Lawrence and others argued for the State, and cited an unbroken line of authority in support of their position.

The Supreme Court held, there was no error in the ruling of the court of common pleas, and refused to allow a petition in error to be filed.

In this district, Judges Guthrie, Knowles and Bradbury, had each held the same way before this decision.

Thus it will be seen that I was right in my statement that the ruling in Vinton County was "unsupported by law, precedent or common sense," and I now add, "in plain, and flagrant defiance of the decision of the Supreme Court."

G.

NEW BOOKS.

THE LAW OF CONVEYANCING.—A treatise on the Law of Conveyancing. By W. B. Martindale Esq., St. Louis. W. H. Stevenson, Law Publisher and publisher of the Central Law Journal. 1882, Pp. LXI, 63; Price \$3.00 net.

We are inclined to think, after examination of the general scope and plan of the work before us that it stands alone in supplying to the profession, and indeed to all who have aught to do with real estate and real estate titles, what is popularly denominated "a want long felt." There is no book extant, to our knowledge, that deals with all the contingencies of acquiring and conveying titles to real estate in so thorough and satisfactory manner as does this new publication. The author understands the subject; that much is evident from the arrangement and manner of treatment of its various phases. H.

is also well versed in the law of real property which is manifest from the aptness and volume of his citations. The Summary of Contents shows:

TITLE I. PURCHASE DEEDS. Subheads.—*General Requisites of Deeds; Formal Parts; Execution of Deeds; and their Acknowledgment and Registration.*

TITLE II. LEASES. Subheads.—*Leases in General; The formal parts of a Lease; The Execution, Assignment and Determination of Leases.*

TITLE III. MORTGAGES. Subheads.—*The Nature and History of Mortgages; Form and Requisites of Mortgage; Assignments, and of Purchasers of Equity of Redemption; Redemption, Payment and Discharge; Foreclosure.*

TITLE IV. WILLS. Subheads.—*The General Requisites of a Valid Devise; Revocation and Repudiation of Wills; The Probate of Wills and their Registration; The Construction of Wills.* To each subhead an entire chapter is devoted.

It will be seen that the work is comprehensive, and so far as our examination has gone, it is as thorough as comprehensive. The mechanical execution does credit to the C. L. J. office; and taken altogether the book should and no doubt will find great favor and a large sale.

AMERICAN DECISIONS, VOL. XXXII.

Another step in the accomplishment of a great work has been achieved in the issuance of this volume. The standard case law of the country has been brought up to 1839, twenty-two volumes of the Reports having been drawn upon and condensed into one.

We find important and valuable treatises and compilation of the following subjects:

The Territorial Limit of the Jurisdiction of Courts of Admiralty, page 54-68.

Servitude to Receive Flow of Water, 120-157.

Enforcement of Contracts because of Part Performance, has no existence at Law, 128-131.

When judgment against Executor or Administrator concludes the Sureties, 197-204.

Conditions in Devise of Land, 241-243.

Adultery, 284-290.

Covenants for Title, 350-356.

Injunction to prevent Nuisance, 412-417.

Power of Common Carrier to Limit his Liability, 455-507. (These principal cases—two—and notes are alone worth the price of the volume.)

The Entirety of Judgments, 603-907.

The volume is a credit to the editor, Mr. Freeman, and the publishers, Messrs. A. L. Bancroft & Co., San Francisco, Cal.

UNITED STATES COURTS REPORTS, VOL. 1.

Reports of Cases Argued and Determined in the Circuit and District Courts of the United States for the Sixth Judicial Circuit. By WILLIAM SEABOY FLIPPIN of the Memphis Tenn. Bar. 1881. Callaghan & Company, Chicago. Ill. Pp. XLI, 691.

While this book is not strictly a late work we have but recently had opportunity to examine it. The cases reported are valuable so far as they go and the mechanical execution of the work is excellent. A few errors however have found their way into the information volunteered by Mr. Flippin, in his list of judges of the courts he claims to represent as "Reporter," an office the existence and duties of which are not generally understood. In the Ohio list Mr. Flippin bestows the ermine of the U. S. District Court upon Benj. Tappan, who he says was commissioned in 1833.

Benj. Tappan was never a U. S. District Court judge. He was a U. S. Senator and a common pleas judge, but is entitled to no place in Mr. Flippin's list. The "Reporter" has omitted the noblest Roman of them all. Judge Humphrey H. Leavitt of Steubenville, O., one of the most eminent and distinguished of an exceptionally strong cotemporaneous Bench. Judge Leavitt was appointed in 1833 by General Jackson, and served until 1871, when he retired. His retirement was the occasion of a banquet tendered him by the Cincinnati Bar, which was one of the notable events of that year. The book likewise contains a finely written memorial sketch of the late Judge Trigg of Tennessee.

SAWYER'S U. S. COURT REPORTS, VOL. VI.

By L. S. B. SAWYER, Esq. 1882. San Francisco. A. L. Bancroft & Co., Publishers.

We acknowledge the receipt of this volume in which many cases of value and importance are reported from the U. S. District and Circuit Courts of the Ninth District, as decided during 1879 and 1880. Messrs. Bancroft & Co. sustain their usual high reputation as first class artists in book making.

APPROPRIATION BY RAILWAY COMPANY—INJUNCTION.

SUPREME COURT OF OHIO.

JOHN WAGNER

v.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

March 28, 1882.

1. In proceedings by a corporation to appropriate private property, there must be a judgment confirming the verdict of the jury, before the corporation is entitled, by a deposit of the amount of such verdict, to possession of the property appropriated.

2. It is within the appellate jurisdiction of the supreme court to allow a temporary injunction where it appears that defendant is doing or threatens to do acts respecting the subject of an action pending, tending to render the judgment ineffectual. (*Yeoman v. Lasley*, 36 Ohio St. 416 followed and approved.)

3. So where the relief sought in the court below was an injunction which was refused, and on error to this court the judgment is reversed for such refusal, this court may, in the exercise of its appellate jurisdiction, proceed to render the judgment which the court below should have rendered.

Error to the District Court of Cuyahoga County.

This was an action in the common pleas, to enjoin defendant, a railroad corporation, from taking possession of land belonging to plaintiff and constructing a railroad thereon, without having first acquired the right thereto by appropriation or otherwise.

The facts are, that the corporation defendant filed its petition against Wagner the present plaintiff, on the 30th of August, 1881, for the purpose of appropriating the land described in that petition; that on the 26th of November, 1881, the jury in the case rendered a verdict assessing the plaintiff's damages for his lands at \$27,100; that on the 28th day of November, the company filed its motion for a new trial; that on the 12th of December the company paid into the probate court the sum of \$27,100 the amount awarded by the jury; that on the 17th of December, five days after having paid the amount into court, and while the plaintiff was still in possession of his lands, defendant entered thereon and made one large excavation therein to erect a pier for the support of its railroad; that on the 19th of December, two days after that, the plaintiff filed in the probate court his proofs of the entry of the defendant on his lands, and its proceedings thereon, and of his written demand for the payment to him of the moneys assessed by the jury; that on the 23d of December the defendant filed in said court written objections to the payment of the sum of \$27,100 to the plaintiff; that on the 24th of December the probate court heard the parties, granted the motion for a new trial, set aside the verdict and overruled the plaintiff's demand for the money, and that no further proceedings have been had in the case; that the defendant, on the 24th of December, desisted from further operations upon the lands, and the plaintiff is still in the possession of them.

Then he sets forth what property he has there, etc., and avers that the corporation is insolvent, that its property is encumbered to an extent greater than its value, and that if the company or its agents are not restrained they will commit irreparable injury upon the premises, and that he has no adequate remedy at law. He therefore asks that "on the final hearing of this action the defendant, its contractors and agents, may be enjoined from taking possession of said premises, and constructing or operating its railroad thereon, and that they be in the meantime restrained therefrom."

There is an amendment to the petition which is filed by consent, but which does not vary what was stated before by the plaintiff, though going into detail somewhat more specifically than in the petition as first drawn.

The common pleas refused to grant the injunction. The case was appealed to the district court where a like judgment was rendered and the petition was dismissed.

Error is prosecuted in this court, to reverse that judgment.

A motion is now made for a temporary injunction to restrain the defendant from constructing its road over the land during the pendency of this proceeding.

JOHNSON, J.

The question is, whether the verdict of a jury, in proceedings to appropriate property, without being confirmed by the judgment of the court, is such an appropriation of the property, where the amount of such verdict has been deposited in the court, as entitles the corporation to take possession of the same for its purposes.

In this case, after the verdict, the corporation filed a motion for a new trial, after this it paid into court the amount of the verdict, later still, the motion for a new trial was heard and the verdict was set aside, and a new trial ordered. In this state of case, the plaintiff insists that the land has not been appropriated, as required by the Constitution, and therefore defendant should be enjoined from entering on his land and destroying its value to him, by constructing its railroad.

On the other hand, the defendant claims, that upon the rendition of the verdict, without any judgment of the court confirming the same, the deposit of the amount of compensation, entitles the corporation to possession, even though the verdict may be afterwards set aside, and a new trial be ordered.

In the Bill of Rights it is provided that "private property shall be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner in money; and in all other cases where private property shall be taken for public use, a compensation therefor shall first be made in money, or

first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

Then in Section 5, of Article 13, of the Constitution it is provided: "No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

The Constitution of 1802, Article VIII, Sec. 4, simply declared that: "Private property ought and ever shall be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner." No limitation was imposed as to the character of the tribunal or person that the law should clothe with authority to exercise the right to take such property, for the public welfare. Nor was the time limited when compensation should be made, for property taken.

In these and in some other respects, the right of eminent domain is abridged by the provisions cited from the Constitution of 1851.

Art. 1, Sec. 19, after declaring, that private property shall ever be held inviolate, but subservient to the public welfare, provides that, except when taken in time of war, or other public exigency, imperatively requiring the seizure, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation therefor shall first be made in money or first secured by a deposit of money. This compensation must be assessed by a jury.

Art. XIII, Sec. 5, is, if anything still more explicit, as to the power of corporations to appropriate. It provides, that full compensation shall first be made in money or first secured by a deposit in money; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

The taking, or appropriation of private property, is the exercise by the State or by its agents, of the right of eminent domain for a public use. The owners right is inviolable, except for a public use, and these provisions impose limitations on the right to take it from the owner and devote it to such use. They are conditions precedent to the exercise of this power.

The compensation must first be ascertained by a jury of twelve men, in a court of record. This means a jury subject to judicial direction, by a court, as in other cases. This jury is a tribunal, presided over by a court, and under its direction, hearing the evidence upon the issue, and by its verdict, declaring the truth upon the evidence under the law as given them by the court. *Smith v. The A. & G. W. R. R. Co.* 25 O. St. 91.

Something more than a verdict of the jury is required, before the corporation can deposit the

money and demand possession. The jury has no right to appropriate the property. It only fixes by its verdict, the compensation that is to be made, in the event the land is taken. The Constitution contemplates a judicial proceeding, in which the effect of the judgment is to divest the owner of the title and possession of his property, and to invest both, to the extent of the condemnation, in the corporation.

No right of possession is divested until the appropriation is complete. The owner's right to dominion over his land is as inviolable as his ownership or title. The right to the possession passes as an incident of a consummated appropriation. In such a case the right of property and the right of possession are inseparable. To deprive the owner of his right of possession, until the appropriation is made, would be as obnoxious to the Constitution, as to take the title. If, therefore, the unconfirmed verdict of the jury, with a deposit of the money, does not amount to an appropriation, i. e. to a taking of the property of an owner, and vesting the ownership in the corporation, the right to take possession for any purpose, in this case, does not exist.

Again, the rights of the parties are mutual. Whenever the corporation is entitled to take the land, its former owner is equally entitled to the money. The right to the money accrues *instantly*, with the right to take the land, otherwise compensation would not first be made. The deposit of the money in court, is in legal effect, for the land owner's use, and belongs to him, as soon as the land becomes the property of the corporation. *Mielly v. Zurmehly* 23 O. St. 628.

And this is so notwithstanding either party may prosecute error and reverse the judgment. The final judgment of the probate court completes the appropriation for the purposes of transferring title, but leaves the parties to litigate over the question of compensation.

In giving a construction to the chapter of the Revised Statutes relating to the appropriation of private property, these principles must be kept in view. In case of ambiguity or doubt, that construction must be adopted that harmonizes the statute with the Constitution. An examination of the sections comprising this chapter, leads us to the conclusion, that an appropriation is not made, until there is a judgment of the court confirming the verdict, that no title passes until the judicial proceeding in the probate court is ended, until the verdict of the jury is made effective by a judgment.

Section 6414, of the Revised Statutes provides, that appropriations of private property, by corporations, shall be made according to the provisions of that chapter.

Then follow, provisions for commencing the proceedings in the probate court, by petition and service, and for the determination by the court, of certain preliminary questions, and among them, the right and necessity of making the appropriation. The summoning, impannelling and serving of the jury is then provided for. They are then under judicial direction, and their ver-

dict when returned is entered of record as in other cases, and unless, for good cause shown, upon a motion for a new trial to be filed within ten days, a new trial be granted, "the judge shall enter a judgment on such verdict," (R. S. Sec. 6432). Until such judgment the verdict is of no more force than verdicts in other civil cases. It must be confirmed. Such a verdict, not followed by a judgment of confirmation, confers no title, nor can it be enforced by process.

Section 6433, provides, that upon payment or deposit of the amount of the verdict and the costs up to the time, the corporation shall be entitled to the "possession of, and shall hold the property, rights and interests, so appropriated, * * * and the judge shall enter an order to that effect, and if necessary, proper process shall be issued to place the corporation in possession."

This order, adjudging that the corporation, having paid the compensation assessed by the jury, is entitled to take possession and to hold the property, is the final order in the case and consummates the proceedings to appropriate. Until it is made, no process can issue to invest the new owner with possession. In the nature of judicial proceedings, process cannot be issued until there is a judgment to enforce.

To hold that the right to take possession can precede a judgment on the verdict, carries with it the authority to have that right enforced by judicial process. In the case at bar it would lead to a compulsory ejectment of the owner after the verdict was set aside, and without the owner being first compensated, by a payment to him or by a deposit to which he would be entitled.

The anomaly would be presented of enforcing an order, transferring title and right to the possession before there was a judgment, and in fact, when there was no verdict in the case. The judgment confirming the verdict is the foundation for the right to acquire possession by its payment or deposit.

That these sections contemplate and require a final judgment on the verdict, is made clear by an examination of Sections 6437, 6440 and 6449.

Section 6437 allows either party to file a petition in error to reverse the *final judgment* within thirty days after the rendition of the verdict, "but the corporation may, on the re-fidition of the final judgment in the probate court, pay into said court, the amount of the *judgment for compensation* and costs therein rendered, and proceed to enter upon and appropriate the property, notwithstanding the proceedings in error. Here there must be a "final judgment," a "judgment for compensation," as a prerequisite to a deposit of the money which gives the right to possession.

No reason can be perceived why there is any greater necessity for a judgment under Section 6437, than under Section 6433, to entitle the corporation to enter upon the land.

Again, on such a deposit, under Section 6437 which law operates as a conveyance of the property, the deposit, by like operation of law, belongs to the land owner, subject to an ob-

ligation to refund any excess over a final verdict if a new trial is granted, and he may maintain an action therefor. In no other way can his constitutional right to be first compensated be complied with. *Mielley v. Zurmehly, supra.*

Again, Section 6440, provides for proceedings in the common pleas, when the probate judge is interested, to be conducted in the same manner, in all respects, as in the probate court; "and after final judgment the corporation may, on depositing the amount of the judgment and costs, * * * be entitled to enter into possession

The construction claimed, makes the deposit on the verdict in the probate court, sufficient to entitle the corporation to take possession, while there must be a judgment on the verdict in the common pleas. The law requires the same in both courts. So also, sections 6448, 6449 and 6450, provide for proceedings to appropriate in certain cases, to be instituted by the land owner and to be conducted in the same manner as if commenced by the corporation.

Here, also, there is to be a "final judgment" on the verdict, and if this judgment is not paid the court will enjoin the use of the property.

Reliance is placed on Section 6436, to support the construction of 6433, claimed by the defendant. It provides that: "If the amount of the first verdict has been paid into court, the probate judge shall retain the same until the final termination of the second trial." This section provides for the disposition of money paid in on a verdict where a new trial is afterwards granted. The judge is to hold it until the final termination of the second trial. Now, if the corporation can take the property, and the judge can retain the money until the final termination of the second trial, what becomes of the constitutional provision, that compensation must first be made or secured to the owner, in money before his property can be appropriated?

The only construction this section will bear, to make it constitutional, is, that the money paid in on the first verdict, which is afterwards set aside, remains the property of the corporation, until the final termination of the second trial, and if the second verdict is less than the deposit, the excess is returned to its owner, but if greater, the corporation must increase the deposit to equal the second verdict, to entitle it to take the property.

While this section provides for the disposition of money paid in on verdicts that are afterwards, by the probate judge, set aside, it does not purport to give any right to appropriate the property pending the second trial. It in fact, provides for the case at bar, while section 6433 does not. The amount of the first verdict, \$27,100, is the property of defendant until the "final termination" of the second trial, when that trial is finally terminated, not when the second verdict is rendered, the deposit, or so much thereof as will equal the second verdict, will become the property of the plaintiff, and his land will be appropriated to the corporation. This entitles

the plaintiff to an injunction until the final termination of the second trial.

II. But it is urged that this court has no power, either to grant a temporary injunction, or an injunction as the final judgment, because by Art. IV. Sec. 2, of the Constitution the original jurisdiction of the supreme court, is limited to quo warranto, mandamus, habeas corpus and procedendo. This is granted, but it has "such appellate jurisdiction as may be provided by law."

By Section 5572, R. S. "when during the litigation, it appears that the defendant is doing, or threatens, or is about to do, * * * some act in violation of the plaintiff's rights, respecting the subject matter of the litigation, and tending to render the judgment ineffectual, a temporary order may be granted restraining such act." This would authorize a temporary order pending the litigation, and is an exercise of the appellate power, which follows the case into whatever court it may be appealed or taken on error, as part of the appellate jurisdiction conferred by law. *Kent v. Mehaffey*, 1 O. State Reps; *Yeoman et al. v. Lasley et al.* 36 Ibid 416.

Section 6726, authorizes this court, in the exercise of its appellate jurisdiction, when it reverses a judgment, to proceed to render the judgment the court below should have rendered.

In this case the district court should have granted the injunction prayed for until the proceedings which are pending in the probate court, are finally determined.

The judgment of the district court, is reversed and an injunction is granted until the final determination in the probate court of the proceedings now pending therein.

[This case will appear in 37 O. S.]

RAILROAD—TELEGRAPH—INJUNCTION— SPECIFIC PERFORMANCE.

SUPREME COURT OF OHIO.

THE MARIETTA AND CINCINNATI RAILROAD COMPANY AS REORGANIZED

v.

THE WESTERN UNION TELEGRAPH COMPANY;
THE ATLANTIC AND PACIFIC TELEGRAPH
COMPANY AND THE BALTIMORE AND
OHIO RAILROAD COMPANY.

March 28, 1882.

1. A railroad company, having a line of telegraph poles and wire, granted to a telegraph company, the privilege of placing another wire on the poles "for general telegraphic correspondence," and of establishing telegraph stations at points along the line as it might think proper, but reserving to the grantor all local telegraph business, "it being understood and agreed between the parties," that the telegraph company should be entitled only to the business of sending such messages as might be received at any of its stations destined for stations on other telegraph lines connected at points where it had stations, or such messages as might be received from other lines connected at points where it had stations destined for its stations, or other lines connected at points where it had stations, with a further agreement for pro-rating as to business re-telegraphed between the parties:

Held, 1. The right acquired by the telegraph com-

pany in the business of the line, other than local business, was not exclusive. 2. The railroad company was not precluded from placing another wire upon its poles either for its own use or the use of another party.

2. Equity will not compel specific performance, where the benefits of the contract cannot be realized in accordance with its terms. Hence, where a railroad company, having a line of telegraph, grants the use of its poles to a telegraph company on certain conditions and stipulations in favor of the grantor, which are *ultra vires*, an injunction will not be granted whereby the grantor will be required to perform other stipulations made in consideration of such void stipulations.

Error to the District Court of Hamilton County.

The original action was brought by The Western Union Telegraph Company against the Marietta and Cincinnati Railroad Company, as reorganized, plaintiff in error, and the Atlantic and Pacific Telegraph Company and the Baltimore and Ohio Railroad Company, to enjoin the defendants from placing an additional wire on the line of telegraph poles located along the line of the Marietta and Cincinnati railroad, and from using the same for the purpose of general telegraph business.

The following statement will suffice to show the nature of the claim of the plaintiff in the original action. Previous to the 10th of November, 1857, a telegraph line consisting of poles and a single wire had been constructed along the line of said road by the owner, the Marietta and Cincinnati Railroad Company. On that day a contract was entered into by and between said railroad company and Jacob Carmean and others constituting the Marietta and Cincinnati Telegraph Company, wherein it was stipulated, among other things, as follows:

"1. That the party of the first part grant to the party of the second part the privilege of putting up and maintaining a telegraph wire "for general telegraphic correspondence," on the line of telegraph posts now erected, or occupied by said party of the first part, along their railroad from Marietta to Cincinnati, subject to the terms and conditions hereinafter mentioned.

2. The party of the second part, while putting up their wire as aforesaid, shall furnish and put up new posts, wherever the present posts are insufficient to sustain two wires with entire security; and if the privilege of putting up another wire upon the line of posts from Cincinnati to Loveland cannot be obtained, then the party of the second part shall put up a new line of posts on said route for the common benefit of themselves and said railroad company.

3. When the wire of the party of the first part is not in working order, the railroad messages shall be sent as far as practicable free of charge by the party of the second part, and in like manner, when the wire of the party of the second part is out of order, their messages shall, as far as practicable, be sent by the party of the first part.

4. The party of the second part shall be at liberty to establish and maintain telegraph stations at Cincinnati and Marietta and at such other points along said line as they may think proper, but all local telegraph business on said

line, and the charges therefor shall belong exclusively to the party of the first part, it being hereby understood and agreed that the party of the second part shall be entitled only to the business of sending such messages as may be received at any of their stations on said line destined for stations on any lateral or other telegraph line connecting with the said Marietta and Cincinnati line at points where said party of the second part may have stations; or such messages as may be received from any lateral or telegraph line connecting with said Marietta and Cincinnati line at points where said party of the second part may have stations, destined for any of the stations of said party of the second part on their said line, or on any lateral or other line connecting with said Marietta and Cincinnati line at points where said party of the second part have stations. For all messages that may be received by the party of the first part at their stations to be re-telegraphed at stations of the party of the second part to stations on any lateral or other line connecting as aforesaid, and for all messages that may be received at any of their stations by said party of the second part, from stations on lateral or other lines connecting as aforesaid, destined for and that may be re-telegraphed by the party of the second part to points on said line where the party of the second part have no stations, the party of the first part shall be entitled to their proportion of the charge for such messages corresponding to the distance such messages may pass upon their line.

5. The party of the second part guarantee to the party of the first part the free transmission of messages for or from the officers and employes of the party of the first part, exclusively on railroad business, or telegraph business over the lines of the Western Telegraph Company extending or to extend from Marietta to Baltimore by way of the Northwestern Virginia Railroad, and from Marietta by way of said railroad to Wheeling, between any stations on said Western Telegraph Company's lines, and any stations on said Marietta and Cincinnati line.

6. Said party of the first part hereby agree to permit the agents of the said party of the second part, and also the agent of the said Western Telegraph Company, when traveling on the business of their respective companies, to travel on the cars of said party of the first part free of charge, but at their own risk of personal injury, the agent so traveling producing evidence thereof from some of the principal officers or agents of the telegraph company for which they are so traveling, and said party of the first part agree to transport in their cars to stations on their line, free of charge, all wire and other material necessary in putting up and working the line of telegraph belonging to said party of the second part."

It was also stipulated that the party of the first part, for \$800.00 per annum, should keep the wire of the second party in good working order; but the cost of renewal of both wire, insulators and posts should be equally divided.

It was also provided, that the first party, within three years, might purchase "the wire and insulators" of the second party, together with its interest in certain contracts with the Magnetic Telegraph Company, and the Western Telegraph Company, upon terms specified:

"9. But should the party of the first part not make the purchase and take upon themselves the obligations of the party of the second part as aforesaid, then the agreement shall remain in force for thirty years and thereafter until one party shall have given one year's notice of a desire to terminate the same, whereupon at the end of said year it shall cease and determine."

Afterwards, on the 3d day of August, 1859, said contract was altered and amended, among other things, as follows:

"So much of the said contract as provides that the party of the first part shall keep the wire of the second party in good working order for a compensation of three hundred dollars per annum, and so much as reserves to the party of the first part the right to purchase the interest of the party of the second part in their line of telegraph shall be and they are hereby annulled.

In lieu of said provisions and in modification of certain other provisions of said contract the following articles are mutually agreed upon and adopted, viz:

1. The party of the second part shall hereafter keep their own wire and also the wire of the party of the first part in good working order, with the same conditions and qualifications as have been heretofore applicable to the party of the first part under the 7th article of the said contract, except that the said party of the second part shall receive no compensation therefor, except the benefits which may be received from the rescinding or alterations of other provisions of said contract."

Subsequently, but prior to the commencement of the original action in June, 1878, the plaintiff in error succeeded to all the rights of property and franchises of the Marietta and Cincinnati Railroad Company, and the Western Union Telegraph Company succeeded to all the rights of the Marietta and Cincinnati Telegraph Company under said contract.

In the year 1871, the plaintiff below, with the consent of the railroad company, placed a third wire upon said line of posts for common benefit of the parties.

The claim of the plaintiff below is, that the addition of a fourth wire on this line of poles to be used by another for general telegraph business is in violation of its rights under said contract.

McILVAINE, J.

It is essential to the rights of the Western Union Telegraph Company to the relief granted in the court below, that it acquired under the contract an exclusive right to the business of general telegraph correspondence on the line of poles described in the contract, except as therein expressly reserved to the railroad company, to wit: the local business. We assume that the parties in this action have succeeded to the

rights and obligations of the original parties to the contract. What, then, is the true construction of the contract? What rights were granted by the railroad company to the telegraph company? By the terms of the contract, the answer is, "The privilege of putting up and maintaining a telegraph wire 'for general telegraphic correspondence' on the line of telegraph posts" along the line of the railroad; and "liberty to establish and maintain telegraph stations at Cincinnati and Marietta and at such other points along said line as they may think proper, but all local telegraph business on said line and the charges therefor, shall belong exclusively to the party of the first part, it being hereby understood and agreed that the party of the second part shall be entitled *only* to the business of sending *such messages as may be received at any of their stations* on said line destined for stations on any lateral or other telegraph line connecting with the said Marietta and Cincinnati line at *points where said party of the second part may have stations*; or such messages as may be received from any lateral or other telegraph line connecting with said Marietta and Cincinnati line at *points where said party of the second part may have stations*, destined for any of the stations of said party of the second part on their said line or on any lateral or other line connecting with said Marietta and Cincinnati line at *points where said party of the second part have stations*." The contract also contains a provision prorating as follows:

"For all messages that may be received by the party of the first part at their stations to be re-telegraphed at stations of the party of the second part to stations on any lateral or other line connecting as aforesaid, and for all messages that may be received at any of their stations by said party of the second part, from stations on lateral or other lines connecting as aforesaid, destined for and that may be re-telegraphed by the party of the second part to points on said line where the party of the second part have no stations, the party of the first part shall be entitled to their proportion of the charge for such messages corresponding to the distance such messages may pass upon their line."

The plain import of these stipulations is not modified by any other provision in the contract; and it appears to us that no exclusive right to the telegraphic business over this line, even outside of the local business and such as was agreed to be prorated, was granted to the telegraph company.

By "telegraph stations" which the telegraph company has the liberty to establish and maintain at "points" along the line of the road, we understand is meant ordinary offices for the business of telegraphy at cities or villages along the line of the road, but the grant of this liberty did not exclude the right of the railroad company, either directly or indirectly, to establish and maintain like offices in the same cities and villages. It will be observed, that the telegraph company was not bound to establish stations at

all points; nor are we advised as to their action under the privilege thus granted.

Now, it must be further observed, that as to the business of sending messages, other than local business, the telegraph company is limited to "such messages as may be received at any of their stations," so that the railroad company, or any other person authorized by it, may compete for messages, at any city or village, to be transmitted on this line of poles and on any wire other than those put up by the telegraph company, without interfering with the privilege granted to it. And again, messages received at an office of the railroad company, though the telegraph company may have an office at the place, to be forwarded over other lines of telegraph from points where the telegraph company has no office, are wholly unprovided for by the agreement; and in such business, the telegraph company certainly cannot claim any interest.

As to the "local business" the whole of which was reserved by the railroad company, and its interest in the class of business to be re-telegraphed as between the parties and for which the compensation was to be divided ratably between the parties, as well as the business left open to competition and that which was not provided for in the contract, we can find no objection in the contract against the right of the railroad company to transfer the same to a third person, or to its right to place an additional wire upon its line of poles, or to authorize another to do so, for the purpose of transmitting such messages. It is reasonable to assume that such a right was within the contemplation of the parties; and it is quite sure that no stipulation was made to prevent its exercise.

Inasmuch therefore, as the right of the plaintiff below, to the injunction prayed for, rests on the ground that it had acquired the right to the sole use of the wires upon this line of poles for transmission of public or general telegraph correspondence, except local business, and as that claim cannot be maintained by a just construction of the contract, it follows, that the judgment below must be reversed.

Another view of the case leads to the same result. Neither the Marietta and Cincinnati railroad company, nor the plaintiff in error, ever had, or have the capacity to engage in the telegraph business for the public generally, whether local or general in its character. The only extent to which either of them could engage in the business of telegraphy was such as might be necessary or convenient to the management of the railroad and its business. For this purpose only can a railroad company, in this State, erect and maintain a line of telegraph poles and wires. True, having constructed such lines for such use, it is competent for the railroad company to grant to another, having capacity to engage in the business, the right to use such poles and wires for the purpose of general telegraphy, and the right so transferrable may be exclusive or partial as the parties may agree.

But where the right transferred is partial only

as in the case before us, and the consideration is so mixed and modified by rights and privileges reserved by the grantor, that it would be unreasonable to suppose that the grant would have been made without the reservations, while in fact and in law, the rights and privileges so reserved cannot be exercised or enjoyed by the railroad company for want of capacity to exercise or enjoy them, a court of equity will not by injunction or otherwise enforce the specific performance of the contract. In such case, where the benefits of the contract cannot be realized according to its terms and the expectations of the parties, equity will remit a party who seeks redress for a breach of the contract to such remedies as may be asserted in courts of law.

Judgment reversed and petition dismissed.

[This case will appear in 37 O. S.]

SUSPENSION OF MUNICIPAL OFFICER BY MAYOR.

SUPREME COURT OF OHIO.

STEBENVILLE v. CULP.

March 28, 1882.

A police officer, suspended from office, by the mayor of a city, under the authority granted by secs. 121 and 211 of the Municipal Code (86 O. L. 170 and 184), is not entitled to wages during the period of such suspension, notwithstanding the council afterward declared the cause of suspension insufficient.

Error to the District Court of Jefferson County.

Defendant in error filed his petition in the Court of Common Pleas of Jefferson County against the city of Steubenville, on appeal from the judgment of a justice of the peace, to recover one hundred and twenty-eight dollars which he claimed to be due him for wages as a policeman between the 30th of April, 1877, and the 4th of July, 1877.

To his petition the city answered as follows:

"The said defendant for answer to the petition of the plaintiff says, that on the 6th day of June, A. D. 1876, the plaintiff was appointed by the mayor of said city of Steubenville, by and with the consent of the council of said city, a day policeman, in pursuance of the ordinance of said city, and continued in the discharge of his duties as such until the 8th day of May, A. D. 1877; that his compensation as such policeman was two dollars per day, and that his compensation was fully paid him by the defendant up to and including the 30th day of April, A. D. 1877; that on the 8th day of May, A. D. 1877, the said plaintiff was, by the mayor of said city of Steubenville, in the discharge of his duties as mayor, suspended from his position as policeman, until the next meeting of the council thereafter, remained under such suspension and did not discharge any duty as policeman from the 8th day of May, until the 22d day of May, 1877; that at a regular meeting of the council of said city held on the 22d of May, 1877, the said mayor reported the said suspension of the plaintiff to the council aforesaid, together with his reasons therefore,

and that by a vote of the said council at said meeting, the said reasons so submitted by the said mayor were deemed insufficient; that on the 23d day of May, A. D. 1877, the plaintiff was again by said mayor in the discharge of his duties as mayor, suspended from his position as policeman until the then next regular meeting of the said council and remained under such suspension and discharged none of the duties of policeman from that day until the 6th day of June, 1877, when at a regular meeting of the council aforesaid, the fact of such suspension, together with the reason therefor, was reported by the said mayor, and the said council then, without any trial, by a vote, determined that the reason submitted by the said mayor was insufficient; that afterwards and on the 6th day of June, 1877, the said plaintiff was again by said mayor in the discharge of his duties as mayor, suspended from his position as said policeman, and remained under such suspension, discharging none of the duties of said policeman until the 4th day of July, 1877, at which time the ordinances under which he was appointed, were repealed by said council; that upon the occasion of each of said suspensions, the position of policeman for which plaintiff is claiming compensation, was filled by the appointment of said mayor, until the next regular meeting of said council, and the duties of said position were discharged by the person so appointed, during all the time the plaintiff was so suspended, who is now claiming compensation therefor, but said plaintiff was always ready and willing to perform said services.

"This defendant says it is not indebted to plaintiff in any manner or form, except the sum of nineteen dollars, for which it offered to confess a judgment before the justice of the peace, before whom the case was tried, unless the facts above set forth render it liable, and it prays that it may be discharged from the payment of any part of the claim of the plaintiff, except that \$19, aforesaid, and that it may recover its costs made since said offer to confess judgment."

To this answer no reply was interposed. At the trial it was agreed that any sum the plaintiff might recover for services rendered the defendant as a policeman, after the 31st day of May, A. D. 1877, should not in any manner affect the offer of the defendant in writing, to confess judgment for the sum of \$19, and the cost made up to the time of the offer, as appears by the transcript of the proceedings had before the justice in this action, and that in case the plaintiff failed to recover more than \$19, for services rendered by him from the 1st to the 31st days of May, both inclusive, judgment should be rendered against him for all costs made since said offer to confess judgment.

The plaintiff below thereupon introduced in evidence the ordinance of council authorizing the mayor to appoint policemen, and it was agreed that under this authority the appointment was made. No further testimony was offered, and, the case having been submitted to the court, judgment was rendered in favor of

plaintiff for the full amount of his claim. This judgment was afterward affirmed in the district court, and the latter judgment is now before us for review.

A. H. Battin for plaintiff in error.

John F. Oliver for defendant in error.

LONGWORTH, J.

By the laws in force in the year 1877 (Municipal Code, secs. 205, 209, 211 and 121, 68 O. L. 184 and 170), the mayor was authorized to suspend any policeman for "neglect of duty, misconduct or other sufficient cause," until the next regular meeting of council, and to appoint other persons to fill the temporary vacancy caused thereby. Beyond this his power did not extend; the right to remove from office being in the council alone.

Two questions arise for our consideration:

1st. Had the mayor authority to make the suspension complained of, and if so,

2d. What is the effect of such suspension upon the policeman's right to wages during the period of suspension?

It is clear that the mayor's authority to suspend is limited to cases in which there exists *sufficient cause* for its exercise; it ought not to be exerted from mere whim or caprice, or for personal or political reasons. In the case before us the answer alleges that the suspension was made by the mayor "in the discharge of his duties as mayor." No reply is interposed, and the allegations of the answer are taken as confessed. In the absence of averment to the contrary we are bound to presume that the facts justified the official action of the mayor, and that the suspension was for sufficient cause. No doctrine is better established than that the acts of an officer, within the scope of his powers and authority, are presumed to be rightly and legally performed until the contrary appears. By the terms of the statute however, (sec. 121), this suspension terminated with the next regular meeting of council, and that body having declined to remove Culp, having declared the reasons for his suspension insufficient, he became thereby reinstated in office. This took place twice as shown in the answer, and on each occasion the mayor, forthwith, suspended him again. It nowhere appears what was the cause or causes of these suspensions; and if it be true, as claimed, that the mayor had no authority to suspend a second time for a cause which the council had declared insufficient, then we are bound to presume that the subsequent suspensions were for other and different causes. Taking the averments of the answer to be true we must conclude that the plaintiff below was legally suspended from office from May 8th, 1877, to July 4th, 1877, because, if there existed sufficient cause, in fact, for the suspension, the declaration of council that such cause did not exist would not have such a retroactive effect as to render it invalid during the time of its continuance.

2d. Was he entitled to wages during this period? In *Smith v. Mayor of New York*, 37 N.

Y. 518, it was held that no claim could be brought for salary or perquisites against a municipal corporation, covering any period when the complainant was not actually in office, for the reason that salary and perquisites are the reward of express or implied services, and therefore cannot belong to one who could not lawfully perform such services. To this extent the doctrine of the case cited was announced in *Auditor v. Benoit*, 20 Mich. 176; *Shannon v. Portsmouth*, 58 N. H. 183; *Attorney General v. Davis*, 44 Mo. 131, and is clearly laid down and justified in the later case of *Westberg v. Kansas City*, 64 Mo. 493. Indeed I have been unable to find any case in which a contrary rule has been upheld. Offices are held, in this country, neither by grant nor contract, nor has any person a vested interest or private right of property in them.

The statute speaks of the suspension creating a vacancy, and provides how that vacancy shall be filled. If the office is vacant it becomes, as to the suspended person, for the time being, as though it did not exist, and as to the public, the person appointed to fill such vacancy is the sole incumbent of the office.

The court below therefore erred in rendering judgment for more than the amount admitted to be due.

Judgment reversed.

OKEY, C. J.

All the members of this court present at the decision of this case concur in holding that during the time Culp was suspended, he was not entitled to compensation from the city of Steubenville. The only question determined in this case is stated in the syllabus, and I concur in the decision so made. But whether the mayor may or may not suspend for any cause satisfactory to himself, and what power the council may have in case of suspension, are questions which we have not considered, much less decided.

[This case will appear in 37 O. S.]

STATUTE OF LIMITATIONS—PARTITION —ORDER OF SALE.

SUPREME COURT OF OHIO.

JOSEPH W. LAFFERTY

v.

WILLIE SHINN.

March 28, 1882.

1. The provision in the code of civil procedure as revised in 1878, by which the period within which a proceeding in error may be commenced is reduced from three to two years (Code of 1853, § 523; 75 Ohio L. 503, § 21; Rev. Stats. § 6723), does not apply to judgments which had been rendered when the act of 1878 took effect, but by force of the act of 1886 (S. & S. 1) the period of three years, prescribed in section 523, governs as to those judgments.

2. Where a demurrer to an answer is sustained, but no judgment is rendered or order made which is definitive in its character until a subsequent term, the time within which a proceeding in error may be commenced by the defendant must be computed from the date of the final judgment or order.

3. Where an action is brought under the code of civil procedure for the partition of real estate, and the admis-

istrator of the ancestor from whom the estate descended to the persons asking for partition is made a defendant, and files an answer and cross-petition setting forth that it is necessary to sell such property for the purpose of paying the debts of such ancestor, and asking for an order of sale, such administrator is, upon proper showing, entitled to such order of sale, and statutes of limitations have no application in favor of such heirs. *Taylor v. Thorn*, 29 Ohio St. 599, followed.

Error to the District Court of Adams County.

On June 25th, 1851, Francis Shinn, owner of certain parcels of land in Adams County, died intestate, leaving a widow, to whom dower was assigned in in-lot 35 in West Union. The personal property and the other parcels of real estate were sold by the administrator for the payment of debts, but the estate, upon settlement in 1854, proved to be insolvent, four hundred dollars and upwards remaining due to creditors.

In 1855, Joseph W. Lafferty purchased of the widow her dower interest and went into possession of in-lot 35, taking with him certain machinery, and he was also owner of the larger part of the claims against the estate of Shinn remaining unpaid. He died in 1869, leaving his widow and children in possession of the premises, and the widow of Shinn died the same year.

In 1872, Willie Shinn, grandson of Francis Shinn, filed in the Court of Common Pleas of Adams County, his petition under the code of civil procedure for partition of in-lot 35, in which suit the other heirs of Francis Shinn, his administrator, and the widow and heirs of Joseph W. Lafferty are defendants. The widow and heirs of Lafferty answered, and an answer with cross-petition was filed by the administrator of Francis Shinn, setting forth the facts here stated, and asking that the lots be sold and the proceeds applied to the payment of the remaining indebtedness of the estate of said Shinn, above referred to.

After decision of the cause in the court of common pleas, it was appealed to the district court. In the latter court demurrers were sustained to the answers and cross-petition, and on September 7, 1875, partition was ordered among the heirs of Francis Shinn; but as the lot could not be divided without manifest injury to the owners, the premises were appraised, the value being estimated at four hundred dollars, and Joseph W. Shinn, one of the heirs, elected to take the premises at such valuation, and the same were adjudged to him.

This petition in error was filed in this court on September 3, 1878, by the administrator of Francis Shinn and the widow and heirs of Joseph W. Lafferty.

White, McKnight & White and L. Thompson for plaintiffs in error.

F. D. Bayless and J. M. Wells for defendant in error.

OKEY, C. J.

Two questions are presented, first whether the right to prosecute this petition in error is barred by the statute; and, secondly, whether the court erred in sustaining a demurrer to the answer and cross-petition of the administrator of Francis Shinn.

1. The demurrer to the answer and cross-petition of the administrator of Francis Shinn, was sustained at a term previous to September, 1875, but no final judgment was rendered until the September term, 1875, which was held on the 7th day of that month, and hence in determining whether the proceeding in error is barred, time is to be computed from that day. The petition in error was filed and summons issued September 3d, 1878, which is four days less than three years from the time the order of partition was made. The limitation for proceedings in error, under the civil code of 1853 (§ 523), was three years; but by the revising act of May 14, 1878, which took effect September 1, 1878 (75 Ohio L. 808, § 20, Rev. Stats. § 6723), the period was shortened to two years; and as the act of 1878, was in force when this petition in error was filed, and two years had elapsed since the order complained of had been made, it is insisted that the proceeding in error is barred. In support of this claim the defendants in error rely on *Schooner Marinda v. Dowlin*, 4 Ohio St. 500. There the judgment sought to be reversed was rendered in February, 1850, when the limitations as to proceedings in error was five years, but the petition in error was not filed until December, 1854, and by the civil code of 1853, the time in which such proceeding could be commenced was fixed at three years, as already stated. The court held that the provision in the code applied, and that the proceeding was barred. No doubt that decision rests on satisfactory ground. That "all courts shall be open, and every person for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law," is ordained in the Constitution (art. 1, sec. 16); and it is not within the power of the legislature to abridge the period within which an existing right may be so asserted as that there shall not remain a reasonable time within which an action may be commenced. *Cooley's Con. L.* (4th ed.) 456; Const. art. 2, sec. 28. But in the right so to appeal to the courts, there is not involved a further right to appeal from the judgment of the court to which such applications for redress is made. On the contrary, a right of appeal from such judgment exists only when given by statute (*Com. v. Messenger*, 4 Mass. 469), and such right of appeal when so given may be taken away by statute, even as to cases pending on appeal. *Ex parte, McCardle*, 7 Wall. 506. And the same thing is true with us as to proceedings in error. *Schooner Marinda v. Dowlin*, *supra*. We would have no hesitation, therefore, in holding that this proceeding in error is barred by the limitation of two years, if the rule declared in that case remained unaffected by other statutory provisions. But the question is whether such rule has not been changed by statute. The act of 1866, which remained in force until 1880, provided as follows: "Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions or proceedings, civil or criminal, nor causes of such action, prosecution or proceeding,

existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act." 1 S. & S. 1; Rev. Stats. § 79.

The remedy by error is a *proceeding* (Hobbs v. Beckwith, 6 Ohio St. 252), and it has been held that it is a *proceeding* within Rev. Stats. § 79, which saves pending proceedings when the statute upon which they are founded is repealed. Railroad Co v. Belt, 35 Ohio St. 479. The same language, it will be seen, occurs in the act of 1866; and if the words, *pending proceeding*, include a pending petition in error, it is difficult to see why the words, *cause of proceeding*, in the same section, when applied to matters as to which relief may be granted notwithstanding the repeal of the statute on which they are founded, do not include the right to file a petition to reverse a judgment. True, it was held in Westerman v. Westerman, 25 Ohio St. 500; John v. Bridgman, 27 Ohio St. 22, that the act of 1866 did not prevent the application of statutes regulating procedure in an action, to causes pending when the statute was passed, and hence a change by statute in the rule as to the competency of witnesses applied to pending actions, notwithstanding the act of 1866. It is insisted that the principle governs here, and that to shorten the period within which petitions in error may be filed is not to *affect the cause of proceeding*, within the meaning of that act. But in Railroad Co v. Hine, 25 Ohio St. 629, a different view was adopted. It was there held that by force of the act of 1866, an action was to be governed, as to the time within which it might be brought, by the statute in force when the cause of action accrued. According to the statute in force when suit was brought, the action was not barred, but it was barred according to the statute in force when the cause of action accrued, and it was held that by force of the act of 1866, the bar was complete. It is impossible to distinguish that case from this, in the particular now under consideration, and other cases construing the act of 1866, support the same view. The State v. Washington Tp., 24 Ohio St. 603; Bode v. Welch, 29 Ohio St. 19; Bergin v. The State, 31 Ohio St. 111. And see Rev. Stats. § 79, note. We hold, therefore, that by force of the act of 1866, this case is governed in this particular by section 523 of the civil code of 1853, and consequently the right to maintain this proceeding in error is not barred.

2. The other question, whether the district court erred in sustaining a demurrer to the answer and cross-petition of the administrator of Francis Shinn, is more easily determined. And we are quite clear that the district court erred. There is no reason why the administrator was not entitled to an order of sale on his answer and cross-petition. His right to obtain an order of sale for the payment of debts, as against the parties to this suit, was wholly unaffected by the statute of limitations; the heirs of Francis Shinn held title to the premises subject to the right of the administrator for such purpose; the widow and heirs of Joseph W. Lafferty had no

interest in the premises, nor any other right with respect thereto, except to remove any property they placed thereon, which had not become part of the realty; and, indeed, the case is in principle like Taylor v. Thorn, 29 Ohio St. 569, which we follow.

Judgment reversed.

[This case will appear in 37 O. S.]

LXVTH GENERAL ASSEMBLY OF OHIO.

SYNOPSIS OF LAWS PASSED THIS SESSION.

MARCH 15, 1882.

House Bill No. 216. To amend section 4848 of the Revised Statutes, to read as follows:

Section 4848. Any balance of assessments made for the construction of any such road, remaining in any county treasury, after the payment of all expenses incurred on account of the road, shall be certified by the county auditor into the treasuries of the townships through which the road is located, proportionately to the amount paid for the making of the same in each of the townships, to be expended under the order of the township trustees in repairing the roads; but in counties where the county commissioners are constituted a board of turnpike directors, such unexpended balance shall be transferred to the general improved road repair fund for such county.

H. B. 221. To authorize the Trustees of Union township, Fayette county, to divide such township into four election precincts, instead of two as now divided.

H. B. 247. An act to change the time for holding the second term of the Court of common Pleas in Allen County for the year 1882, to the 22nd day of May instead of the 29th, as fixed by the judges.

H. B. 307. An act making appropriations to meet deficiencies.

MARCH 16, 1882.

Senate Bill 61. To authorize the Trustees of Gosham township, Clermont County, to purchase a town Hall and levy a tax for that purpose.

S. B. 43. Supplementary to section 3378 of the Revised Statutes, as follows:

Section 3378a. No contract of or for the sale of railroad equipments, rolling stock or other personal property, (to be used in or about the operation of any railroad) by the terms of which, the purchase money, in whole or in part, is to be paid in the future, and wherein it is stipulated or conditioned that the title to the property so sold shall not vest in the vendee, but shall remain in the vendor until the purchase money shall have been fully paid, shall be valid against creditors or innocent purchasers for value, unless recorded in the office of the Secretary of State, or a copy thereof filed in the office of said Secretary of State, and when said contract is so recorded, or a copy thereof so filed as aforesaid, the title to the property so sold, or contracted to be sold, shall not vest in the vendee, but shall remain in the vendor until the purchase money shall have been fully paid, and such stipulation or condition shall be and remain valid, notwithstanding the delivery of the property to, and its possession by such vendee.

Section 3378b. In any written contract for the renting, leasing or hiring of such property (to be used as aforesaid), it shall be lawful to stipulate or provide for a conditional sale of such property at the termination of such renting, leasing or hiring, and to stipulate or provide that the rental reserved shall, as paid, or when paid in full, be applied to and treated as purchase money; and in such contract it shall be lawful to stipulate or provide that the title to such property shall remain in the lessor or vendor, until the purchase money shall have been fully paid, notwithstanding delivery to and possession by the other party; subject, however, to the requirement as to recording or filing, contained in the foregoing section of this act.

Section 3378c. The Secretary of State, when so requested, and upon being paid the proper fees, shall record any such contract, and shall file in his office a copy of any such contract, when the same shall be delivered to him for that purpose, and for every such copy so filed he shall be entitled to receive one dollar.

Ohio Law Journal.

COLUMBUS, OHIO, : : APRIL 13, 1882.

AS TO RIGHT OF OUTSIDE PARTIES TO EMPLOY COUNSEL IN BEHALF OF THE STATE IN CRIMINAL CASES.

COLUMBUS, O. April 8, 1882.

EDITORS OHIO LAW JOURNAL:

As my name is mentioned by G. in your last number as giving an opinion in favor of a ruling made by a judge as to the right of prosecuting witness to employ counsel in a criminal case, I deem it but proper that my position should not be misunderstood, and for this purpose only I address you a few lines.

In the first article by G. appears this language, "Judge Tripp proceeded to deliver a long, fully-prepared and manifestly pre-arranged decision, in which he held, that the attorney was improperly in the case and had no right to appear under the circumstances." Again, "the decision was an arbitrary opinion of the judge unsupported by law, precedent or common sense."

Again, "no lawyer can read this section of the statute without concluding that this section contains the only limitation upon the *right* of outside counsel to appear in cases."

Another correspondent has shown that this section referred to was repealed, and, therefore, the only legal construction that can be given to this language is, that there is now no limitation upon the *right* of such counsel to appear.

To this view of G. I did dissent, and to this only, and expressly stated that without the statute, "the court might permit the prosecutor to have assistance when it was deemed necessary."

The decision of the court in *Bailey v. The State*, cited in the last article, would expressly uphold this view, and goes no further, and even G. in another article of February 10th, says, "that it was not claimed by him that counsel retained by outside parties might demand to appear." This language expressly admits the correctness of the legal principles laid down in my former article, although it would disclaim the construction given by me to his first article, which was based upon the language above quoted, and which seemed to claim such right. If no such right is claimed by G., but only that the court may allow such appearance when it deems it proper and necessary, there is no difference

between us and I did not sustain the court in Vinton in any ruling against this doctrine.

O. W. ALDRICH.

HARBORING A THIEF.

BELMONT COMMON PLEAS.

THE STATE OF OHIO

v.

GEORGE W. DOUGLASS.

March 20 & 21, 1882.

The defendant was indicted under section 6979 of the Revised Statutes of Ohio. The indictment alleged substantially that, on or about the 10th day of August, 1881, one Frederick Wheatley robbed the store of Wheatley & Outland, of the village of Boston, Belmont county, Ohio, and stole therefrom goods, specified in the indictment, to the value of \$101.27; and that afterwards, on or about the 2nd day of September, 1881, the defendant, George W. Douglass, harbored and concealed the said Frederick Wheatley, knowing him to be a thief, and knowing him to be guilty of the larceny charged in the indictment.

The evidence showed that the alleged thief was a brother of the senior member of the firm of Wheatley & Outland, and a second cousin of the defendant. It was shown that a robbery had been committed, as charged in the indictment, and testimony was given pointing strongly to Frederick Wheatley as the guilty person. It was proven that on the 2nd of September, Wheatley was arrested at defendant's house, upon a charge of having previously committed some crime in the State of Illinois; and testimony was given tending to show that the defendant, when asked as to Wheatley's whereabouts by the officers who went to the house to make the arrest, at first denied Wheatley's being there, but afterwards, when assured that the officers would search the premises, induced Wheatley to come out and deliver himself up. It was further shown that, upon a search-warrant subsequently issued, goods of Wheatley & Outland to the value of about \$2.50 were found concealed in defendant's house.

The court charged the jury as follows:

In order to maintain the indictment, it is essential that the State prove: 1st. That said Fred Wheatley was, at the time of the act charged against the defendant, a thief—that is, that he (said Wheatley), had recently before that time stolen the personal goods of another (namely, of Wheatley and Outland, the owners named in the indictment), of the value of \$35, or over, and that Fred Wheatley was, at that time, liable to arrest, indictment and punishment for the crime of larceny. If said Fred Wheatley stole the goods of another, and was guilty of larceny—that is, if he took and carried away the goods of another without consent of the owner and without claim or color of right,

with intent to deprive the owner of them, and to appropriate them to his own use,—and the goods were of the value of \$35 and upwards, then said Wheatley was a thief within the meaning of the statute.

2nd. The defendant must, at the time, have known that Fred Wheatley was such thief, and that he was subject to, and in danger of arrest and punishment for said crime of larceny named in the indictment, namely, the goods of Wheatley & Outland.

3d. That the defendant with such knowledge, concealed or harbored said Fred Wheatley, for the purpose and with the intent to prevent his arrest and punishment for the crime.

Defendant is presumed to be innocent until his guilt is proved beyond a reasonable doubt, and each and all of the ingredients of the crime charged against him must be so proved before he can be convicted.

If the evidence proves that a larceny was committed at the store of Wheatley & Outland, and proves that Fred Wheatley was in possession of the stolen goods soon after the larceny, such possession is to be considered by the jury in connection with other evidence of the conduct of said Fred Wheatley, in relation to said goods, for the purpose of ascertaining whether such possession was an innocent or guilty possession. It is said that possession of goods stolen, recently after the theft, affords a strong presumption of guilt; but there is no rule of law that such possession is, of itself, sufficient proof of guilt. It is for the jury to determine the effect of such possession, upon a consideration of all the testimony in the case.

If Fred Wheatley stole only a part of the goods named in the indictment, and not the whole; or if the goods stolen were of less value than \$35, then he could not be convicted of grand larceny, and the defendant in this case can not be convicted, even if proved in other respects guilty. But if a quantity of goods were stolen from Wheatley & Outland by one act of burglary and larceny, as alleged, and part of these goods were soon afterward found in possession of Fred Wheatley, the fact of such possession of a part will be considered by the jury as evidence tending to prove that Fred Wheatley stole the whole of the goods.

You will carefully examine all the testimony in the case, and decide whether each and all of the essential, as before stated, of the crime have been proved.

Did defendant harbor and conceal Fred Wheatley—did defendant knowingly and intentionally give him shelter, refuge, concealment or protection from detection or arrest? Was Fred Wheatley, at the time, a thief, subject to arrest for having stolen said property of Wheatley and Outland worth \$35 and more, and did defendant at the time know that Fred Wheatley was such thief and guilty of that larceny? If all this has been proved so as to remove all reasonable doubt, it is your duty to find a verdict of

guilty. If not so proved, your verdict must be not guilty.

JUDGE ST. CLAIR KELLY, on the bench.

A. H. Mitchell, Prosecuting Attorney, for the State.

S. W. Emerson, W. S. Kennon and R. E. Chambers, for the defense.

Verdict of *Not Guilty*.

EVIDENCE IN CRIMINAL TRIAL—GENERAL REPUTATION.

SUPREME COURT OF OHIO.

HENRY H. UPTHEGROVE

v.

THE STATE OF OHIO.

March 21, 1882.

In a trial upon an indictment charging the prisoner with shooting at the prosecuting witness, with malicious intent to kill, where evidence has been introduced tending to show that the act charged was committed by the accused at a time when he was being actually assaulted by the prosecuting witness with a dangerous weapon, it is competent for the defense to prove that the general reputation of the prosecuting witness was that of a violent and dangerous man, and that such general reputation was known to the accused at the time of the assault, as tending to support the plea of self defense.

Error to the Court of Common Pleas of Paulding County.

At the October term, 1881, of the Court of Common Pleas of Paulding County, the plaintiff in error was tried upon an indictment for shooting at one Lewis Talbot with intent to kill.

The State having rested its case, evidence was introduced by the accused tending to show that at the time charged, Talbot attacked him and knocked him down with a club, and was about to strike him again. That he, the accused, fearing death or great bodily harm at the hands of his assailant shot at him, with the sole purpose of self-defense and without malicious intent. At this stage of the case the accused proposed to prove, by a competent witness, that the general reputation of Talbot for peace and quietness was bad and that his character was that of a dangerous and violent man, and that this was known to the accused at the time. To the introduction of this testimony, objection was made and sustained by the court, and exception was noted. This ruling of the court is now before us for review by the present proceeding in error.

Geo. K. Nash for defendant in error.

I. N. Alexander and DeWitt & Freshwater for plaintiff in error.

LONGWORTH, J.

As a general rule in trials for homicide, or felonious assault, the character of the person assaulted or killed cannot be shown, for the reason that the law holds it to be as criminal to assault a bad and violent man as a good and peaceable one. But to this rule there is an exception in cases where the plea is self-defense and there is evidence tending to show that the actual or at-

tempted killing took place while the accused was being actually assaulted. In such case, the intent being an essential element of the crime, evidence is competent to show what the accused person really believed at the time, and what reasons he had for entertaining such belief; and it will not affect the competency of the evidence that such belief turns out to have been a mistaken one. It is no defense to a charge of this character to show that the deceased or prosecuting witness was a wicked or violent man, but the fact that the accused believed him to be so, is calculated to throw light on his actual intent as rendering his act criminal or excusable. A club may or may not be a deadly instrument, and I can well understand that when in the hands of a man known to be of blood-thirsty disposition, a reasonable ground to fear great bodily harm might exist, whereas when used under the same circumstances by an irritated, but ordinarily peaceable man, no such apprehension would be justifiable.

The rule allowing evidence of character or general reputation in such cases, brought home to the knowledge of the prisoner, is founded on the clearest principles of reason and common sense, and is amply sustained by authority,

In 1 Greenl. Ev. § 101, the learned author lays down the broad principle as follows: "Thus where the question is whether the party acted prudently, wisely or in good faith, the information on which he acted, whether true or false, is original and material evidence." * * * * "Upon the same principle it is considered that evidence of *general reputation, reputed ownership, public rumor, general notoriety* and the like, though composed of the speech of third persons, not under oath, is original evidence and not hearsay." To illustrate the proposition he cites with approval, the case of *People v. Shea*, 8 Cal. 538, in which it was held that where the accused claimed to have procured a pistol to defend himself against the attack of another, upon the ground of certain information received from others, such information became an original fact proper to be proved in the case.

It is said in 2 Bishop Crim. Proced. § 614: "Though, as a general rule, even on an indictment for murder, the character of the deceased as being quarrelsome, and the like, can have no effect, however ill it may be, to excuse the act of the defendant, and, therefore, it should not be received in evidence when brought forward by him; yet, if in the particular case as presented before the court, as for instance, where there is a question whether the homicide was committed from malice or was prompted by the instinct of self-preservation, and there is no direct testimony as to what was done, but the whole or the principle evidence is circumstantial—then it may be proper to permit the defendant to give in evidence what he knew of the character of the person whose life he took; for so an act which would otherwise seem unjustifiable, or premeditatedly malicious, might appear more

probably to have been done in self-defense or in a quarrel."

The subject is carefully discussed in Wharton Crim. Ev. § 68 to § 84 inclusive. See also 14 Am. Law Review, 579.

The rule as announced by us was declared to be the law in the following cases, in most of which the question arose in substantially the same manner as in the case at bar.

Nichols v. People, 30 Hun, 165.

Stephens v. State, 1 Tex. Ap. 591.

People v. Murray, 10 Cal. 809.

People v. Anderson, 39 Ibid. 703.

State v. Bryant, 55 Mo. 75.

State v. Matthews et al., 78 N. C. 523.

Eiland v. State, 52 Ala. 323.

Monroe v. State, 5 Ga. 85.

Horbach v. State, 43 Tex. 242.

People v. Lamb, 2 Keyes, 371.

As far as I am aware the doctrine has never been denied except in *Commonwealth v. York*, 9 Met. 93 and in *Commonwealth v. Hilliard*, 2 Gray, 294, in which evidence of reputation was not admitted under a like state of facts. These decisions, although entitled to the greatest respect on account of the eminence of the distinguished judges who announced them, are at variance with the whole current of decision in other States and with the views of the text writers who have treated of the subject, and do not appear to us to be supported by the sound common-sense logic which underlies the whole law of evidence.

Judgment reversed.

[This case will appear in 37 O. S.]

RAILROAD—FELLOW SERVANT—NEGLIGENCE—RELATION OF SUPERIOR AND SUBORDINATE.

SUPREME COURT OF OHIO.

THE PITTSBURGH, CINCINNATI & ST. LOUIS RAILWAY COMPANY

v.
ALBERT M. RANNEY.

March 21, 1882.

1. Where, by the rules of a railroad company, brakemen on a train of cars are placed under the control and direction of the conductor, the relation of superior and subordinate, as between the engineer and a brakeman, is not created by a rule of the company requiring the engineer to give certain signals for setting or relieving brakes, which also requires brakemen to work the brakes accordingly.

2. In such case, the engineer and brakeman are fellow-servants in a common employment; and the company is not liable to either for an injury resulting from the negligence of the other. *Railway v. Lewis*, 38 Ohio St. 198, approved.

Error to the District Court of Franklin County.

The original action was brought by defendant in error against plaintiff in error to recover damages for personal injuries resulting from the carelessness of defendant's engineer under the following circumstances:

On the 2d of August, 1871, the plaintiff below

was employed as a brakeman on a train of freight cars of the defendant running from Columbus, Ohio, to Dennison, Ohio, under the management of a conductor, an engineer, a fireman and two brakemen. On approaching Pataskala station, the train was moving at the speed of about fifteen miles per hour when a flag signal from the station was given to slow the train for orders, whereupon the engineer, by a single blast of the locomotive whistle signaled the application of brakes by the brakemen and thereby the speed of the train was reduced to six or eight miles per hour when opposite the station house. While moving at this rate the engineer received dispatches from the station agent, and also orders to proceed without stopping at the station, whereupon, by two blasts of the whistle the engineer signaled the removal of the brakes by the brakemen. While the plaintiff, in obedience to the signal, was engaged in removing brakes and before a reasonable time for the removal had elapsed, the engineer applied steam to the engine so violently as to break and separate the train at the coupling of the cars where the plaintiff was engaged in removing brakes, whereby the plaintiff was thrown from his feet and fell between the cars and was thereby very seriously injured, so that it became necessary to amputate his left leg above the knee and three toes from the right foot.

In stating his cause of action, the plaintiff alleged in the petition, among other things, the following:

"This plaintiff states that it then and there became the duty of this plaintiff, when on said train of cars as brakeman as aforesaid, to obey and carry out in a prompt and reasonable manner, all orders or commands given to him in any manner by the engineer, then and there handling, operating and controlling the locomotive attached to said train of cars, and hauling the same from Columbus to Dennison, as aforesaid, in reference to putting on or letting off the brakes attached to the cars, making up and forming said train of cars so hauled and moved by said locomotive, and that in said employment of brakeman on said train he was under the command and order of said engineer, and therefore compelled to obey the orders and commands given by said engineer to him in reference to using said brakes in the starting or stopping said train of cars, and as above stated in said operating, hauling, and moving said locomotive and train of cars attached thereto, said engineer was in all respects the superior of this plaintiff, and it was his duty to give orders and commands to plaintiff when on said train of cars, in reference to the time and place, and under what circumstances said brakes should be applied to the stopping or impeding the speed of said train, and when the same should be let off or loosened in order that the train might be enabled to move at a greater rate of speed."

"The plaintiff further says that said injuries were so inflicted upon him without any fault, neglect, or carelessness upon his part, and whilst

he was in the proper discharge of his duties as a brakeman on said train of cars aforesaid, in an ordinary, careful and prudent manner, and plaintiff avers that said injuries were so inflicted upon him as hereinbefore stated, by reason of the negligence, default, and want of proper care and caution, and by reason of the rashness, negligence and carelessness of the said engineer, who had charge of the said locomotive, its movements, management and control as aforesaid, and who gave said order and commands to plaintiff, and the said injuries were caused by the said engineer aforesaid, by his sudden and rapid starting of said locomotive and cars in motion, without signal or warning to plaintiff or other employees, and without the said engineer waiting a sufficient or reasonable time to enable plaintiff to obey and carry out his said order or command to let off or loosen brakes as aforesaid; in all which, said engineer was guilty of the most grossly negligent, improper, rash and careless conduct which, as aforesaid, was the sole cause of the infliction of said injuries upon plaintiff hereinbefore stated."

The defendant, by its answer, denied that the engineer was guilty of carelessness or negligence as charged in the petition, and also, "that in virtue of said employment he (plaintiff) thereby became, and was in fact, subject to the orders and control and direction of the engineer of said freight train, or that said engineer thereby became, and was in fact, in all respects his superior upon said train, whose orders and commands he was in all respects bound to obey. On the contrary thereof, the defendant avers that said train was on said day, under the charge and control of a conductor, who was, as such conductor, the superior of both said engineer and brakeman, and whose orders and commands both said engineer and brakeman were alike bound to obey in said common service and in subordination to said superior servant of said defendant."

To this answer the plaintiff replied as follows: "That this plaintiff admits that there was on and connected with said train of cars mentioned in plaintiff's petition, a conductor who was the superior of plaintiff, and in reference to the time of starting said train at stations where it stopped, was the superior of said engineer, but plaintiff says that in all respects as to the starting, stopping, controlling and movements of said engine and the cars attached thereto, both said engineer and conductor were, in all respects, the superiors of plaintiff, and both were the responsible parties in charge of said train as to said plaintiff and said railway company."

On the trial in the common pleas, a verdict and judgment were rendered for the plaintiff. A bill of exceptions containing all the testimony and the charge of the court was made part of the record. The judgment of the common pleas was affirmed in the district court, and this proceeding is prosecuted by the railroad company to reverse both judgments.

MOLLVAINE, J.

The principles of law in relation to the liability of a master for an injury to his servant while engaged in the performance of duties under his employment, have been so frequently considered and declared by this court, and upon such varied statements of fact, that one might be justified in assuming that the law upon this subject, in all its bearings, has been fully settled. The respective rights and duties of employer and employee, sound in contract. The employer implicitly engages to use reasonable care and diligence to secure the safety of the employee, and among other things, to exercise reasonable care in the selection of prudent fellow servants. He also engages that every one placed in authority over the servant, with power to control and direct him in the performance of his duties, will exercise reasonable care in providing for his safety, whether such superior be a fellow servant or not in the ordinary sense. The superior, in his relation to the subordinate servant, is, in the language of Judge Day, in *Railway Co. v. Lewis*, 33 Ohio St. 196, the *alter ego* of the master. This doctrine, which imputes to the master the negligence of a servant to whom he has delegated authority over other servants, has been firmly ingrafted in the jurisprudence of this State ever since the case of the *Little Miami R. R. Co. v. Stephens*, 20 Ohio R. 416. See also *C. C. & C. M. R. Co. v. Keary*, 3 Ohio St. 201, and *L. S. & M. S. R. R. Co. v. Lavally*, 36 Ohio St. 221, and cases therein cited.

On the other hand, the servant assumes all ordinary risks of the employment against which ordinary care on the part of the master does not provide, and among the risks thus assumed by the servant, are those which may result from the carelessness or negligence of fellow servants. Indeed, in the case before us, it is not claimed by the defendant in error that the railroad company should be held liable, if it were free from negligence, actual or imputed; and it is conceded, that such would be the case, if the engineer and himself were mere fellow servants in a common employment.

Nor is it denied by the railroad company, that it would be liable if the injuries of the defendant in error were caused by the carelessness of one of its employees, who was entrusted with power to control and direct the defendant in error in the discharge of his duties in their common employment.

The contention between the parties is not, whether a given proposition is or is not law, but rather as to a question of mixed fact and law; namely, whether such relation of superior and subordinate existed between the engineer of the train and the defendant in error as rendered the plaintiff in error responsible for an injury to the latter, caused by the carelessness of the former. The case is one for the application, rather than the definition of legal principles. We must therefore ascertain the exact relation which existed between the engineer and the defendant in error.

They were both servants of the railway company engaged in a common employment, to wit: the operation of a single train of cars. The service of the engineer was confined to the care and management of the engine, the motive power of the train, while the defendant was employed upon the cars, and his duty, among other things, was to tighten and loosen the brakes upon the cars. Although the duties of these servants were not identical, yet as the services of each were necessary to the accomplishment of a single purpose, namely, the movement of the train, they were fellow servants in a common employment; so that, if this relation, and none other, existed between them, the risk of injury to either by the carelessness of the other was assumed by each, and the common master or employer would not be liable. See *Whaalan v. M. R. & L. E. R. R. Co.* 8 Ohio St. 249; *Manville v. C. & L. R. R. Co.* 11 Ohio St. 417; *P., Ft. W. & C. Ry. Co. v. Devinney*, 17 Ohio St. 198; *Kumber, adm'r of Larkin, v. Junction R. R. Co.*, 33 Ohio St. 150.

This brings us to inquire whether there was such relation of superior and subordinate existing between the engineer and brakeman as to render the common employer responsible for injuries to the latter caused by the negligence of the former. The crew consisted of a conductor, engineer, fireman and two brakemen. Unquestionably the train was under the control of the conductor and all the train hands were subject to his control and direction. By the rules of the company, "conductors are required to see that brakemen are attentive to duty. Two brakemen must at all times, be stationed on the top of the cars of each freight train when the train is in motion. The speed of freight trains must be governed by the use of brakes when descending grades," so as not to exceed 15 miles per hour. "Conductors of all trains are required to keep a brakeman on the last car, while the train is in motion." "Freight conductors are required to ride on a part of their train where they can see that their men attend to their duties, can signal them on descending grades and can assist in applying the brakes in case of danger." "Brakemen must use judgment in applying the brakes when approaching a station and endeavor to stop the train at the right point without the necessity of the engine sounding the whistle." These rules as well as the weight of all the testimony, show that brakemen are under the general control and direction of the conductor.

Indeed, the only pretense found in the testimony, for the claim of defendant in error that brakemen are subordinate to the engineer of the train, is found in the fact, that it is the duty of brakemen to observe and obey certain signals given by the engineer, to wit: Rule 18. "One long blast of the whistle is a warning of the approach of a train; one short blast is a signal for putting down brakes and stopping the train; two short blasts for relieving the brakes and starting the train; three, for backing the train." It is contended that these signals are in the nature of orders or commands which the engineer

is authorized to give to brakemen which they are bound to obey; and hence, the relation of superior and subordinate is created. A majority of the court do not so understand either the purpose or effect of the rule. These signals are so named properly, and are intended to notify all concerned of the thing signified. They are addressed to the conductor as well as brakemen, and it is the duty of the conductor to see that brakemen perform the duty signified. This duty is imposed upon the brakemen by force of the rule itself, and not by virtue of any authority vested in the engineer over the brakemen. The signal is a mere notice. The rule is the order of the company to the brakemen directly. Suppose a train is signaled by a station agent, as this train was, to stop for orders. It thereby becomes the duty of the conductor, as well as of each employee on the train, to stop for orders; and yet, no one can contend that such station agent, who gives the signal, is the superior, and train crew subordinate employees of the company within the meaning of rule under consideration. A variety of signals, under a variety of circumstances, are required to be given by different employees of the company, to signify that an occasion exists for the performance of a particular duty, but, it would be absurd to hold that in each case, the employee giving the signal is a superior servant, to whom all others, to whom information is thus communicated, are subordinated; so that the company would be responsible to them for any act of negligence of the employee who gave the signal, whether such negligence was in giving the signal or in the performance of other duties.

For it must be observed, that negligence or carelessness is not affirmed of the act of the engineer in giving either the signal to tighten the brakes or to loosen them. The only negligent and careless act charged against him, was in forcing the engine forward violently, without giving time to the brakemen to loosen the brakes. The signal informed the brakemen that the train was about to go forward. The rule is, "two short blasts for relieving the brakes and starting the train." The matter of applying the steam to the engine, and starting the train forward, was under the control of the engineer alone, and, although we think, upon the testimony, the act was recklessly performed and caused a very serious injury to the brakeman, it was nevertheless, within the risks assumed by the defendant in error when he engaged with the plaintiff in error to discharge the duties of brakeman on the train.

This conclusion of the court is fully sustained by the decision of the Supreme Court Commission in *P. Ft. W. & C. Ry. Co. v. Lewis*, 33 Ohio St. 196. That case was an action by a brakeman against the railway company for an injury caused by the negligence of the engineer, and the negligent act complained of was in starting the train, while the brakeman was in a dangerous position, without giving the required signal.

We refer to the very able opinion of Judge

Day, without quoting from the case, further than 4th proposition in the syllabus, which reads as follows: "Where an engineer and brakeman were employed by a railroad company in operating the same train, and there was no evidence to prove that the brakeman was placed in a position of subordination to the engineer, other than what may be implied from the rules of the company, requiring the engineer to give certain signals as "a notice" to apply or loose the brakes, and requiring the brakeman to manage the brakes "according to circumstances and the signals of the engineer," and placing the brakeman while on the train, in subordination to the conductor. Held, that the engineer and brakeman were servants of the company engaged in a common service; that the relation of superior and subordinate did not exist between them; and that, therefore, the company was not responsible to the brakeman for an injury occasioned by the negligence of the engineer."

True, in the case before us, several witnesses testified that, on the road of plaintiff in error, brakemen are subordinated to the engineer of the train, but upon the whole record, it is quite evident that the information of the witnesses was based solely upon the rules above quoted in regard to the giving and obeying signals for setting or relieving brakes, so that, in point of fact, this case in this respect is exactly similar to *Lewis'* case; and a majority of the court can see no good reason for overruling that decision.

Judgments reversed and cause remanded.

OKEY, C. J., dissenting.

A railroad company is liable in this State for the negligence of a conductor, causing injury to a brakeman, upon the ground that the company has placed the conductor in a position of superiority to the brakeman. But there is no magic in the word conductor; and if the brakeman is bound to obey the orders of the engineer in applying and loosening brakes, as he clearly is, and while obeying such orders is injured by the negligence of the engineer, it is difficult to find satisfactory ground for holding that the company is not equally liable. Argument, however ingenious, based on a distinction between such cases, has for its support no valid reason, and is necessarily fallacious. In my opinion the law of this State is, that whenever a master has in his employ two or more persons, and the nature of their employment is such that one is required to give orders to the others, who are bound to obey, and while doing so are injured by the negligence of the person placed in such position of superiority, the master is liable, and it is immaterial whether the negligent person was known as conductor, engineer, or by other designation.

In this case the company is clearly liable, in my judgment, by a just application of the principle I have stated. By the very nature of the employment, the brakeman was subordinate to the engineer. But that view is much strengthened by reference to the "general rules for running trains," which are made part of the record.

In looking into those rules I find they do not support the theory that the conductor alone is superior to the brakeman. On the contrary, the engineer is, under the rules of the company, in many things as much superior to the brakeman, and as much beyond his control or advice, as the conductor, and the brakeman is quite as likely to be injured by the negligence of the former as the latter. The company speaks as emphatically and as potently through the engineer as through the conductor. Take the very case under consideration. Pataskala was not a regular stopping place for this freight train. The conductor gave no signal to stop, but the engineer, in pursuance of a rule of the company, did give the signal for that purpose. The rules provide, *inter alia*: "One short blast is the signal for putting down the brakes and stopping the train; two short blasts for relieving the brakes and starting the train. * * * When signal bell on engine is rung by conductor to stop at next station, the engineer will answer with two short whistles. *Engineers will also give the same signal when it is seen to be necessary to stop at a station at which he has not been signaled to stop by the conductor.*" Engineers "will be held equally responsible with the conductors in case of any violation of the rules and regulations of the road."

Here the engineer gave the signals because the company, by fixed rules, commanded him to give them, without waiting for any order of the conductor, and the brakeman obeyed the signals because it was his imperative duty to do so, under the rules of the company. And the same rules which required the engineer to give the signals, made it his duty, when the brakes were loosened, to put on more steam so as to increase the speed. The engineer, in performing this last duty, however, was guilty of gross negligence; he started the train so suddenly as to break it into three sections and maim Ranney for life; and it is fair to say that Ranney would not have been injured if he had not been at the very moment obeying the orders of the company, given through the engineer, to loosen the brakes.

The conductor performed no office whatever at or before reaching Pataskala station—there was none for him to perform. The injury would have happened the same way, to the same extent, and from the same cause, *i. e.* the negligence of the company acting through the engineer, if the conductor had been absent from the train. Shall we segregate the acts of the engineer performed in the few moments which elapsed from the time of giving the signal to apply the brakes until the injury occurred, holding that in giving the signals he was the company's *alter ego*, and in putting on more steam a fellow servant of Ranney—his right hand the company, his left a mere fellow servant? Surely there is no real foundation for any such distinction.

Railway Co. v. Lewis, 33 Ohio St. 196, was, I think, wrongly decided, and of the same opinion were two of the five judges who heard that case,

and the decision of the majority in this case is, in my judgment, equally erroneous.

White, J., dissented on the same ground.
[This case will appear in 37 O. S.]

INSURANCE—LOSS—LIABILITY

SUPREME COURT OF OHIO.

DETROIT FIRE & MARINE INS. CO.

v.

COMMERCIAL MUTUAL INS. CO.

March 28, 1882.

Where an insurance company, after having taken a risk and reinsured in another company to indemnify itself against loss on its policy, discharges its liability by the payment of a less sum than that for which the original insurance was effected, the sum so paid by it will be taken as the amount of damage sustained, and the measure of indemnity to be recovered from the reinsuring company; provided such sum is within the amount of the reinsurance policy, and does not exceed the amount of actual loss, and such policy contains no condition for prorating loss or limiting liability.

Error to the District Court of Cuyahoga County.

The petition alleged that on the 10th of May, 1871, the plaintiff, the Commercial Mutual Insurance Company, issued its policy of insurance, causing \$20,000 to be insured upon the body, tackle, apparel, and other furniture, of the Schooner called the "John Burt," from noon of the 6th day of May, 1871, to noon of the 5th day of December, 1871. That on the same day, the defendant, the Detroit Fire & Marine Insurance Company, on account of the Commercial Mutual Insurance Company—loss if any, payable to them—made re-insurance, and caused \$5,000, to be insured upon said Schooner, from noon of said 6th day of May, to noon of said 5th day of December. That in and by said policy of re-insurance, the said vessel, with her tackle, apparel and other furniture was valued at \$25,000; and the limit of insurance upon the vessel interest thereby insured, was fixed at \$20,000. That with the exception of the names of parties and amount insured, the terms, conditions, and stipulations of said re-insurance policy, were substantially the same, as those contained in the policy issued by the re-insured company to the owner of the vessel. That on the 14th of October, 1871, the said vessel was, by the perils and dangers of the lakes, sunken, and so damaged, that she was abandoned as a total loss, and the abandonment was accepted.

The answer alleged that before the commencement of said action, the plaintiff settled and compromised with the owner of said vessel, his claim of \$20,000 under the policy issued to him, for the sum of sixty cents on the dollar, to wit, \$12,000; and obtained from the owner an absolute release and discharge from all liability under said policy; that at the time of said settlement and compromise, the plaintiff was not in a bankrupt or insolvent condition; that in accordance with the terms of said settlement and compromise, the defendant paid to the plaintiff \$3,000, or sixty

per cent. of the amount insured on said vessel by said policy of re-insurance; and paid the same, in full satisfaction and discharge of all claim against it, under said re-insurance policy.

To the foregoing answer the plaintiff below demurred generally, and the court sustained the demurrer, the defendant, not desiring to plead further, judgment was thereupon rendered in plaintiff's favor for the full amount of its claim; and at the following term of the district court this judgment was affirmed.

LONGWORTH, J.

The original insurer became liable to the owner of the vessel for a total loss, but actually paid him only \$12,000, being sixty per cent. of the amount of the policy, in full discharge of its liability. The whole amount of re-insurance was \$5,000. Shall the re-insured company recover the full amount of its policy, or only a *pro rata* part of the latter sum, at the rate of sixty cents on the dollar?

The contract of insurance has always been regarded as one of indemnity, the object being to protect the insured from any and all damage occasioned by the happening of the loss insured against, not exceeding the amount of the policy.

Re-insurance is thus defined by Mr. May: "It is a contract of indemnity to the re-insured, whatever be the subject matter, and binds the re-insurer to pay to the re-insured the loss sustained in respect to the subject insured, to the extent for which he is re-insured, and not necessarily differing in form from an original insurance." May on Insurance § 11. In the case before us the policy does not differ in form from the original policy, although it may be true, as I am informed it is, that policies of re-insurance generally contain a condition that the loss, if any, shall be payable *pro rata*, at the same time and in the same manner with the re-insurance company, yet no such condition is expressed in the policy before us. Is it to be implied? To answer this question we must have a clear idea of the nature and object of such a contract. Parsons in his work on Marine Insurance, vol. 1 p. 299, says: "In all cases of re-insurance, whatever may be their ground, the re-insured stands, as to his insurer, in the same relation in which the insured stands to him," "and it may be said in general, that, wherever the insurance is not on the property of the insured, but against risks which he bears, this is in the nature of re-insurance." (p. 308). And in Phillips on Insurance § 374, this definition is given: "Re insurance is a contract whereby one party, called the re-insurer, in consideration of a premium paid to him, agrees to indemnify the other against the risk assumed by the latter, by a policy in favor of a third party." And it has been held that the original assured cannot assert any interest in a policy of re-insurance. Herkenrath v. Ins. Co., 1 Barb. Ch. 363.

If it be true, then, that it is the risk which is insured against, and the contract is intended to furnish complete indemnity, it is difficult to understand any reason why, when such risk has be-

come a certainty, and the re-insured has actually sustained a loss, he is to be indemnified only *partially* and not *completely*; at least to the extent of the amount named in the policy of re-insurance.

Upon this subject, there are but few adjudged cases. None are to be found in the English books. From a very early day re-insurance has been interdicted in that country by act of Parliament, (19 Geo. 2, Ch. 37, sec. 4), Mr. Arnold states that this statute arose from the fact that re-insurance had come to be employed as a mode of speculating in the rise and fall of premiums, and the legislature foresaw that it might be used as a cover for wager policies, 1 Arnold on Ins. 290. Andree v. Fletcher, 2 T. R. 161, is an emphatic declaration of the meaning and force of this statute. Whatever may have been the reasons for its adoption, however, it has certainly never been recognized as a part of the common law of this country. Our courts have refused to so regard it, or to find anything in re-insurance contrary to public policy and fair dealing. Upon this subject, Mr. Justice Sedgwick said in the early case of Merry v. Prince, 2 Mass. 176, "That a contract of re-insurance is not prohibited by the principles of the common law is admitted by the parties. It is a contract which, in itself, seems perfectly fair and reasonable, and might be productive of very beneficial consequences to those concerned in this important branch of commerce; but because it was much abused, and turned to pernicious purposes it was prohibited by an act of the Parliament of Great Britain." In this case he goes on to show conclusively that the principle of that statute has never found a place in the insurance law of the United States. See also Merchant's & M. Ins. Co. v. Washington Ins. Co., 1 Handy 408, 425. This will serve to explain the fact that the English reports are barren of authority upon the subject under investigation.

Since the decision of the French Court of Admiralty at Marseilles, in December, 1848, cited in Emerigon, Traité des Assurances, Meredith's Translation 202, (but no other report of which I have been able to find), it has been uniformly held, that, where the first insurer becomes insolvent, and, on a compromise with his creditors, pays only a certain percentage of the loss, the re-insurer is nevertheless, bound to pay the re-insured the full amount of the loss to the extent of the re-insurance. The most carefully considered case, and perhaps the leading case upon this subject is Hone and Bokee v. Mutual Safety Ins. Co. 1 Sandford 137, subsequently affirmed in 2 Comstock 285. In this case the decision of the French Admiralty Court is followed, and the court repeat with approval the language of Emerigon and Roccus, to the effect that the re-insurer is bound to pay the *whole* loss which is incurred by the first insurer.

Bonlay Paty and Alanzet, two distinguished modern french authors, are also cited as speaking to the same effect.

In Blackstone v. Alemannia Ins. Co. 58 N. Y.

104, the same doctrine is declared to be definitely settled. See also to same effect, *Ins. Co. v. Cashow*, 41 Md. 59, and *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443.

If it be true, then, that the re-insurer is liable to the re-assured (to the extent of the sum named in the policy) for the full amount of the loss, for which only a liability has attached to the original insurer, but which he has *not paid* and cannot pay on account of insolvency, how much more must it be true that such obligation exists where the re-assured has not only incurred a liability but has *actually paid* the full amount for which he asks indemnity? If there existed room for doubt as to how this question should be answered the answer would be found in the decision of *Ill. Mut. Ins. Co. v. Andes Ins. Co.* 67 Ill. 362, which, as far as I am able to understand it, is indistinguishable from the case at bar. In that case the element of insolvency did not exist. The original insurer was liable to pay to the insured the sum of \$6,000, in consequence of the loss of the subject matter insured, but actually paid only \$600, in full discharge of the liability, the amount of the re-insurance was \$2,000. It was said by the court, that the re-assured would have been entitled to recover \$600, had there been a clause in the policy *pro-rating* the loss.

The claim of the plaintiff in error is based upon the theory that, in respect to the subject matter of insurance, the re-insured and the re-insurer are engaged in a common venture and ought thereupon to bear the loss in ratable proportion. In the light of the authorities this view is wholly untenable. It pre-supposes a certain privity of contract to exist between the original insured and the re-insurer, the existence of which is denied by every authority which has spoken upon the topic. I am content to close this subject by quoting the language of Emerigon: "The re-insurance is absolutely foreign to the original assured, with whom the re-insurer contracts *no sort of obligation*." *Traité des Assurances*, Meredith's Translation, p. 201.

Judgment affirmed.

[This case will appear in 37 O. S.]

RAILROAD—CONSTRUCTION IN A STREET OF A CITY—INJUNCTION.

SUPREME COURT OF OHIO.

THE SCIOTO VALLEY RAILWAY

v.

DAVID LAWRENCE ET AL.

March 28, 1882.

1. Where the construction of a railroad in a street of a city, will work material injury to the abutting property, such construction may be enjoined, at the suit of the owners, until the right to construct such road in the street shall first be acquired, under proceedings instituted against such owners as required by law for the appropriation of private property.

2. In such case it is immaterial whether the fee is vested in the city or in the abutting owners, so long as it

is held upon the same defined uses. *Railway Co. v. Cumminsville*, (14 Ohio S. 524) approved and followed.

Error to the District Court of Scioto County.

On July 3, 1877, the defendant in error, David Lawrence and others, filed their petition in the Court of common Pleas of Scioto County to enjoin the Scioto Valley Railway Company, the plaintiff in error, from constructing its railroad along and on Gay street in the city of Portsmouth in said county.

The plaintiffs aver that they are the owners of valuable lots abutting on said street; that said street is dedicated to public use as a street, the fee thereof being vested in said city in trust for said use. They also aver that said railway company has obtained from said city of Portsmouth, the right of way so far as said city has power to grant the same, to construct and build said railroad over and along said Gay street, that the construction of said railroad and the laying of the track thereof along said street as contemplated in said grant of the right of way by said city, and the running of locomotives and trains thereon, will have the effect of rendering the property of the plaintiffs in Gay street to a great extent worthless, and to deprive them of their property in said street, and the private rights and easements which they respectively now have in the same. It is also averred that such contemplated use of said street is not only an essential diversion of it to other purposes than those for which it was acquired, but is such an enlargement of its uses as to accumulate materially additional burdens upon the land, and destroy or impair the incidental rights of the plaintiffs appurtenant to their lands abutting on said street, and that the damages resulting therefrom will be irreparable.

The answer of the defendant, put in issue the averments of the petition as to the injurious effects upon the property of the plaintiffs, resulting from the construction and operation of the railroad, and relied upon the grant from the city as a bar to the relief sought.

On the trial the court found the issues in favor of the plaintiffs and granted the injunction as prayed for, unless the railroad company, as against the plaintiffs, should first acquire the right to construct said road, under proceedings instituted as required by law for the appropriation of private property.

On error this judgment was affirmed by the district court, and the present proceeding is instituted in the court to reverse both judgments.

WHITE, J.

This case is governed by the principles laid down in *Street Railway v. Cumminsville*, (14 Ohio St. 524); and we are not disposed to depart from the ruling in that case.

1. As to the claim of the plaintiff in error that the abutting lot owners will sustain no appreciable damage by the construction of the railroad on the street.

This question was put in issue by the pleadings and was found by the court below in favor

of the defendants in error. All the evidence is embodied in the bill of exceptions and is brought before us for review. The result of our examination is that we see no reason to warrant us in disturbing the findings of the court upon the issues of fact.

2. It is also claimed that as the fee to the street is vested in the city, the abutting lot owners are not entitled to an injunction, whatever damage or injury may result to their lots; that their only remedy is by civil action against the company to recover for such injury.

The statute under which the fee of streets, is vested in the city provides as follows: "That all proprietors of lots or ground in any city or town corporate in this State, who have subdivided or laid out, or who shall hereafter subdivide or lay out the same in lots for sale, shall cause accurate and true maps or plats thereof to be recorded in the office of the recorder of the county in which such town or city may be situated; which maps or plats so to be recorded, shall set forth and describe, with certainty, all grounds laid out or granted for streets, alleys, ways, commons or other public uses; * * * and such map or plat so recorded, shall be deemed a sufficient conveyance to vest the fee of the parcel or parcels of land therein set forth and described, or intended to be for streets, alleys, ways, commons or other public uses, in such city or town corporate, to be held in the corporate name thereof, in trust to and for the uses and purposes so set forth and expressed or intended." S. & C. 1843; Chase 1846.

It seems to us it can make no material difference where the fee is vested, so long as it is held to the same defined uses.

The established doctrine in this State is that the abutting lot owners "have a peculiar interest in the street, which neither the local nor the general public can pretend to claim, a private right of the nature of an incorporeal hereditaments, legally attached to their contiguous grounds, and the erections thereon; an incidental title to certain facilities and franchises, assured to them by contracts and by law, and without which their property would be of little value. This easement, appendant to the lots, unlike any right of one lot owner in the lot of another, is as much property as the lot itself."

In speaking of the rights of the public in the street, in the case already referred to, the court (on p. 549), say: "It" (the public) "may regulate and modify the manner of using the street by the public at large, and may, undoubtedly, devote its own interest to the maintenance of new structures placed in the hands of other agencies, and calculated to enlarge the general purposes for which the highway was originally constructed. But where these new structures, and new modes of travel, devolve additional burdens upon the land, and materially impair the incidental rights of the owner in the highway, they require more than the public has, or can grant, and the deficiency can only be supplied by appropriating the private right upon

the terms of the Constitution." See also *Pierce on Railroads*, (1881) p. 241.

The doctrine laid down in *Street Railway v. Cumminsville* was subsequently adopted by the General Assembly in the act of May 27, 1866, to amend the Act of April 10, 1861, providing for street railroad companies. S. & S. 137, 2 Sayler 958. And there is no reason why abutting lot owners should not have the same rights against the construction of steam railroads as they have against street railroads.

Judgment affirmed.

[This case will appear in 37 O. S.]

Digest of Decisions.

WISCONSIN.

(Supreme Court.)

HOWLAND v. MILWAUKEE, LAKE SHORE & WESTERN RY. Co. February 7, 1882.

Railroad—Accident to Employee.—Plaintiff, while going as a shoveler of snow for the defendant company upon a train engaged in the business of removing snow from the track, was injured by the overturning of the car in which he rode, by reason of an unsuccessful attempt of the conductor to remove a snow bank from the track by means of the snow-plow alone, aided by the momentum of the train. Held, upon all the facts set out in the complaint, that a recovery by the plaintiff is precluded by the facts that such overturning of his car was one of the perils of the business, which he assumed, and that the conductor and others, whose negligence is alleged, were fellow-servants in the same employment.

TETZ v. BUTTERFIELD. February 7, 1882.

1. *Building Contract.*—A contract for the erection of a dwelling by T. for B. provides that T. shall complete it in all its parts "in a good, substantial, and workmanlike manner, to the acceptance of W. D. architect;" that if a dispute shall arise respecting the true construction of the drawings or specifications the same shall be finally decided by the architect, but if any dispute shall arise respecting the true value of any extra work or of work omitted, "the same shall be valued" by arbitrators whose appointment is provided for; and that the work is to be executed "so as to fully carry out the design of said building as set forth in the specifications or shown in the plans and according the true spirit, meaning, and intent thereof, and to the full satisfaction of W. D., architect, * * * and to the satisfaction of the owner." Held, that the last paragraph has no reference to the quality of the workmanship or materials, and as to these, in the absence of proof of fraud, mistake, or unfair dealing on the part of the architect, his acceptance of the work as satisfactory binds the owner.

2. In an action by the builder upon the contract the answer alleges that improper and inferior material was used by the plaintiff, and that if the architect "has expressed satisfaction with said work he has failed to discharge his duty as an architect, and has done so in fraud of the rights of defendant, and through some collusive management, as defendant is informed and believes, between himself and the plaintiff." On the trial defendant offered evidence to show that one of the floors was made of rotten flooring, and that much of the material used was rotten, etc., and that before plaintiff quit work defendant notified him and the architect that he (defendant) was not satisfied with the work and material. Held, that it was error to reject this evidence, as it tended to show bad faith on the part of the architect in accepting the building; and such proof was admissible under the contract and answer.

LXVTH GENERAL ASSEMBLY OF OHIO.

SYNOPSIS OF LAWS PASSED THIS SESSION.

MARCH 16, 1882.

S. B. 30. To authorize the Trustees of any township in Harrison county, to construct free turnpikes.

House Joint resolution No. 32. Requesting the President of the United States to pardon Serjeant Mason.

Senate Bill 116. To authorize the issue of bonds by cities having a population of not more than 12,258, and not less than 12,000, for market house and city hall purposes.

MARCH 24, 1882.

House Bill 186. Amending sections 952 and 953 of the Revised Statutes prescribing rules for the governance of the board of Lufitary Directors of Hamilton County.

H. B. 57. Amending section 2373 of the Revised Statutes, for a more perfect description of town lots.

H. B. 434. To amend sections 1462 and 1463 of the Revised Statutes, empowering the trustees of townships to investigate and take action relating to the prevalence of small-pox or other infectious or loathsome disease.

H. B. 258. To authorize the Commissioners of Athens County, Ohio, to levy an additional tax.

H. B. 202. To authorize certain township trustees to dispose of burying ground and purchase other ground.

H. B. 201. To authorize the village of East Liverpool to issue bonds for the defraying of expenses incurred by reason of the recent prevalence of small-pox.

H. B. 203. To authorize the village of East Liverpool, Columbiana County, to issue bonds for the purchasing and improving of grounds for a cemetery.

H. B. 309. To authorize the city council of the city of Gallon, and the incorporated village of Kent, to borrow money, and to issue bonds therefor, for the purpose of providing water works.

H. B. 8. To authorize the Trustees of Silver Creek township, Green County, to transfer certain funds.

Senate Bill, 70. To authorize the township trustees of Kelly's Island township, Erie County, to assess a tax for sidewalk purposes.

S. B. —. To authorize the Commissioners of Monroe County, to settle certain claims, therein named.

S. B. 60. To divide Twin township, in Darke County, into two election precincts.

S. B. 88. An act to create two election precincts in Meigs township, Adams County.

H. B. 236. Authorizing the city of Gallon to borrow money, and issue bonds therefor, to purchase grounds for a cemetery.

H. B. 226. To divide York township, Athens County, into election precincts.

MARCH 27, 1882.

H. B. 435. To change the time for holding the second term of the Court of Common Pleas in the County of Coshocton, to April 26th, 1882, instead of April 4th, 1882, as fixed by the Judges.

H. B. 59. To amend an act, entitled an act to authorize the payment and transfer of bounty funds to aid in the erection of Soldier's Monuments etc. (77 O. L. page 127).

H. B. 94. To amend section 7082 of the Revised Statutes to read as follows:

Section 7082. Whoever adulterates, for the purpose of sale, any spirituous, alcoholic or malt liquors, used or intended for drink, or medical or mechanical purposes, with cocculus-indicus, vitrol, grains of paradise, opium, alum, caspium, copperas, laurel-water, logwood, brazilwood, cochineal, sugar of lead, aloes, glucose, tannic acid, or any other substance which is poisonous or injurious to health, or with any substance not a necessary ingredient in the manufacture thereof; and whoever sells or offers for sale or keeps for sale, any such liquors so adulterated, shall be fined in any sum not less than twenty nor more than one hundred dollars, or be imprisoned not less than twenty nor more than sixty days, or both, at the discretion of the court. And any person guilty of violating any of the provisions of this section, shall be adjudged to pay in addition to the penalties hereinbefore provided for, all necessary costs and expenses

incurred in inspecting and analyzing any such adulterated liquors, of which said party may have been guilty of adulterating, or selling or keeping for sale, or offering for sale.

H. B. 284. To amend section 2142 of the Revised Statutes to read as follows:

Section 2142. Any city or village having a board of health, or "the standing committee on health of any city or village council, who may do and perform all the duties of a board of health, as prescribed in this chapter," or a health officer, may establish a quarantine ground, or grounds, within or without its own limits, but if such place be without its limits, and within the limits of any other municipal corporation, the consent of the corporation, within the limits of which it is proposed to establish such quarantine shall be first obtained.

H. B. 254. To authorize the city council of the city of Lima to issue bonds to provide said city with water works.

MARCH 29, 1882.

H. B. 352. Amending an act enabling the commissioners of Montgomery and Warren counties to purchase toll-roads and convert the same into free roads.

H. B. 374. To authorize the village council of the incorporated village of Medina, to issue bonds to build water works.

House Joint Resolution, 12. Relative to obtaining from the Federal Government, a training ship for Reform School boys.

H. B. 219. Making appropriations for defraying the expenses of the Ohio National Guard, while attending the obsequies of the late President Garfield, etc.

Senate Bill, 135. To authorize the trustees of Vienna township, Seneca County, to macadamize a certain road.

S. B. 107. To authorize the council of the incorporated village of Defiance, to transfer certain funds.

S. B. 78. To amend sections 984, 944 and 946 of the Revised Statutes, relating to Children's Homes.

S. B. 59. To amend Section 4908 of the Revised Statutes to read as follows:

Section 4908. The board of education, except in cities of the first class, second grade, shall hold regular meetings once every two weeks. In cities of the first class, second grade, said board shall hold its meetings on the first and third Mondays of each month following the third Monday of April, and in all city districts of the first class, said board may hold such special meetings as it may deem necessary; it may fill all vacancies that occur in the board until the next annual election, and may make such rules and regulations, for its own government, as it may deem necessary, but such rules and regulations must be consistent with the Constitution and laws of the State.

H. B. 355. Authorizing the city of Dayton to issue Water Works and Fire Department bonds.

H. B. 343. Enacting section 1692 b, of the Revised Statutes as follows:

Section 1692 b. That all incorporated villages within this State, having within their limits a college or university, shall have the power to provide by ordinance against the evils resulting from the sale of intoxicating liquors within the limits of the corporation.

H. B. 316. Authorizing the Commissioners of Paulding County to improve certain streams.

H. B. 154. To authorize the Commissioners of Clermont County to construct certain free turnpike roads.

S. B. 122. Amending section one of an act passed April 18, 1881, authorizing the Commissioners of Erie County to issue bonds to build a jail.

H. B. 301. Making appropriations for the benevolent, penal and reformatory institutions of the State.

APRIL 5, 1882.

H. B. 143. To authorize the commissioners of Adams county to construct certain turnpike roads.

S. B. 78. Supplemental to an act passed February 17th, 1882, which authorized the commissioners of Pike county to pay certain bonds and coupons issued by said county.

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

Tuesday, April 11, 1882.

GENERAL DOCKET.

No. 69. Fayette Building and Loan Association v. George Dahl. Error to the District Court of Fayette County. Dismissed for want of preparation.

70. George Greis v. Francis Wagner, Treasurer of Seneca County. Error to the District Court of Seneca County. Judgment affirmed. There will be no further report.

157. Howes, Babcock & Co. v. Johnson & Beck. Error to the District Court of Washington County. Petition in error dismissed, cause being settled, as per agreement on file.

1076. Ohio ex rel., Attorney General v. Henry Heinmiller. Quo Warranto. Cause taken out of its order and set for oral argument April 19th, next.

MOTION DOCKET.

No. 54. Charles Stoddard v. The State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Ashland County. Motion granted.

55. James Clark v. Margaret Bruce. Motion to strike the printed record from the files on the ground that it is imperfect, material parts being omitted and statements of counsel substituted, also parts deemed by counsel material italicized throughout the record. Motion granted, and leave given to supply proper copies within sixty days.

56. Milton H. Miller v. J. T. Sullivan & Co. Motion for revivor in cause No. 1088, on the General Docket by plaintiff, and counter-motion by defendants to dismiss. Motion of plaintiff to revive overruled and counter-motion of defendants sustained.

57. Margaret Nulter v. Elizabeth McKinney. Motion to dispense with printing record in cause No. 362, on the General Docket. Motion granted.

58. Henry P. Sabbert v. Antonius Zeilvernik. Motion to dismiss cause No. 762, on the General Docket, for want of printed record. Motion granted.

59. Charlotte Miller, executrix &c. v. J. T. Sullivan & Co. Motion of plaintiff in error to take out of its order cause No. 1083, on the General Docket, and counter-motion of defendants in error to dismiss. Motion of plaintiff in error sustained, and counter-motion of defendants in error overruled.

60. Jacob Ridenour v. The State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Butler County. Motion granted.

SUPREME COURT RECORD.

[New cases filed since last report; up to April 11, 1882.]

No. 1092. S. Kuhn & Sons v. Oscar I. Frank. Error to the District Court of Hamilton County. Jordan, Jordan & Williams and Follett, Hyman & Dawson for plaintiffs; Hoadley, Johnson & Colston for defendant.

1093. Charlotte F. Miller, Ex'r &c. v. J. T. Sullivan & Co. Error to the District Court of Hamilton County. Hagans & Bradwell for plaintiff; H. C. Whitman for defendants.

1094. William A. Lowe v. Union Central Life Insurance Co. Error to the District Court of Hamilton County. D. Thew Wright for plaintiff; Ramsey, Matthews & Matthews for defendant.

1095. Isaac N. Topliff v. George H. Ely et al. Error—Reserved in the District Court of Lorain County. S. Burke and W. W. Boynton for plaintiff; E. G. Johnson for defendants.

1096. George H. Ely et al. v. Isaac N. Topliff. Error—Reserved in the District Court of Lorain County. E. G. Johnson for plaintiffs; S. Burke and W. W. Boynton for defendant.

1097. John A. Topliff et al. v. Isaac N. Topliff. Error—Reserved in the District Court of Lorain County. E. G. Johnson for plaintiffs; S. Burke and W. W. Boynton for defendant.

1098. Rebecca Bantz v. Oliver C. Gates, Ex'r &c. Error to the District Court of Preble County. J. E. Freeman and Thomas Millikin for plaintiff; Foss & Fisher for defendant.

1099. Evaline C. Downing v. The Farmer's Insurance Co. Error to the District Court of Belmont County. D. D. T. Cowan and N. K. Kennon for plaintiff; Critchfield & Graham for defendant.

1100. Isaac Smith v. George W. Manahan. Error to the District Court of Huron County. F. P. Finefrock and Frank Sawyer for plaintiff; G. T. Stewart for defendant.

1101. Abraham Zimmerman v. David Zimmerman. Error to the District Court of Mahoning County. Van Hyning, Johnson & Wolf for plaintiff; Jones & Murray for defendant.

1102. Lydia Loudon, Adm'r &c. v. James Patterson, Adm'r &c. Error to the District Court of Columbiana County. Clarke & McVicker for plaintiff; Wallace & Billingsley for defendant.

1103. Mary L. Ryan et al. v. James W. O'Connor. Error to the District Court of Hamilton County. Stallo, Kittbridge & Shoemaker for plaintiff; Taft & Lloyd and O'Connor & Glidden for defendant.

1104. Thomas Stayner v. David Bower et al. Error to the District Court of Wyandot County. C. R. Mott for plaintiff.

1105. Sarah C. Mortan v. George Newhouse et al. Error to the District Court of Columbiana County. J. W. & H. Morrison and J. T. Spence for plaintiff; O. Hume for defendants.

1106. Martha E. Burket v. Callius A. Weage. Error to the District Court of Hamilton County. S. T. Crawford for plaintiff.

1107. Julius H. Neth v. W. E. Guerin. Error to the District Court of Franklin County. S. A. Nash for plaintiff.

1108. Jacob Albright v. Wm. Ford et al. Error to the District Court of Sandusky County. Bartlett & Finefrock for plaintiff; Lemmon, Finch & Lemmon for defendants.

1109. Lemuel McMannees, Adm'r &c. v. Edwin Boutwell. Error to the District Court of Hancock County. Henry Brown for plaintiff; A. Blackford for defendant.

1110. Dennis McClurg, Adm'r &c. v. John Cole, Ex'r &c. Error to the District Court of Trumbull County. C. A. Harrington for plaintiff.

1111. Henry Ruffner v. Co-operative Land and Building Association No. 1. Error to the District Court of Hamilton County. Stimmel & Davis for plaintiff; Paxton & Warrington for defendant.

Ohio Law Journal.

COLUMBUS, OHIO, : : APRIL 20, 1882.

THE Supreme Court has in its hands for consideration, cases up to and including number 83, in regular order on the General Docket. This of course does not include numerous cases taken out of their regular order for hearing.

THE signs of the times indicate a nearer approach of the millenium than is generally hoped for.

A Judge has been found in Washington, D. C., who possessed the courage to pronounce the indictments against the Star Route thieves good, notwithstanding a few questions were raised and a few doubts existed which would have given a weak-kneed judge abundant room to dodge. Ingersoll, the thieves' counsel, has therefore, warned his clients to look to their insurance and fire proof appliances, as there may be a hell after all.

Another Judge has been found—in the Maryland Court of Appeals—who has exhibited an unusual degree of courage by granting an injunction to prevent the carrying on of the business of slaughtering, where it was a sore annoyance to honest and pure-air-living citizens. To be sure the authorities all justified the ruling, but judges don't always have the backbone to take a decided stand in such matters. In this case (*Woodyear v. Shaffer*, 57 Md.), Judge Magruder declared—following precedent—that "slaughter houses are *prima facie* nuisances," and that "it is not necessary that a public nuisance is injurious to health; if there be smells, offensive to the senses, that is enough, as the neighborhood has a right to fresh and pure air." Numerous authorities are cited supporting this very common sense ruling. The case is of such value that we publish it in full in this issue.

Again, a New York paper has the following which is a decided innovation upon the belief that gas consumers have rights which gas companies are bound to respect:

"Judge Lawrence has continued the temporary injunction granted in the suit brought by Gen. Daniel E. Sickles against the Manhattan Gaslight Company to restrain the defendants from removing the meter or cutting off the supply of gas from Gen. Sickles' residence, at 14 Fifth avenue. Gen. Sickles asserted that unjust and improper bills for gas, for a time while he was abroad, were presented to him, and that

on his refusal to pay them in full, the company threatened to remove the meter. Judge Lawrence holds that the law of 1859, allowing gas companies to stop the supply of gas in case of non-payment of bills, has not made the gas company the sole judge of the question whether any, and if so, what amount of remuneration is due to it, or of the right of resort to the courts to ascertain the facts. He says:

"The bills rendered before the plaintiff's departure on January 28, 1881, show that at times he consumed between 116 and 135 cubic feet of gas per night, while the bill rendered on the 18th of February, covering a period of eleven days, shows a consumption of nearly 200 feet per night. I think that the inference strongly arises that the meter did not register correctly, and that the plaintiff, before submitting to the annoyance and vexation of having his gas cut off, is entitled to have the question tested as to the correctness of the bills presented to him. It is proper to state that everything appears to have been done which could have been done by the company to secure accuracy in the meter, but the fact remains that other parties occupying rooms in the same house received bills for gas indicated by other meters as having been consumed by those parties when they are confessedly absent from the city and the gas had been shut off. This evinence tends strongly to show that gas meters are not infallible. I am of opinion that when a dispute arises between the company and the consumer, the latter is entitled to have his rights investigated by the courts. This seems to me to be a case in which, if the plaintiff is right, it cannot be justly claimed that he can be fully compensated by an action for damages. The use of gas in the cities has become almost as great a necessity as the use of water, and an illegal deprivation of one or the other, particularly where such use is for ordinary domestic and family purposes, would cause, I think, such damages as to call for the interposition of a court of equity."

All these things point to the near approach of the millennial period.

SLAUGHTER-HOUSES AS NUISANCES.

MARYLAND COURT OF APPEALS.

WOODYEAR v. SCHAEFER.

Defendant maintained a slaughter-house from which he let flow blood and offal into a stream, rendering the water impure and offensive. Others maintained slaughter-houses, breweries, etc., from which offensive matter was allowed to run into the same stream contributing to its pollution. Plaintiff was the owner of a flour mill on the same stream and the offensive matter ran into his mill dam and mill race. *Held*, that plaintiff was entitled to an injunction restraining defendant from allowing blood, etc., from his slaughter-house to run into the stream and would be entitled to similar relief as to the others allowing offensive matters to run into the stream and that he might join all in one action.

Held, also, that the acts mentioned constituted a public nuisance for which there can be no prescription. Slaughter-houses are *prima facie* nuisances.

Bill to obtain injunction to restrain a nuisance. From a decree denying the prayer of the bill complainant appealed. The opinion states the facts.

MAGRUDER, J.

The bill was filed by the appellant to obtain an injunction to restrain a nuisance.

The appellant has been since 1853 the owner and proprietor of a large flour mill in Baltimore city, on Gwynn's Falls, below its junction with a small stream called Gwynn's Run. Before the purchase of the mill he had operated it from about 1849, and a mill on that site had been operated for over fifty years.

The appellee (the defendant below) is a butcher, having a slaughter-house on Gwynn's Run in Baltimore County, about a mile above the mill.

The complaint is that the appellee for several years past, and up to the time of filing the bill, has emptied, and still continues to empty or allows to flow into the said run, the blood from slaughtered animals, and also continuously discharges from his slaughter-house into the run, the entrails and other offal from slaughtered animals, and that this blood and offal, naturally and necessarily by the flow of the stream, makes its way into the appellant's mill dam, and from that into the mill race, whereby the water in the race and its banks are mixed with and covered by said animal matter, causing and creating a nuisance, the said matter decomposing and creating an offensive smell, at times unbearable; the atmosphere filled with the stench is not only disagreeable and uncomfortable to health but it causes and tends to create disease; that this animal deposit becomes greater each year; that the run from the slaughter-house to the dam is little better than a cess pool; that as the deposit increases the stench increases; that until within two years the appellant and his hands and operatives only suffered inconvenience and discomfort, but now especially in the hot days of summer the stench has made most of the operatives sick, even making the hands so sick as to be unable to retain their food, compelling them at times to quit the premises, whereby the mill has to be stopped, and to obtain an atmosphere that can be even endured the flow of water to the mill has to be stopped and the contents of the dam emptied into the falls; that the operatives complain of the discomforts connected with their employment, and that unless the nuisance shall be abated it is only a question of time when the operations of the mill shall be compelled to cease; that the acts complained of are a nuisance, prejudice and lessen the value of the mill, and deprive the owner of the comfortable and reasonable enjoyment of it, and that he is without adequate remedy at law and can only have full relief in equity, and an injunction is prayed restraining the appellee, his agents and employees and servants from emptying, depositing, discharging or allowing to flow into Gwynn's Run from his premises any blood, entrails or offal from slaughtered animals.

The answer does not deny the condition of the stream as charged, nor the effects produced thereby, but denies that any offensive matter is thrown in the stream by the appellee, that the only matter allowed to flow into the stream from his premises is beef's blood in quantities not exceeding fifteen buckets full upon an average per week, which blood cannot be seen or detected in the waters of said run over one hundred yards below the slaughter-house, and cannot cause any offensive deposit or otherwise create a nuisance or injure the appellant; that if any cause of complaint exists the appellant is himself responsible for it by damming up the stream, which if allowed to flow unobstructed would be free from cause of complaint, and by allowing vegetable matter to accumulate and decompose in the dam and race, and by not using proper appliances to keep out offensive matter; that on Gwynn's Falls and the run there are a large number of slaughter-houses and other establishments which (some for over thirty years and nearly all for over twenty years) have used these streams as sewer-ways, and that the blood from all these slaughter-houses, and the refuse from breweries, soap and other factories, have flowed into these streams for all this time without complaint; and that there are cattle scales over and adjoining the run in which are kept large numbers of swine from which large quantities of filth and refuse matter are washed and thrown into the run and carried down with the current; and that the appellant's remedy is at law and not in equity; and that to grant him the relief prayed would be ruinous to a vast amount of property owned by butchers and others and destructive to one of the most important branches of trade in the State, besides working a most grievous wrong to the appellee.

A vast mass of testimony was taken, which although somewhat conflicting as to the point whether any solid matter was thrown from the appellee's premises into the stream, yet establishes the offensive condition of the water of the run, and in the mill dam and race, quite as fully as the bill charges, and shows the condition of the air at the mill to be at times so offensive as to be practicably unbearable, although at the same time showing other causes besides the slaughter-house of the appellee for the existence of the nuisance, there being a large number of slaughter-houses on the falls and run besides breweries, soap and other factories, and the cattle scales with the occasional addition of dead animals and offal and other offensive matter from various other sources. So that throwing out of consideration the fact of solid animal matter coming from the appellee's slaughter-house, which is shown to have been only an occasional occurrence, if it existed at all, as it probably has in a measure, judging from all the evidence, we are left to the blood which is proved to have flowed regularly from the slaughter-house of the appellee, though in comparatively moderate quantities, as the principal contribution of the appellee in common with a large number of others to

the serious injury and grievance from which the appellant is manifestly so great a sufferer.

So that the question to be decided is, can a court of equity intervene to stop the appellee from committing the acts which constitute such an inconsiderable part of the wrong complained of, and which if stopped would leave the appellant still suffering from almost as great a grievance as he is now subject to?

As to the right of the appellant to the free use of the water of the stream for the purposes of his mill there can be no doubt. The site has been used for the present mill and one which succeeded uninterruptedly for fifty years or more. The appellant has carried it on since 1849 and has owned it since 1853, and the right to the free and unobstructed use of the water for the purposes of operating the mill has been maintained without pretense of objection or interference for all this long period, and has thus become a prescriptive right which no prescriptive right to use the stream for a sewer-way, if such exists, could countervail, for the one must be so used as not to impair or destroy the other. But the wrong complained of and disclosed by the evidence amounts to a public nuisance, for which there can be no prescription. *Wood on Nuisances*, § 724; *Commonwealth v. Upton*, 6 Gray, 473; *Mills v. Hall*, 8 Wend. 315.

But the appellee's slaughter-house was not erected until about 1874, and the pollution of the stream did not give any trouble of material importance until about eight years ago, since which time it has been gradually growing worse. It was natural for the complainant to bear evil as long as it was slight rather than engage in a tedious and expensive litigation.

He could not be expected to sue until his right was materially interfered with. *Crosby v. Bessey*, 49 Me. 539.

If he had complained sooner he might have been unable to make out a case of such interference with the reasonable enjoyment of his property as would have entitled him to the aid of a court of equity. Until he received some substantial injury he could not be expected to sue, and so there could be no prescription as against his right to the free use of the water until that right was interfered with for the purpose for which he used it, and then only to the extent of that interference.

The right of a riparian owner to have the water of a stream come to him in its natural purity, or in the condition in which he has been in the habit of using it, for the purposes of his domestic use or of his business, is as well recognized as the right to have it flow to his land in its usual quantity. See *Wood on Nuisance*, § 677; *Gladfelter v. Walker*, 40 Md. 1, 13; *Wood v. Sutcliffe*, 2 Sim. (N. S.) 163; 8 Eng. L. & Eq. 217; *Stockfort Water Works Co. v. Potter*, 7 H. & N. 159.

And where any prescriptive right to pollute a stream has been gained it can only be maintained to the extent that it is shown to have injuriously affected the interest complaining.

In the case of *Goldsmid v. Tumbridge Wells Imp. Comm'rs*, L. R., 1 Ch. App. 349, where the pollution of a stream which had been going on for over twenty years was complained of, and the continuance of the pollution was sought to be maintained on the ground of a prescriptive right, an injunction was maintained on the ground that the right to pollute the stream could only be acquired by the continuance of the discharge of the sewer, prejudicially affecting the estate, at least to some extent, for the period of twenty years, and that the discharge had not prejudicially affected the estate for so long a period. See *Moore v. Webb*, 1 C. B. R. (N. S.) 673.

In the case before us the appellant suffered no injury at all eight years ago, and could hardly be expected to go a mile away to look after the mode in which the appellee was conducting his business upon his premises, when he himself was subjected to no inconvenience, and could not look to the acts of the appellee as likely to subject him to loss.

It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. Each and every one is liable to a separate action and to be restrained. *Wood on Nuisance*, § 689; *Crossley v. Lightowler*, L. R. 3 Eq. Cas. 279; *Chipman v. Palmer*, 16 N. Y. Sup. 517.

The extent to which the appellee has contributed to the nuisance may be slight and scarcely appreciable. Standing alone it might well be that it would only very slightly, if at all, prove a source of annoyance. And so it might be as to each of the other numerous persons contributing to the nuisance. Each standing alone might amount to little or nothing. But it is when all are united together and contribute to a common result that they become important as factors in producing the mischief complained of. And it may only be after from year to year the number of contributors to the injury has greatly increased, that sufficient disturbance of the appellant's rights has been caused to justify a complaint.

One drop of poison in a person's cup may have no injurious effect. But when a dozen, or twenty, or fifty, each put in a drop, fatal results may follow. It would not do to say that neither was to be held responsible.

In that state of facts, as in one presented by this case, each element of contributive injury is a part of one common whole, and to stop the mischief of the whole, each part in detail must be arrested and removed.

The right to pure air is held to be a natural right and as incident to the enjoyment of land. Its sensible pollution by the exercise of a noxious trade, whereby the comfortable enjoyment of property is diminished, is a nuisance against which courts of equity will always, when the state of the facts applies, give relief, and such injury as is not fairly and reasonably incident to the ordinary use of property and renders surrounding property physically uncomfortable will

be restrained. Wood on Nuisance § 791; St. Helen's Sm. Co. v. Tipping, 11 H. of L. Cas. 649; Walter v. Selfe, 4 Eng. L. & Eq. 20.

And the remedy in equity to prevent a nuisance is generally said to exist whenever that nature of the injury is such that it cannot be adequately compensated by damages or will occasion a constantly recurring grievance. An injunction is the only effectual remedy to stop the injury. Adams' Eq. 211.

Especially is this the case when the injury is caused by so many that it would be difficult to apportion the damage or say how far any one may have contributed to the result, and so damages would likely be but nominal, and repeated actions without any substantial benefit might be the result.

This very difficulty in obtaining substantial damages was stated in *Cloves v. Staffordshire, etc. Co. L. R.*, 1 Ch. Ap. 142, to be a ground for relief by injunction. See *Lingwood v. Stowmarket Co., L. R.*, S. 1 Eq. Ca. 77.

Slaughter-houses are held to be *prima facie* nuisances, Wood on Nuisance, § 504; and that where originally in a remote place, but the building of houses near by renders them noxious. *Rex v. Cross*, 2 C. & P. 483; *Catlin v. Valentine*, 9 Paige, 575; *Peck v. Elder*, 3 Sandf. 126; *Brady v. Weeks*, 3 Barb. Sup. C. R. 157.

It is held that blood running into a stream constitutes a nuisance that will be restrained. In *Att'y Gen'l v. Stewart*, 5 C. E. Green, 419, the defendants were enjoined from allowing blood from slaughtered animals to run into a stream, on the ground that it was *per se* a pollution and would render the stream offensive. In *Rex v. Neil*, 2 C. & P. 185, the right to stop nuisances in cases where many contribute is thus stated:

"It is not necessary that a public nuisance should be injurious to health; if there be smells offensive to the senses, that is enough, as the neighborhood has a right to fresh and pure air. It has been proved that a number of other offensive trades are carried on near this place, etc., but the presence of other nuisances will not justify any one of them; for the more nuisances there were the more fixed they would be; however one is not to be less subject to prosecution because others are culpable."

The law governing the right to an injunction to restrain a nuisance is well settled in *Holsman v. Boiling Sp. Bl. Co.*, 1 McCarter (N. J. Ch.) 335, where a great many leading authorities are collected.

And the law is fully laid down by this court in *Hamilton v. Whitridge*, 11 Md. 128; *Adams v. Michael*, 38 id. 123; *Dittman v. Repp*, 50 id. 516.

And the doctrine is well settled that where the nuisance operates to destroy health or impair the comfortable enjoyment of property, an action at law furnishes no adequate remedy, and protection by injunction must be given. *Daniell's Ch. Pr.* 1858; 2 Story's Eq. 926; 2 Johns. Ch. 166.

We think that the complainant has shown him-

self to have suffered greatly and likely to suffer more in the future from the nuisance to his property, whereby it is likely to become practically valueless unless the injury is restrained. He will be entitled to the same relief against all the parties contributing to the injury, and as all are together contributing to the same result, if the injury does not cease upon the granting of the injunction in this case, he may be entitled to join in one case all who still continue the injury, upon the principle of the case of *Thorpe v. Brumfitt*, L. R. 8 Ch. 656, where it is held that the acts of several persons acting separately and without concert and entirely independent of each other may together constitute a nuisance when the acts of either one alone would not create it, and such persons may be joined as defendants in a bill for an injunction. And this illustration is given: "Suppose one person leaves a wheelbarrow standing on a way that may cause no appreciable inconvenience, but if a hundred do so that may cause serious inconvenience which a person entitled to the use of the way has a right to prevent; and it is no defense to any person among the hundred to say that what he does causes of itself no damage to the defendant." See Wood on Nuisance § 800.

It has been urged in argument that to restrain the appellee and others engaged in the same occupation from doing the acts complained of will prove ruinous to their business and destructive to a vast amount of capital invested in the business. But we do not think the apprehension is well founded. Experience and the necessity of the case have elsewhere applied the remedy in a manner entirely satisfactory to those engaged in the business, and to the great relief of the public; besides converting into a matter of revenue the refuse and offal, before constituting an intolerable nuisance. The business of the appellant and those situated like him will certainly be destroyed if the condition of things shown in this case is allowed to go on and increase, to say nothing of the interference with the comfort, health and development of the whole neighborhood affected by the pollution of the stream. Certainly there must be a remedy and a prompt and thorough one for such an evil in and adjacent to a large and rapidly growing city; and we know of no remedy equal to the emergency but that of the protective and preventive interference by injunction.

The appellee and those situated like him must learn to act upon the maxim *sic utere tuo ut alienum non laedas*.

The *pro forma* decree below will therefore be reversed and the cause remanded in order that an injunction may be issued as prayed in the bill. Under the circumstances of the case we think the costs should be equally divided between the parties.

Decree reversed and cause remanded.

STARE DECISIS — COMMISSIONERS OF
APPEALS—RIGHTS OF PURCHASER
AT VOID SALE—INTEREST.

SUPREME COURT OF TEXAS.

J. R. & ADELIA BURNS

v.

W. H. LEDBETTER.

February 14, 1882.

The questions decided by the Commissioners of Appeals in arriving at their award, are as conclusively settled as the law of the case as they would have been had the case been decided in the usual course of procedure by the supreme court.

Appeal from Fayette county.

GOULD, C. J.

With a single exception the questions now sought to be presented were settled on a former appeal. 54 Tex. 374. By agreement of parties the cause was, whilst pending in this court on that appeal, referred to the Commissioners of appeals, and they having reported their award and opinion, said award was regularly made the judgment of this court. That award and judgment settled the questions of law decided therein for the purposes of any further proceedings in the case as conclusively as if the appeal had been disposed of by this court, without reference to the Commissioners of Appeals. It has even been suggested that by reason of the consent of parties to the reference, the award may be more conclusive on them than would be the adjudication of the case by this court. However this may be, we are satisfied that the questions decided by the Commissioners of Appeals in arriving at their award, are as conclusively settled as the law of the case, as they would have been had the case been decided in the usual course of procedure by this court. How conclusive such an adjudication by this court would be is a point on which the court expresses no opinion. Cases have occurred in which this court has deemed itself justified in departing from the law as decided on the former appeal. See *Layton v. Hall*, 25 Tex. 212; *Reeves v. Petty*, 44 Tex. 149; *Ragland v. Rogers*, 42 Tex. 422; *White, Smith & Baldwin v. Downs*, 40 Tex. 207.

Speaking only for myself, I desire to say that whilst on the authority of these cases it must be conceded that, in this State, the rule making the former decision the law of the case, is not inflexible, but has its exceptions, that the rule itself is well established, is founded on the policy of preventing endless litigation, and that it should not be departed from, even for the purpose of re-investigating the correctness of the former decision, save for urgent reasons.

Reference is made to some authorities supporting the rule. Wells on Res Adjudicata, Chap. 44; *Burke v. Matthews*, 37 Tex. 74; *Corning v. Troy Nail Company*, 15 How. 466; *Ogden v. Larroke*, 74 Ill 510; *Donner v. Palmer*, 51 Cal. 629; *Dodge v. Gaylor*, 53 Ind. 368, citing numerous authorities. For convenience of reference some of these authorities are given here. *Roberts v.*

Cooper, 20 How. 467; *Cumberland Coal Co. v. Skerman*, 20 Md. 117; *Mitchell v. Davis*, 23 Cal. 381; *Parker v. Pomeroy*, 2 Wis. 112; *Booth v. Commonwealth*, 7 Met. 285; *Craig v. Bagby*, 1 T. B. Monroe, 148; *Groff v. Groff*, 14 Serg. & R. 181; *Wilcox v. Hawley*, 31 N. Y. 648; *Nichols v. Midgepast*, 27 Conn. 459; *Chambers v. Smith*, 30 Mo. 156; *Jesso v. Carter*, 28 Ala. 475. See, also, Rom on Legal Judgments, ch. 14 p. 197, where it is said: "If the rule of *stare decisis* is of any value it should be adhered to, where the precise question is again presented in the same court between the same parties, and on the same state of facts," citing *New Haven R. R. v. Ketcheson*, 34 How. 304.

In view of this rule I would myself have thought it proper to dispose of all the questions passed on in the opinion of the Commissioners of Appeals by a simple reference to that opinion as having conclusively settled them for the purposes of this appeal. The other members of the court, however, entertain views which lead them more readily to re-examine such questions, and the authorities have been looked into sufficiently to satisfy us that the rules of law laid down by the Commissioners of Appeals are supported by the previous decisions of this court, and should be adhered to.

The principal question was as to Ledbetter's right to recover back the purchase-money bid and paid by him at an execution sale, void because the execution conferred no authority to sell any property of the defendants in the execution, the amount so bid having been applied to the payment of the judgment.

Ledbetter was the attorney of the judgment creditor, and sued out the execution, notwithstanding the judgment had been so far superceded that there could be no sale, though execution might still issue, under which property might be levied and held subject to the result of the appeal. After buying in the land at the sale he sued Burns and wife for its recovery, sequestered it and obtained possession by himself replevying. When that suit was decided against him he brought this his second action of trespass to try title, seeking, however, as alternative relief, the recovery back of the purchase-money with interest, and asking for other relief.

By the award of the commissioners he was allowed the recovery sought, and to secure him therein, was subrogated to the lien of the original judgment which had been in part paid by his purchase. His right to recover back the purchase-money is, we think, complete both on principle and authority. If the judgment creditor had been himself the purchaser at a sale, void because of the character of the process, and had thereby apparently satisfied his judgment "without any gain to himself or loss to the defendant," he could, on motion, have had the satisfaction set aside, or in this State, have maintained an action on the judgment as unsatisfied. *Townsend v. Smith*, 20 Tex. 465; *Freeman on*

Judgments, Sec. 478; Freeman on Executions, Sec. 352.

In such a case if a third person become the purchaser he may recover back the "purchase-money paid to the use of defendant and interest." *Stone v. Darnell*, 25 Tex. Sup. 435; Freeman on Judgments, Sec. 478; Freeman on Executions, Sec. 352.

Brown v. Lane, 19 Tex. 203, was not a case where the execution conferred no power to sell, but where the sale was void for other reasons. It is not in conflict with *Stone v. Darnell*.

Where the process confers no authority to sell, and for that reason there is no valid sale, it seems that the maxim of *caveat emptor* does not apply. Freeman on Executions, Sec. 301, and note 7 and note 2.

Ledbetter was the attorney of the judgment plaintiff, but was not, for that reason, precluded from recovering back money paid without consideration. His position can scarcely be such as to give him less rights than the plaintiff.

The cases are numerous in this State in which equitable relief, predicated on these rights of the judgment plaintiff or the purchaser, has been liberally extended. *Harrison v. Oberthin*, 40 Tex. —; *Peters v. Clemens*, 52 Tex. 140; *French v. Grenet*, 4 Tex. Law Jour. 675; *Martin v. Wellborn*, 21 Tex. 773; *Andrews v. Richardson*, 21 Tex. 296; *Howard v. North*, 5 Tex. 315, 317.

But we do not find it necessary to enquire whether Ledbetter should have been granted the equitable relief of subrogation or not, for it now appears that he has been reimbursed and does not need subrogation. Burns and wife were entitled to recover of him rent during the time that he held possession after replevying, and that claim was before the court on the last trial. The court set off the rents due Burns and wife against Ledbetter's moneyed demand and found a balance of \$123 in favor of Ledbetter.

In stating this account Ledbetter was held to be subrogated to the judgment lien, and as that judgment bore 10 per cent. interest, he was allowed interest at that rate. We think that he was only entitled to legal interest. *Stone v. Darnell*, 25 Tex. Sup. *supra*. Even had the case been one for partial subrogation, Ledbetter, in equity, could claim nothing more than his money and 8 per cent. interest. Stating the account anew with interest at 8 per cent., it is found that there is a balance of \$39.76 due Burns and wife, with interest from April 1, 1881.

The judgment will be reversed and rendered in their favor for that sum with interest, but will, in all other respects, be affirmed.

An Irishman was accused of some crime, and his wife tried to encourage him by reminding him that he was certain of having an upright judge to try him. But he replied promptly, "Indade, thin, it is not an upright jedge at all I want; it's a jedge that'll lane a little." Not a bad type of some people's theology.

SPECIFIC PERFORMANCE OF A PAROLE CONTRACT.

HOLMES COUNTY COMMON PLEAS.

JOHN E. R. EWING ET AL.

v.

MARY J. RICHARDS ET AL.

A contract made between the father and mother of a child born out of wedlock, that the mother would surrender to the father all her claim to the custody and control of the child, in consideration that he would take the child into his family, raise him, and give him a share of his property equal with the rest of his children, when clearly and satisfactorily made out by proof, will sustain the claim of the child for an heir's portion of the father's estate. The right of action to the child to recover such share, accrues upon the death of the father.

C. F. VOORHES, J.

John E. R. Ewing, Sarah M. Mitten and Innis M. Ewing, and Samuel Swartz, as administrators of the estate of John Ewing Jr., deceased, file their petition, in which they alleged that on the 18th day of October, 1831, John Ewing Jr. was born, being the illegitimate son of John Ewing, Sr. and Margaret Gushwa. That Ewing, Sr., and Gushwa never intermarried but were both afterwards married to other parties. The plaintiffs are the surviving heirs and legal representatives of John Ewing, Jr., deceased, and the defendants, Mary J. Richards and Edith Ewing are the only heirs and legal representatives of John Ewing, Sr., who died on the 24th of July, 1880.

It is averred in the petition that in the month of April, 1839, John Ewing, Sr., and Margaret Gushwa entered into a verbal agreement whereby John, Sr., promised and agreed in consideration that Margaret Gushwa would then deliver and surrender to John, Sr., their illegitimate son, John Jr., he would take him into his family; that he would raise him and give him a share of his property, the same as the rest of his children. That in pursuance to the agreement, John, Jr., was received into the family of John, Sr.; that he was ever after called by the name of John Ewing, Jr.; that he was regarded and treated by John, Sr., as his son; that he remained with, and obediently served his father until he arrived at the age of twenty-one years, when he was married, and he was then provided with a home upon his father's premises, and the plaintiffs were born to him as the issue of his marriage, all of whom were treated and regarded by John, Sr., as his grandchildren.

In 1861, John, Jr., volunteered as a soldier in the service of the United States, with the knowledge and approval of his father, and died on the 3d of April, 1863.

John, Sr., at his death, was possessed of personal property amounting to the sum of \$11,225, and owned in real estate some seven tracts of land in Holmes county, which are described in the petition and are regarded of large value. He made a will in which he gave to Mary J. Richards, his daughter, three of the tracts of land, and to his granddaughter, Edith Ewing, he gave one

tract, having died intestate as to the last three tracts of land described in the petition.

The plaintiffs ask the decree of a specific performance of the contract made between John Ewing, Sr., and Margaret Gushwa, and that they may have decreed to them an equal one-third interest of the estate after the payment of debts.

To the petition, the defendants interpose a demurrer, stating as the reason therefor: 1st. That the petition does not state facts sufficient to constitute a cause of action. 2d. That there is a misjoinder of parties plaintiff. 3d. That several causes of action are improperly joined. 4th. That the cause of action did not accrue in six years. 5th. That the cause of action did not accrue in four years. 6th. That the cause of action did not accrue in twenty-one years.

The plaintiffs ask for the specific performance of the contract made in April, 1839, between John Ewing, Sr., and Margaret Gushwa, which was to be performed by Ewing when he made a disposition of his estate. This he was not bound to do by the contract until he made a disposition to his other children, when John, Jr., was to have a like share with the other children.

John, Sr., made his will disposing of a part of his estate to his legitimate children, leaving a portion undisposed of. The will took effect at his death, which occurred on the 24th day of July, 1880. As to the portion of his estate that was not disposed of by his will, it remained for a disposition after his decease, so looking at the terms of the agreement and the disposition made of the estate by John, Sr., we think the right of action accrued to the plaintiffs at the death of John, Sr., and it does not occur to the court how the statutes of limitation, raised by the demurrer, can furnish a defence against the action—and this disposes of the 4th, 5th, and 6th causes assigned in the demurrer.

The second cause for demurrer is, that there is a misjoinder of parties plaintiff. If John, Jr., had survived his father, he would have been the proper party plaintiff. When he is dead we are not able to see a necessity for any person to stand in his place and demand his rights besides his children and his administrator. These are now the plaintiffs, and we think necessarily and properly and this supposed defect does not exist in the case.

The third ground for the demurrer is, that several causes of action are improperly joined in the petition. This objection is not apparent from reading the petition. In it there appears to be a brief single statement of a contract claimed to have been made between the testator and Gushwa, which was not performed by Ewing, Sr., and which is here sought to be enforced.

The first cause for the demurrer is, that it does not state facts sufficient to constitute a cause of action. This I regard as the most important—and the prime cause presented for the consideration of the court. If the plaintiffs have set forth the contract claimed to have been made between Ewing and Gushwa, and if it, when proved as

alleged, would not secure to them the relief prayed for, then the demurrer should be sustained and the petition be dismissed.

The plaintiffs ask nothing by reason of the Ewing blood that may run in their veins. Although John Ewing, Sr., may have been as truly the father of John Ewing, Jr., as he was the father of Mary J. Richards, yet John, Jr., having been born out of wedlock and no intermarriage of his parents, he is interdicted by law from making any claim to the estate under the laws of descent. But the claim of the plaintiffs is, that their ancestor, John, Jr., was the illegitimate son of John Ewing, Sr.; that their relation was mutually recognized; that when John, Jr., was seven and one half years of age, an agreement was made between his father and mother whereby he was taken into his father's family, and there remained under his control and parental direction, rendering obedient service until he arrived at the age of twenty-one years. In consideration for said services and obedience, etc., the father agreed that he would give him an equal share in his property with his other children. It is averred that this contract was strictly kept and fully performed on the part of John, Jr., until he arrived at the age of majority, being as long as the parties had power to contract for his society or labor.

Such were the terms of the contract as admitted by the demurrer, and if the contract is such a one as a court of equity has power to enforce, then the demurrer should be overruled.

It is conceded that the contract was verbal and that it was entered into in 1839. But it is averred that by its terms, John, Jr., was to live in the family as a son and be in parental subjection to John, Sr., from that date until the time when he would be released from the obligation of further servitude by operation of law, which happened when he attained the age of majority, for which services John, Sr., obligated himself that he should have with his other children an equal division of his estate. John Jr., went into the family and service of his father and there remained for a period of some thirteen and one half years, rendering to his father obedience and service that in law belonged to his mother only, but by the contract was rendered to his father. So if it is conceded that the averments of the petition are true, there was on the part of the ancestor of the plaintiffs an exact and full performance of the terms of the contract, which he had a right to expect would bring to him an equal share with the other children of John Ewing, Sr., of his estate.

But we are reminded by the demurrer that under the statute of frauds, contracts in relation to real estate, or any interest therein, and contracts that are not to be performed within one year from the making, must be in writing or some memorandum thereof, and signed by the party sought to be charged. If this cause must fail because it is not in writing, we presume that the one or the other of these provisions must furnish authority for its defeat.

It has long been settled in the courts of equity that a contract is not void because it is not reduced to writing. The statute does not in any way effect the substance of an agreement, but it simply prescribes as a rule that the same shall not be enforced upon oral proof alone. This is the case always when the contract remains executory on both sides. But when both parties have performed the terms and conditions of the contract, it is as valid and binding as though it had been reduced to writing, and duly signed. And so, likewise, if one party has fully performed his part of the contract, the statute furnishes no shield to the other to escape from a performance because it was in parole. To do so would make the law a protection to a fraud, the very thing it was intended to prevent.

It is conceded by the demurrer, that in this case there has been a complete performance by the ancestor of the plaintiffs, by his work and labor for the period of over thirteen years, contributing to some extent in the accumulation of the large estate left by John Ewing, Sr. And we may well enquire would it be equitable or just for the court to refuse to enforce the terms of the contract on behalf of John, Jr.? Could we so decree without aiding in the perpetration of a manifest wrong upon the plaintiffs and their deceased father, who was a party to and long labored in the performance of the agreement? If this question be answered by the letter and spirit of the decisions of our courts of equity ever since the enactment of the statute, the answer would be that the contract must be enforced, for it is not a case that falls within the terms and spirit of the statute.

Many things might be said as reasons why a contract such as is set forth in the petition might be presumed from the acts of the parties. The performance of the terms and stipulations as read in the acts of the parties, would be hard to account for in the absence of an agreement.

At one time the doctrine was well recognized in the courts of equity, that if a defendant by answer admitted the contract and then set up the statute of frauds as a defence, it passed for no defence to the action, for when the contract and a part performance was once admitted the chancellor would decree a specific performance notwithstanding the statute of frauds, and it was also doubted if the advantage of the statute could be taken by demurrer, for by the demurrer the facts plead in the bill were admitted. The doctrine now prevails however, that when the petition discloses the fact that the claim is obnoxious to the statute, it may be brought to the notice of the chancellor by demurrer, and if the decision of the court is adverse to the defendant upon his demurrer he may still have the advantage of a denial.

Under our code the demurrer admits to be true all the facts that are well plead, at the same time securing to the party the right of making a more complete defence by answer after the demurrer shall be overruled. But taking the demurrer here as an admission of the facts set forth

in the petition, that there was a contract duly made and fully performed by the ancestor of the plaintiffs, it would be hard to find a good reason for excusing the other party from a performance on his part.

The demurrer keeps from the view of the court many facts and trains of facts that might be sufficient or inadequate to establish such a contract as a court of equity would enforce by decreeing its specific performance, but when the defendants rely upon a demurrer, they distinctly admit the facts of the petition, and if they are ample to demand relief the demurrer should be overruled.

Another question is made by the demurrer. That the contract between John Ewing, Sr., and Margaret Gushwa, was not to be performed within one year from the time it was made, and it was therefore obnoxious to the statute of frauds, which requires all contracts which are not to be performed within one year to be reduced to writing and signed by the party to be charged.

The authorities upon this branch of the statute are abundant, that when the contract might be performed within one year it is not within the statute. The statute of descents makes a disposition of a man's estate at his death. The contract here was on the part of Ewing, Sr., for the care, custody and control of John, Jr., intended, no doubt, to be until he should arrive at the age of majority. But the law would inject the condition in the absence of any conditions to be performed by the representatives of the parties that the contract would be performed and terminate upon the death of John Ewing, Sr., and that he might have died within one year is beyond cavil.

In a case reported in 19 Pickering's Reports, 365, the facts were that a verbal contract was made to support a child then eleven years old until she should arrive at the age of eighteen years. This was held by the court to be a contract not within the statute because the party might have died within one year.

We think the statute furnishes no defence against the claim presented by the plaintiffs and the demurrer is therefore overruled.

Reed & Hoagland attorneys for plaintiffs.

Uhl, Critchfield & Huston attorneys for defendants.

A Justice of the peace was very much puzzled at a point of law which had been raised in a case over which he was trying. Finally he appealed to the attorneys, "You gentlemen understand the law, tell us honestly how the thing is." S. laid it down from his side of the case, and M. from the other, and a thoughtful pause followed as the judge compared the points. Finally the judge spoke. "Gentlemen, are you ready for the decision?" "We are." "Well, the decision of the court is, *that one of you has lied.*"

NEGLIGENCE—PRESUMPTION—ORDINARY
COURSE OF THINGS.

U. S. CIRCUIT COURT, S. D. NEW YORK.

ROSE v. THE STEPHENS AND CONDUIT TRANSPORTATION COMPANY,

March 13, 1882.

1. The plaintiff was injured by the explosion of a boiler which was under the control of the employees of defendant; *Held*, that the jury might infer negligence from the fact of the explosion; a presumption of negligence is indulged as a legitimate inference whenever the occurrence is such as, in the ordinary course of things, does not take place when proper care is exercised and is one for which the defendant is responsible.

2. The instructions to the jury must be considered in their integrity and not in isolated parts.

On motion for a new trial.

The plaintiff was injured by the explosion of a steam boiler, which was being used by the defendant to propel a vessel chartered by the defendant to others, to be used for the transportation of passengers and freight. The jury found a verdict for the plaintiff.

WALLACE, J.

If the explosion resulted either from the carelessness of the employees of the defendant in charge of the boiler, or from the negligence of the defendant in sending forth an unsafe or dangerous boiler to be used where human life would be endangered if it should explode, it is conceded the defendant was liable. It is contended, however, that it was error to instruct the jury that they might infer such negligence from the fact of the explosion, and it is argued that such a presumption only obtains when the defendant is under a contract obligation to the plaintiff, as in a case of a common carrier or bailee. Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in authority or in reason for any such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relations between the parties. It is indulged as a legitimate inference whenever the occurrence is such as in the ordinary course of things does not take place when proper care is exercised, and is one for which the defendant is responsible. *Scott v. The London and St. Katherine Docks Company*, 3 H. & C. 596; *Transportation Co. v. Downer*, 11 Wall. 129; *Mullen v. St. John*, 57 N. Y. 567. In the present case the boiler which exploded was in the control of the employees of the defendant. As boilers do not usually explode when they are in a safe condition and are properly managed, the inference that this boiler was not in a safe condition or was not properly managed was justifiable, and the instructions to the jury were correct. The instructions must be considered in their integrity and not in isolated parts, and so considered present the whole of the case fairly and correctly.

Motion denied.

Digest of Decisions.

TEXAS.

(Court of Appeals.)

J. J. CONN v. THE STATE OF TEXAS. February 18, 1882.

Theft—Principals—Charge of Court—Unauthorized Conduct of the Court.—1. It is the duty of the trial court to charge the law applicable to every phase of the case made by the evidence, or any part of the evidence, leaving the jury to pass upon the strength of the evidence, but the court should never charge a rule of law, though perfectly sound, which has no support in the evidence.

2. The jury, after having retired, may ask further instructions of the judge touching any matter of law. This should be done in a body in open court through their foreman, and the defendant should be made acquainted with such request. The court must instruct upon the point presented in the request of the jury, and this must be done in writing. If not proper matter for instruction the court must inform the jury of this fact in writing.

3. The fact that a State's witness is related to one of the defendants, is no good and sufficient ground to authorize leading questions by the State's attorney, when the witness shows no disposition to evade or answer in doubtful or double sense, but answers frankly, plainly and pertinently each question propounded.

4. The conduct and remarks of the trial court, and of the prosecuting attorney, held to be highly improper and which are severely condemned.

SALLIE HILL v. THE STATE OF TEXAS. March 1, 1882.

Murder—Manslaughter—Charge of Court.—1. The clerical omission from the charge of the court of a word which would naturally and unmistakably supply itself from the context, and which could not possibly have confused or misled the jury, would not be ground for reversal.

2. Where the evidence tends to show that the killing was done by the use of means not in their nature calculated to produce death, and that the defendant was not actuated by an intention to kill or by an evil or cruel disposition, then the killing could not be murder and the offense might be reduced to any grade of assault and battery, and the court should charge upon this phase of the case.

WILLIAM FRANKEL v. HEIDENHEIMER BROS. February 15, 1882.

Evidence—Res Adjudicata.—1. Whenever all that portion of the record pertaining to, and enough of it to show the action had in relation to facts stated in a plea of res adjudicata is offered in evidence, it should be admitted by the court, it being unnecessary that other portions irrelevant and unnecessary to the issue should be produced.

2. The applicability of the plea of res adjudicata depends upon the identity of the cause of action or matters of defense in issue, and not the identity or similarity of the grounds or points urged to support or maintain the action or matter of defense, and all the matters determined by the court are as fully concluded by the judgment as those considered and discussed, if the matter put in issue has been determined by the court upon the merits.

TOM BROWN v. THE STATE OF TEXAS. March 1, 1882.

Affidavit—Information—Amendment—Agreement of Counsel—Practice.—1. The fact that the person making the affidavit upon which the prosecution is founded, deposed to the best of his knowledge and belief and not positively to the facts stated, does not affect or invalidate the affidavit.

2. An information referring to the complaint upon which it is founded and alleging that it shows to the court the matter and thing charged against the accused, is fatally defective.

3. *Quare.* Whether an agreement by defendant's attorney allowing the amendment of an information, as to matters of substance, would be upheld in the face of the express language of the statute upon this subject.

GEORGIA.

(Supreme Court.)

FIRST NATIONAL BANK OF AMERICA v. MAYOR, ETC., OF AMERICA. Sept. 27, 1881.

Taxes—Municipal Corporations—Duress.—To recover taxes paid to a municipal corporation it must appear that the tax was unauthorized, that the amount was actually received by the corporation, and that it was paid under compulsion, to prevent the immediate seizure or sale of plaintiff's goods or the arrest of his person. Voluntary payment (in the absence of fraud, accident, or mistake) accompanied by protest will not suffice.

CONNECTICUT.

(Supreme Court of Appeals.)

THE AMERICAN RAPID TELEGRAPH CO. v. THE CONNECTICUT TELEPHONE CO. February, 1882.

Mandamus—Telephone Company—Telegraph Company—Patent.—The respondent having organized as a joint-stock company to carry on a telephonic exchange system, at Bridgeport, purchased from a Massachusetts company, which owned the patent, the right to use its magnetic telephone for a certain period, under certain conditions, among which were that the respondent should not permit telegraph companies to use the system who had not purchased the right of the Massachusetts company. The petitioner, a telegraph company which had not purchased the right, prayed a writ of mandamus to compel the respondent to permit the petitioner to use the system. *Held*, that the respondent was not a common carrier of articulate speech, and that the writ must be denied.

LOUISIANA.

(Supreme Court.)

MUTUAL NATIONAL BANK v. RICHARDSON. Nov. 1881.

Partnership—Partner using Firm Name for Personal Advantage—Validity.—A partner cannot use the name of the firm as security for the debt of a third person or of himself, without special authority from all composing the firm. A party receiving such security, under those circumstances, although not chargeable with actual *mala fides*, does so at his risk and peril and cannot hold the firm and its other members responsible, unless upon proof of knowledge, consent, or ratification.

NEW YORK.

(Court of Appeals.)

DILLEBER v. THE HOME LIFE INSURANCE CO. November 22, 1891.

Life Insurance—Evidence.—In an action on a life policy where the defence is a breach of warranty by reason of a fraudulent concealment of the fact that the assured had had well-defined symptoms of consumption, it is competent, on cross-examination of a witness who has testified that certain facts did not necessarily indicate any disease of the lungs and that a hemorrhage in the previous year did not change his opinion, to include in the hypothetical question a hemorrhage occurring the month after the policy was issued to ascertain how far that fact would modify the opinion expressed as to a bleeding in the prior year.

In framing hypothetical questions to put to expert witnesses counsel are not confined to facts admitted or absolutely proved, but may assume any facts which there is any evidence tending to establish and which are pertinent to any theories they are attempting to uphold.

On cross-examination of an expert they may, in putting hypothetical questions, assume any pertinent facts whether testified to or not with a view of testing the skill and accuracy of the expert, subject, however, to the control of the court.

MICHIGAN.

(Supreme Court.)

L. S. & M. S. R. R. Co. v. BANGS. January, 1882.

Railroads—Negligence—Jumping off at a Station from Moving Train.—It is negligence for a passenger to jump from a train in motion in order to get off at a station which is his destination and where the train should stop; if injury results, his act is contributory negligence.

NEW JERSEY.

(Supreme Court.)

KENNEDY v. MCKAY. June, 1881.

1. *Tort—Innocent Vendor—Agent's Fraud—Action.*—An innocent vendor cannot be sued in tort for the fraud of his agent in effecting a sale.

2. *Contract—Deceit—Rescission—Liability of Agent.*—In such cases, the vendee may rescind the contract and reclaim the money paid, and if not repaid may sue the vendor in assumpsit for it, or he may sue the agent for the deceit.

CALIFORNIA.

(Supreme Court.)

THE PEOPLE v. MILNE. January 24, 1882.

Criminal Procedure—Indictment—One Attempt and Several Offenses—Validity.—Where an indictment sets forth the act, and the intent to commit two or more offenses according to the fact, it is not bad for duplicity. There is but one attempt alleged, though the object aimed at in the attempt be multifarious.

LXVTH GENERAL ASSEMBLY OF OHIO.

SYNOPSIS OF LAWS PASSED THIS SESSION.

APRIL 5, 1882.

S. B. 32. To amend Sections 6445 and 6447 of the Revised Statutes, to read as follows:

Section 6445, any railroad corporation of this State may condemn and appropriate to its own use, the interest and easement in, and quiet title to, any unfinished road-bed, or part thereof, lying within the State, and on the line of its proposed road, owned or claimed by any other railroad company or companies, person or persons, partnership or corporation, where such road-bed or part thereof has remained or shall thereafter remain, in an unfinished condition, and without having the ties or iron placed, and continued thereon for the period of five years or more, immediately preceding the commencement of proceedings to condemn or appropriate the same as herein authorized, and every such company or companies, person or persons, partnership or corporation, shall be made a party defendant to such proceedings to condemn or appropriate the same, and shall be required to answer therein, setting forth fully its or their title to or interest in such road-bed or part thereof, so sought to be appropriated or condemned, if any, it or they claim, to which answer the plaintiff shall plead issuably, unless it admit the validity of the defendant's claim; and in such case, if such party defendant be a non-resident of this State, or a foreign corporation, service of summons may be made by publication, under sub-division three, of section 5048 of the Revised Statutes of Ohio, and that the terms, company, or companies, as used in this chapter, shall be held to embrace also person or persons, partnership or corporation, as used in this section.

Section 6447. Proceedings under this act may be commenced in the Probate Court, the Court of Common Pleas, or the Superior Court of any county in this State in which such road-bed or part thereof so sought to be appropriated or condemned may be situated; all or part only of such road-bed, within this State may be included in one proceeding, and when such proceeding is commenced in the court of common pleas or superior court, the same proceeding shall be had as is prescribed in this chapter for the conduct of the same in the Probate Court,

so far as the same may be applicable to such Common Pleas or Superior Court, and not excepted in this section, and the case shall, on motion, be taken out of its order, by the court or by any reviewing court, and determined without any unnecessary delay; and proceedings in error to such Common Pleas or Superior Court may be commenced directly in the Supreme Court, but the provisions of this chapter as to viewers, shall not apply to appropriations authorized by such sections, and when any railroad corporation shall commence proceedings under this act, the president of said corporation shall make, subscribe and file in the court where any such proceeding is had, a statement under oath, declaring that it is the bona fide intention of said corporation to complete and operate a railroad on the road-bed so sought to be appropriated; and if said corporation shall, for a period of one year after it shall have acquired rights to occupy the road-bed, fail to expend in and about the completion of a railroad thereon, a sum equal to twenty-five per centum of the total cost of completing the same, to be estimated by the commissioner of railroad and telegraphs, then, and in such case the said road-bed shall be open to appropriation and condemnation, under this act by any other railroad corporation. The word road-bed used in this act shall be held to include right of way, depot grounds and other easements connected therewith, and it shall be sufficient in the petition and proceedings under this act to designate the road-bed as the road-bed of the railroad corporation, by which the route of the road was located and established with the terminal points within which appropriation is sought.

FOND BILL.

S. B. 12. An act to more effectually provide against the evils resulting from the traffic in intoxicating liquors. It goes into effect on the first day of May next and provides:

When the place of business of any person engaged in the liquor traffic is located not within any village or city, nor within one mile thereof, the tax will be \$100; when within a village having a population of less than 2,000 or within one mile thereof, \$150; when within any other village or city, having a population of less than 10,000 inhabitants, or within one mile thereof, \$200; when within any city of the second class, having a population of 10,000 inhabitants, or more, or within two miles thereof, \$250; and when within any city of the first class, or within two miles thereof, \$300.

Every person engaged in such traffic, and every person hereafter engaging therein, is required to execute to the State of Ohio his bond in the sum of \$1,000, with at least two sureties, resident of the county, and each holding therein a freehold estate, not exempt from execution, worth at least double the amount of the bond above encumbrances, which bond shall have indorsed thereon a pertinent description of the lot or premises wherein said traffic is or shall be carried on together with the name of its owner, and the sureties thereon shall be to the acceptance of the probate judge of the county, who shall keep and record the same, together with the indorsement thereon, in a book to be by him kept for that purpose, which bond shall be conditioned for the faithful performance of all, and singular, the requirements of this act, and the probate judge shall receive in each case for his services under this act, to be paid by the person giving such bond, the sum of two dollars. If the tax be not paid the condition of the bond shall be deemed broken, and an action will lie thereon against the principal and his sureties.

Heavy penalties are annexed for all violations of the law.

It provides that the taxes arising from the liquor traffic shall be paid into the county treasury, and two-thirds thereof shall be credited to the townships, villages and cities from which the taxes were received, and the remaining one-third to the general county fund.

It also provides that the act shall not be construed or held to authorize or license in any way the sale of intoxicating liquors.

SUNDAY LAW.

Section 1. Be it enacted by the General Assembly of the State of Ohio, that the sale of intoxicating liquors, whether distilled, malt, or vinous, on the first day of the week, commonly called Sunday, except by a regular druggist, on the written prescription of a regular practicing physician, for medicinal purposes only, is hereby declared to be unlawful, and all places where such intoxi-

cating liquors are on other days sold or exposed for sale, except regular drug stores, shall on that day be closed, and whoever makes any such sale, or allows any such place to be open or remain open on that day, shall be fined in any sum not exceeding one hundred dollars, and be imprisoned in the county jail or city prison not exceeding thirty days. In regular hotels and eating houses the word "place" herein used, shall be held to mean the room or part of room where such liquors are usually sold or exposed for sale, and the keeping of such room or part of room securely closed shall be held, as to such hotels and eating houses, as a closing of the place within the meaning of this act.

Sec. 2. Said original section 6044 be and the same is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its passage.

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

Tuesday, April 18, 1882.

GENERAL DOCKET.

No. 50. City of Ironton v. Kelly and Wife. Error to the District Court of Lawrence County.

LONGWORTH, J. *Held*:

Where the trustees of waterworks in a city, authorized and directed the digging of trenches in the streets for the purpose of laying water mains, in pursuance of a previous ordinance of council, and it is made the duty of the superintendent to cause such trenches to be dug and mains laid, the city is responsible for his negligent acts in doing the work causing injury, while such authority and direction remain unrevoked; notwithstanding the trustees, individually, while said work was being done, notified the superintendent that they would have nothing further to do with the work.

Judgment affirmed.

797. Ohio on relation of the Attorney General v. Rollin C. Powers et al. In Quo Warranto.

McILVAINE, J. *Held*:

1. Common school districts and boards of education are not corporations within the meaning of section 1 of article 13 of the Constitution.

2. Under section 26, article 2, and section 2, article 6 of the Constitution, laws regulating the organization and management of common schools must have a uniform operation throughout the State.

Judgment of ouster.

White and Johnson, J. J., did not concur in the 2nd proposition.

76. Scioto Fire Brick Company v. Erastus Pond. Error to the District Court of Scioto County.

JOHNSON, J. *Held*:

A., by an agreement in writing, "leased" to B., "all the clay that is good No. 1 fire clay, on his land" described, for a term of three years, subject to the conditions that B. "shall mine, or cause to be mined, or pay for, not less than 2,000 tons of clay every year, and shall pay therefor, twenty-five cents per ton for every ton of clay monthly, as it is taken away." *Held*:

1. That this was a contract, which gave B. the exclusive right to mine and remove all the good No. 1 fire clay that was on the land, and not a lease of the land itself.

2. If clay of that quality, and in quantity sufficient to justify its being mined existed, B., on failure to mine at least 2,000 tons per year, each year while the contract was in force, was bound to pay for that amount, at the agreed price per ton.

3. But if, in fact, clay of that quality and in quantity sufficient to justify its being mined could not, by the use of due diligence be found on the land, then there was no obligation to pay the amount agreed on, in case of failure to mine. Cook v. Andrews, 36 O. St. 178 followed and approved.

4. Where it is an open question, whether such clay, was to be found on the land, and the exclusive possession of the clay lands was vested in the lessee or pur-

chaser of the clay, for the purpose of ascertaining the fact, the burden is upon him, in order to defeat a recovery for the annual sums to be paid in case of a failure to mine and remove the same, to prove that such clay as is contemplated in the contract did not exist in minable quantity. *Cook v. Andrews, supra.*

Judgments of common pleas and district courts reversed and cause remanded.

6. Samuel Shorten v. Drake et al. Error to the District Court of Hamilton County.

WHITE, J. Held:

1. Where a debtor purchases real estate and causes it to be conveyed to his wife in fraud of his creditors, a bona fide mortgagee from the husband and wife, will not be affected by the fraud.

2. The possession of the husband and wife at the time of taking the mortgage will not charge the mortgagee with notice of the fraud; nor will he be affected by notice of levies made upon the property as that of the husband subsequent to the conveyance to the wife.

3. The levy of an order of attachment, in the absence of process of garnishment, has no greater operation than the levy of an execution.

4. Where, in a court of equity the fund in controversy is held for distribution, and the equities of the respective claimants are equal in point of merit, the distribution will be ordered according to the maxim, *qui prior est tempore potior est jure.*

Judgment reversed; and distribution ordered (1) in payment of the mortgage, (2) in payment of the execution, and (3) of the attachment.

72. The Trustees of the original surveyed township of Oxford, Butler County, Ohio, v. Thomas H. B. Columbia and Elsie Columbia. Error to the District Court of Putnam County.

ORRY, C. J.

1. Where a party requests that the court state separately the conclusions of fact and law under the civil code, § 280 (Rev. Stats. § 5205), and the request is not complied with, a judgment against such party should be reversed, unless it appear from the record that he was not prejudiced by the refusal.

2. Trustees of a township holding the title to lands granted to them by the general government for school purposes, are not exempt from the operation of the statute of limitations, in an action to recover possession of the premises prosecuted by them.

Judgment affirmed.

71. The Trustees of the original surveyed township of Oxford, Butler County, Ohio, v. Calvin L. Noble. Error to the District Court of Putnam County. Judgment affirmed on authority of case No. 72, in which the same plaintiffs are plaintiffs in error, and Thomas H. B. Columbia and Elsie Columbia are defendants in error.

56. Baltimore & Ohio Railway Company v. Isaac J. Clark. Error to the District Court of Perry County. Judgment reversed on authority of Baltimore & Ohio Railway Co. v. McKelroy, 35 Ohio St. 147. There will be no further report.

68. Edward Poor et al. v. Lucinda Burris et al. Error to the District Court of Jackson County. Judgment affirmed without penalty. There will be no further report.

140. City of Ironton v. Thomas D. Kelly. Error to the District Court of Lawrence County. Judgment affirmed without penalty; following No. 50 above reported. There will be no further report.

MOTION DOCKET.

John D. Williams v. Charlotte Englebrecht et al. Error to the District Court of Scioto County. Motion to re-instate cause and to revive action, &c.

By THE COURT.

A judgment of reversal is effective notwithstanding the death of the plaintiff in error during the pendency of proceedings in error. Such judgment takes effect, by relation, as of the date of the commencement of the proceeding in error; and it is competent for the court, to which the cause is remanded for a new trial, to order a revivor of the action in the name of the proper representative of the deceased party.

Motion overruled.

53. Farmers Ins. Co. v. Benjamin C. Zeigler. Motion to advance No. 879 on the General Docket to be heard with No. 379 on same docket. Motion granted.

61. Robert C. Lindsay v. The State of Ohio. Motion for leave to file a petition in error to reverse the judg-

ment of the Common Pleas Court of Jefferson County. Motion granted and cause taken out of its order.

62. Ellisha Wilkinson et al. v. Commissioners of Preble County. Motion to take cause No. 908 on the General Docket out of its order. Motion overruled.

63. Cleveland, Columbus, Cincinnati & Indianapolis Railway Co. v. Arthur Nazor. Motion for leave to substitute copies and withdraw original papers in cause No. 934 on the general Docket. Motion granted.

65. Ohio ex rel. the Attorney General v. The Standard Life Ins. Co. Motion to take cause No. 1047 on the General Docket out of its order. Motion granted and cause set for trial April 23, instant.

66. Ohio ex rel. Attorney General v. The Middleport Mutual Aid Association. Motion to take cause No. 1045 on the General Docket out of its order. Motion granted and cause set for trial April 27, instant.

SUPREME COURT RECORD.

[New cases filed since last report, up to April 18, 1893.]

No. 1112. Henry Newbegin et al. v. Samuel Vanvlerah. Error to the District Court of Defiance County. Newbegin & Kingsbury for plaintiffs.

1113. Iron National Bank v. W. T. Lodwick, Assignee. Error to the District Court of Scioto County. Moore & Newman for plaintiff; W. A. Hutchins and J. W. Bannon for defendant.

1114. Chester Bedell v. Joseph Brown. Error to the District Court of Mahoning County. Jones & Murray for plaintiff; Van Hyning & Johnson for defendant.

1115. Levi Scudder v. H. H. Wallace, Adm'r. Error to the District Court of Butler County. S. Z. Gard and H. L. Morey for plaintiff; I. Robertson for defendant.

1116. Robert J. Turnbull v. Horatio Page. Error to the District Court of Franklin County. Lorenzo English for plaintiff.

1117. Charles Stoddard v. The State of Ohio. Error to the Court of Common Pleas of Ashland County. Charles Stillwell for plaintiff; Attorney General Nash for defendant.

1118. Jacob Ridenour v. The State of Ohio. Error to the Court of Common Pleas of Butler County. C. H. Blackburn and others, for plaintiff; Attorney General Nash for the State.

1119. Elizabeth Barrett v. J. B. Hart. Error to the District Court of Ottawa County. T. L. Magers for plaintiff; T. J. Marshall for defendant.

1120. Hugh A. McNicol v. The Village of East Liverpool. Error—Reserved in the District Court of Columbiana County.

1121. Paul J. Kreltz v. The Citizens Savings and Loan Association. Error to the District Court of Cuyahoga County. Stone & Heerenmueller and F. C. Gallup for plaintiff; E. D. Stark for defendant.

1122. Newman Lumber Co. v. John W. Purdum et al. Error to the District Court of Scioto County. Moore & Newman for plaintiff; H. W. Farnham for defendants.

SUPREME COURT ASSIGNMENT.

FOR ORAL ARGUMENT.

April 20th—No. 9. Julius Bowen et al. v. C. L. Bowen et al. Error to the District Court of Washington County.

April 21st—No. 34. Charles W. Rowland v. The Meader Furniture Co.

April 26th—No. 40. W. H. Crabill Ex'r v. Nancy Marsh.

April 27th—No. 1045. Ohio ex rel. v. The Middleburgh Mutual Aid and Life Association. Quo warranta.

April 28th—No. 1047. Ohio ex rel. v. The Standard Life Association of America. Quo warranta.

Ohio Law Journal.

COLUMBUS, OHIO, : : APRIL 27, 1882.

We desire it to become a matter of record that the OHIO LAW JOURNAL is sorely puzzled by the inconsistencies and incongruities in the administration of justice; and the eccentricities of law-makers; and of those who execute the laws, now so undeniably and prominently a part of the leading events of the present age.

We do not attack these stupendous mysteries; we do not shout for them or condemn them; nor yet hold up our hands in holy horror at the thought that they exist. We simply confess to being—overcome.

The chief executive of a great State with all the police power of a nation, directly or indirectly at his command—with the army within his control for the preservation of peace and the defense of the lives and property of his people and for the execution of the laws, conspiring with cut-throats to work out plans of assassination which would disgrace even Thuggery is a spectacle well calculated to excite—surprise.

And to see that same executive afterward wrangling with his hired assassins as to whether his pardon, promised before the bloody work was done, did or did not extend to all the previous murders of his co-conspirators is not very soothing to that surprise.

Another source of wonderment lies in the organization and attempted incorporation of a company to resist and violate the laws of our own state!

It has remained for the saloon keepers of a great city—Cincinnati—to write this most singular chapter in the history of modern times. An incorporated company—that is, a body borrowing the semblance of life and individuality from the Law—having for its avowed object, resistance to and violation of the Law is certainly an anomaly never before dreamed of!

We are not sure that the rulings of the New York Court of Appeals in the Badger Case, do not properly fall within this list of modern marvels in a legal way.

Marriage has long been supposed to be under the special guardianship of the Law. It has long been regarded as the highest civil contract, executed with all the formality and solemnity that can possibly attend an occasion so momentous; elevated to the highest honor as a ward of the

Law by the punishment of any breach of faith therein, under the name of adultery or bigamy; and by making illicit loving a crime—fornication. No other contract and no other relation has ever held so high a place under the law as the contract of marriage and the marriage relation, yet we see a long continued violation of the laws of God and man and of the State, rewarded by being declared to be not only right and proper, but within the law, and to be rewarded by the law! If 30 years of fornication are equal to the solemn rites of the altar—under the law, why not 29 years? Why not 28? Why not 2? Why not 1? Why not a single act of fornication?

Is it not barely possible that there are cranks still at large?

NEW BOOKS.

DIGEST OF THE AMERICAN DECISIONS VOLS. 1 TO 30 INCLUSIVE; AND INDEX TO THE NOTES THEREIN CONTAINED; WITH TABLE OF CASES RE-REPORTED. 8 Vo. Pp. 825. A. L. Bancroft & Co. San Francisco. 1882.

If any excellence had been omitted from the AMERICAN DECISIONS, it is fully supplied by this Digest, which is, of course, of great value to those who have the volumes digested in this work. It is likewise valuable to others. The systematic arrangement of all the subjects of judicial decision, and the full statement of the rulings, make it next in value to a complete library of the hundreds of volumes from which the cases are taken. To those who can not afford to buy all the volumes of the AMERICAN DECISIONS, but can have access thereto in public libraries, this book is worth many times its price, (which we believe is only \$5.00) and it ought to be in the library of every lawyer in the land.

THE SUPREME COURT TRANSCRIPT OF DECISIONS IN THE SUPREME COURT OF IOWA; No. 2.

We have received from the publishers of the Western Jurist, Messrs. Mills & Co., Des Moines, Iowa, this number of vol. 1, which is in reality only the advance sheets of vol. 56 of the Iowa Reports, bound and trimmed in good style.

Over forty cases are reported in full, and as the print is from the plates of the Reports as they will subsequently appear, the cases are of interest and value.

The Transcript is furnished to subscribers of the Jurist, at \$1.50 per volume.

MANUAL FOR ASSIGNEES—A Manual for Assignees, Insolvent Debtors and others affected by Assignments in trust for the benefit of Creditors, or by Assignments to avoid Arrest, in Ohio, with Forms, Copious Notes of Decisions, Practical Suggestions, and complete Analytical Index. By Florein Giaque, Author of "A Manual for Guardians and Trustees," etc. etc. 8 vo. pp. 428. Cloth, \$2.00 net. Sheep, \$2.50 net. Cincinnati. Robert Clarke & Co. 1882.

We have looked for the appearance of this work with more than ordinary interest. The great favor in which Mr. Giaque's Manual for Guardians &c. is held by the profession, and the great necessity existing for a convenient hand book, wherein should be collected the statute law and decisions relating to assignments, combined to arrest the attention and ground a hope that the work before us, which for some time has been promised, would speedily appear.

Its appearance now abundantly fulfills the expectations regarding it, so far at least as the arrangement and full quotation of case and statute law in Ohio is concerned. The title heading gives a complete key to the plan and scope of the work. We may have hoped that as an aid to a more complete understanding of the law of assignments, and the involuntary creation of trusts by fraudulent debtors, the editor had given a full history of the various changes in the law since the enactment of the old English Statute of Frauds, and particularly of the re-enactment of that statute in Ohio, and the subsequent legislation in its successive steps, with reasons therefor. The Statute of Frauds and the Insolvent debtor laws, have insensibly become confused or interchanged in the minds of many otherwise good lawyers; and a complete history of these legislative changes and enactments would have found a proper place in this book, and would have wrought much good by disentangling this confusion. But taken altogether, the work is a credit to the editor and to the publishers as well.

COMMON SCHOOLS—LAWS RELATING TO, UNIFORM THROUGHOUT STATE.

SUPREME COURT OF OHIO.

THE STATE OF OHIO ON RELATION OF THE ATTORNEY GENERAL.

v.

ROLLIN C. POWERS AND OTHERS.

April 18, 1882.

1. Common school districts and boards of education are not corporations within the meaning of section 1 of article 18 of the Constitution.

2. Under section 26, article 2, and section 2, article 6 of the Constitution, laws regulating the organization

and management of common schools must have a uniform operation throughout the State.

Quo Warranto.

The defendants, having assumed to act as the Board of Education of The New London school district, New London Township, Huron County, are called upon in this proceeding to show by what title or warrant they assume to do so. They answer by showing an election under the act of the General Assembly of March 31, 1879, entitled "an act to consolidate the territory comprising the Township of New London, in Huron County, Ohio, into a special school district."

The provisions of the statute are as follows:

Section 1. Be it enacted by the General Assembly of the State of Ohio: That upon a vote as hereinafter provided for, the territory comprising the Township of New London, in Huron County, Ohio, now consisting of the New London Township school district, and the New London village school district, be and the same is hereby organized into a special school district, to be known as the New London school district.

Sec. 2. The trustees of said township shall, at least five days prior to the annual election occurring on the first Monday of April, A. D. 1879, cause written or printed notices to the qualified electors of said township, of an election to be held at the same time and place of said annual election, to determine the question of the proposed consolidation, to be posted in at least five conspicuous places in said township, and at such election the said trustees shall provide a separate box to receive the ballots cast. The electors of said township in favor of such consolidation shall have written or printed upon their ballots the words "Special School District—Yes"; and those opposed thereto the words "Special School District—No"; and the majority of the ballots cast shall determine the question of such consolidation.

Sec. 3. The board of education of such special school district shall consist of six members, who shall be apportioned to the same as follows: Two shall be residents of the territory now comprising the said village district, two shall be residents of the territory now comprising the township district, and two shall be chosen from the territory of the township at large; and said board of education shall be elected in the manner now provided by law for the election of boards of education in village districts, except that on the first Monday following the affirmative determination of the question of the proposed consolidation, the board of education of each of said districts shall meet, and each choose three persons to serve as members of the board of education of such special district as follows: Two persons, resident electors of their respective districts, one to serve for one year, and one to serve for three years; and one person, a resident elector of said township at large, to serve for two years; and the six so chosen shall constitute the board of education of

such special district, and shall serve until their successors are elected and qualified.

Sec. 4. The said special district shall be governed and controlled in every manner now by the laws of Ohio now in force relating to village districts; and the board of education may appoint a board of examiners, in the manner provided by law for city and village districts having a population of twenty-five hundred inhabitants; provided, however, that no change shall be made in any of the joint sub-districts of said township, except in the manner now provided by law; but in such of said joint sub-districts where the school buildings are now situated in said township, no local director shall be elected, but the same shall be under the supervision of the board of education of said special district.

Sec. 5. All school funds on hand belonging to either of said school districts shall be transferred to the treasurer of said special district, and all school property, both real and personal, belonging to either of said school districts, shall become the property of said special district; provided, however, that if the school funds on hand of either of said districts should exceed that in the other, the amount necessary to make them equal shall be raised by taxation in the district so deficient.

Sec. 6. This act shall take effect and be in force from and after its passage.

The relator claims that this statute is unconstitutional; and upon this claim the case depends.

MCLLVANE, J.

In compliance with the second section of the Sixth Article of the Constitution, which provides, "The General Assembly shall make such provisions, by taxation or otherwise, as with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State," general laws have been passed from time to time for the organization and maintenance of common schools throughout the State.

In the system adopted by the general law of May 1, 1873, (in force when the act under consideration was passed, and re-enacted in substance in the Revised Statutes), the State was divided into school districts, styled respectively, city districts of the first class, city districts of the second class, village districts, special districts and township districts, and for each district was provided a board of education having the general management of the schools in such district. And it was also provided that "the several boards of education, now organized and established, and all school districts organized under the provisions of this act, shall be and they are hereby declared to be bodies politic and corporate"; and the act under consideration declares, that the New London school district shall be governed and controlled in every manner by the laws of Ohio now in force relating to village districts: Hence, it is claimed by the relator that this act, being a special act assuming to confer corporate powers, is in violation of the 1st

section of 13th article of the Constitution, which provides, "The General Assembly shall pass no special act conferring corporate powers."

Whether powers conferred by the legislature upon a common school district be corporate or not, within the meaning of this provision of the Constitution, cannot be determined definitely by the mere fact that such district or its board of education is declared by statute to be a corporation, but rather by the object of its creation and the nature of its functions. The district is organized as a mere agency of the State in maintaining its public schools, and all its functions are of a public nature. The evils, which this provision was intended to prevent, are not found in the special privileges conferred upon such public agencies. The evils sought to be prevented were such as resulted from special privileges conferred upon private corporations. That the inhibition extends to municipal corporation—cities and villages—has been settled by adjudications. See *State v. Cincinnati*, 20 Ohio St. 18, and 23 Ohio St. 445; *State v. Mitchell*, 31 Ohio St. 592, and cases there cited. In reference to these decisions, it is proper to remark that many of the powers and franchises of municipal corporations are of a private and local character essentially different from those of mere political sub-divisions of the State, commonly called *quasi* corporations. And again cities and villages are classified as corporations and provided for in the 13th article of the Constitution which relates solely to corporations; the 6th section of which provides for their organization by general laws, so that the decisions referred to, in which the inhibition of the 1st section is held to apply to municipal corporations, are of no weight on the proposition that school districts, or other political sub-division of the State, are subject to the same inhibition.

On the other hand, school districts are constituted so as to partake rather of the character of counties and townships which are provided for in the 10th article of the Constitution, not as corporations, but as mere sub-divisions of the State for political purposes as mere agencies of the State in the administration of public laws. (*Hunter v. Mercer County*, 10 Ohio St. 515; *State v. Cincinnati*, 20 Ohio St. 18.) In this article reference is also made to "similar boards" in connection with the commissioners of counties and trustees of townships.

It is quite obvious to us, that county and township organizations, although *quasi* corporations, are not within the meaning of this provision of the Constitution; and upon full consideration, we are unanimous in the opinion, that school districts, as similar organizations, though declared by statute to be bodies politic and corporate, are not within the reason or meaning of this inhibition of the Constitution. 11 Kansas, 23, which is a case exactly in the point.

It is also contended that the statute in question is in conflict with section 28, article 2 of the Constitution, which provides, that "all laws of a general nature shall have a uniform op-

eration throughout the State." Confessedly this statute operates only in New London Township, and, under it, the schools of the township are organized and supervised differently from those of any other township in the State.

The true meaning of this constitutional provision is somewhat involved in obscurity, and has been questioned several times before this court. Two propositions, at least, involved in its construction may be said to have been settled. 1. That the *general form* of a statute is not the criterion by which its *general nature* is determined. In several instances, portions of the State have been exempted from the operation of a statute, in form general, by the enactment of local and special laws. *The State v. The Judges*, 21 Ohio St. 1; *McGill v. The State*, 34 Ohio St. 228. 2. That whether a law be of a *general nature* or not, depends upon the character of its subject matter. *Kelly v. the State* 6 Ohio St. 272; *McGill v. The State* 34 Ohio St. 228. It follows, therefore, that if the subject matter be of a general nature, all laws in relation thereto must have a uniform operation throughout the State, and if the subject matter be of a local nature, the legislature may provide therefor by laws either general or local in form.

The difficulty, therefore, in all cases, is in determining whether the subject matter of a statute be of a general nature or not, and this difficulty, it seems to me, cannot be obviated by general rules, but by the consideration of each case as it arises. That courts, as well as legislators, will differ as to this question, in many cases, is to be expected. Hence, the presumption in favor of the constitutionality of statutes, when challenged under this provision, is entitled to peculiar weight. But, while this is so, courts dare not trifle with the guaranty of this Constitution, or fritter it away by holding the provision to be a mere direction to the General Assembly, whose judgment in the premises is final. That there are subjects for legislation of a general nature concerning which all statutes must have a uniform operation throughout the State, we entertain no doubt. And, although it would be presumptuous to attempt an enumeration of them, I will venture to suggest the subjects of marriage and divorce, and the descent and distribution of estates, and others of like common and general interest to all citizens of the State.

In order, however, to avoid misunderstanding, I will here add, that on subjects concerning which uniformity is required, we have no doubt, that judicious classification and discrimination between classes, will not destroy the required uniformity.

Again, I assume that no one will dispute the proposition, that if the constitution declares a given subject for legislation to be one of a general nature, that all laws in relation thereto must have a uniform operation throughout the State, and courts should not hesitate to declare special and local enactments on such subject to be unconstitutional and void.

This brings us to the turning point in the

case. The constitution declares, not only that the General Assembly shall pass suitable laws to encourage schools and the means of instruction, (Sec. 7 Art. 1), but also, that it shall make such provisions, by taxation or otherwise, as, with the income arising from the school trust fund, "will secure a thorough and efficient system of common schools throughout the State" (Section 2 Art. 6). A majority of the court are of opinion, that the subject of common schools is thus declared to be one of a general nature. These schools are sustained, in part, by a trust fund in which every section, as well as every individual of the State has a common interest. This is not all; the interest of every section and every individual is to be secured by a thorough and efficient *system* of schools, and as if it were to guard against such special and local legislation as we find in this statute, it is expressly declared that such system shall extend "throughout the State." It appears to me that no amount of logic could make plainer, the proposition, that the common schools of the State, as a subject for legislation, is one of a "public nature," and that all laws in relation to the organization and management thereof, must have a uniform operation throughout the State.

It is no answer to this objection to the statute, to say that the system inaugurated by the general law is not interfered with by this local act, inasmuch, as it is provided that the district of New London township shall be governed in every manner by the laws in force relating to village districts; for two reasons: 1st. Because under the general law there is no authority for extending the government of village districts over the sub-districts of townships, or for consolidating village and township districts in the manner provided in this act: and 2d. There is no authority under the general act for organizing a board of education, as under this local enactment. And surely it cannot be said that these matters are not parts and parcels of the system provided for in the general statute.

We will not undertake to compare the two systems as to efficiency. If the New London system is more efficient than that provided by the general law, it should be adopted throughout the State, otherwise it should not; but this is a consideration alone for the General Assembly. We are satisfied, however, that it was a wise provision in the Constitution that the system of common schools should be controlled and governed by general laws, so that the whole State may enjoy the benefits of the best system which the experience and wisdom of the legislature can devise. It does not require a prophetic eye to see, local legislation to suit the views of this locality and of that, would soon impair the efficiency of our public schools—that while in some places they might be elevated, in others they would be degraded. True, in some localities, from density of population and other causes, different necessities may exist requiring modification in the management of schools in order to attain the greatest efficiency; but for all such cases,

ample provision can be made by judicious classification and discrimination in general laws.

And I will add, in conclusion, that in expressing these views, the majority of the court should not be understood as holding, that, under peculiar circumstances, local legislation may not be resorted to for the purpose of enabling localities to discharge duties merely incidental, and such as would be incidental to any system; but would not either change or destroy the system itself, for instance, in the selection or change of school house sites, or the erection or repair of school buildings and the like.

Judgment of ouster.

[This case will appear in 38 O. S.]

CONCLUSIONS OF LAW AND FACT TO BE STATED BY THE COURT—STATUTE OF LIMITATIONS.

SUPREME COURT OF OHIO.

THE TRUSTEES OF OXFORD TOWNSHIP

v.

THOMAS H. B. COLUMBIA ET AL.

April 18, 1882.

1. Where a party requests that the court state separately the conclusions of law and fact under the civil code, § 280 (Rev. Stats. § 5205), and the request is not complied with, a judgment against such party should be reversed, unless it appear from the record that he was not prejudiced by the refusal.

2. Trustees of a township holding title to lands granted to them by the general government for school purposes, are not exempt from the operation of the statute of limitations, in an action to recover possession of the premises.

Error to the District Court of Putnam County.

The trustees of original surveyed Township of Oxford, Butler County, Ohio, commenced an action in the Court of Common Pleas of Paulding County, against Elsie Columbia and Thomas H. B. Columbia, to recover possession of a tract of land in that county, alleging in the petition that the plaintiffs have a legal estate in and are entitled to the immediate possession of the premises, and that the defendants wrongfully and unlawfully keep them out of possession. The summons served upon the defendants is dated May 25, 1875. The defendants admit that they are in possession of the premises, but they deny in their answer all other allegations in the petition.

The judge presiding in that county having an interest in the cause, the same was by agreement of parties certified for trial and judgment to the Court of Common Pleas of Putnam County, in which county a jury was waived and the cause submitted to the court. "Thereupon the plaintiffs requested the court to find and state in writing the conclusions of fact found separately from the conclusions of law in this case, for the purpose of excepting to the decision of the court upon questions of law involved in the trial. On consideration whereof the court finds that the plaintiffs are not seized of an estate in or entitled to the possession of the property in the petition described

or any part thereof, but that the defendants are seized in fee simple and are rightfully entitled to the possession of said lands. Thereupon the plaintiffs moved the court for a new trial for reasons stated in their motion, which motion was overruled by the court. * * * It is therefore considered and adjudged by the court that the defendants go hence without day and recover of the plaintiffs their costs. * * * And then came the plaintiffs and presented their bill of exceptions taken by them in this case, and the same is allowed and filed and ordered to be made part of the record in this case." That bill of exceptions contains all the testimony offered on the trial.

The facts, so far as it is necessary to state them, are as follows: Under authority of an act of Congress approved March 3, 1839, "to authorize the trustees of the Township of Oxford, in the County of Butler, and State of Ohio, to enter a section of land in lieu of section sixteen, in said township, for the use of schools" (6 Stats. at Large, 773), the division of the south half of section nineteen lying west of the river, in township three north of range four east, in Paulding County, embracing the lands in dispute, was, on February 3, 1841, selected among other lands by the trustees of Oxford Township, for school purposes. Subsequently, the inhabitants of Oxford Township, at a meeting called, in pursuance of the statute, for such purpose, agreed to accept such selection; but it does not appear when that meeting was held. On October 5, 1841, the President of the United States issued a patent, reciting the facts above mentioned, and granting said lands "unto the trustees of the Township of Oxford and County of Butler, in the State of Ohio, for the use of schools." This patent was delivered to the trustees, and upon it their right to recover is based.

By virtue of acts of Congress passed in 1827 and 1828 (4 Stats. at Large, 236, 305), an act of the General Assembly passed in 1828 (27 Ohio L. 16,) and other acts (Swan's C. S. 166, 169; Swan's R. S. 137, 140; S. & C. 198, 200), and a selection made by John A. Bryan, special agent of Ohio, the State, it is claimed, became the owner of the premises in controversy, and clothed with the legal title thereto, in 1841.

In 1852, Dana Columbia went into possession of the west fraction of said south half of section nineteen, said fraction containing one hundred and sixty-four and nineteen-hundredths acres, and during that year and the year following he enclosed nearly seven-eighths of it with a good fence, cleared more than twenty acres, planted an orchard, farmed the cleared lands, employed workmen to assist in quarrying stone upon and clearing the lands, and kept cattle thereon. He continued to improve the lands, built a good frame dwelling house thereon, built a barn, planted another orchard, made a cistern, and moved upon the farm, where he resided until his death, which occurred in 1865. During all the time from 1852 until his death, his occupancy was open, notorious, continuous and exclusive; and since his death the defendants, his

widow and son, who have succeeded to his rights, have occupied in the same manner that part of the premises for which the suit is brought.

During the time that Dana Columbia occupied the premises he claimed to be in possession as owner under the State. This is shown by the testimony of several witnesses. Judge Latty, a witness called by the plaintiffs, testified: "Columbia called on me and wanted to know if there was any difficulty in the title of the State, or what was the difficulty. * * * I told him I did not know; * * * he might not be disturbed. He told me he was about to purchase it at a certain price. * * * My recollection of the date of the conversation with Columbia is, that it was about 1852 when he spoke of purchasing the land. This may have been a second conversation when he told me he was about to purchase it at a certain price. Afterward he told me he had purchased it. * * * My impression was that he had surrendered his first certificate and taken a second." This second certificate issued by the State to Columbia, is dated June 2, 1854, and the purchase money, \$328.38, having been paid in full by him, the Governor, on January 9, 1855, executed and delivered to him a deed for the premises. He also paid during his life all the taxes assessed against the lands, and the defendants, since his death, have regularly paid all the taxes assessed against that portion of said lands in controversy in this case. In 1866, the widow and heirs, being in possession of the whole tract purchased by Dana Columbia, conveyed to Calvin L. Noble the north half of the tract, and he has remained in possession ever since, paying taxes and farming the lands, and it is agreed that he has succeeded to the rights of Dana Columbia and his widow and his heirs therein.

Other facts with respect to the title which appear in the record, and have been commented on by counsel, need not be here stated, in view of the grounds upon which the court has placed the decision of the case.

The District Court of Putnam County affirmed the judgment of the court of common pleas, and this petition in error was filed to reverse the judgment of the latter court as well as the judgment of affirmance.

H. Newbegin and A. S. Latty, for plaintiffs in error.

C. H. Scribner and S. T. Sutphen, for defendants in error.

OKEY, C. J.

In disposing of this case, it is necessary to determine two questions. 1. The plaintiffs requested the court to state separately, in writing, the conclusions of law and fact. That request was made under the statute, which provided: "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally for the plaintiff or defendant, unless one of the parties re-

quest it, with the view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law." Civil Code, § 280; Rev. Stats. § 5205, note. This provision is one of much importance, and it is in no sense directory. That there was no proper compliance with the request is admitted; and it is clear to us that the action of the court in that respect affords ground of reversal, unless it be shown that the plaintiffs were not prejudiced thereby. But we are of opinion that it is shown that there was no such prejudice as to call for a reversal on that ground. The record contains all the testimony offered on the trial, and objection is made that the judgment below is opposed to the weight of the evidence. In deciding the case, therefore, we necessarily ascertain the facts.

2. If a patent for the lands in dispute could be properly issued by the President, under the act of Congress approved in 1839 (6 Stats. at Large, 773), that patent was, probably, properly issued "unto the trustees of the township of Oxford and county of Butler, in the State of Ohio, for the use of schools," for the title, under the act and patent, would, it seems, pass to the trustees and not the State, notwithstanding the remarks in *Trustees v. Campbell*, 17 Ohio 267, affirmed, 13 Howard 244. But we do not find it necessary to determine whether a patent for the lands was or could have been properly issued; nor is it necessary to decide whether the State was or was not, at any time, clothed with the legal title to the premises. Assuming, without deciding, that the trustees of Oxford township became clothed with the legal title to the premises in 1841, we all unite in holding that they are barred from maintaining this suit by the limitation of twenty-one years prescribed in the statute as the period within which actions to recover the possession of real estate may be brought. This action, as already stated, was brought in 1875. But Dana Columbia was in possession of the premises from 1852 until his death in 1865, and the defendants who succeeded to his rights have been in possession ever since, and that possession has been, during the whole period, in the largest sense open, notorious, adverse, uninterrupted and exclusive. It has been held and maintained, moreover, from the beginning, under a purchase from the State, and the purchase money and all taxes have been paid. Large and valuable improvements were made by Columbia upon the premises as early as 1852, and he resided thereon at the time of his death; and if it is true that the trustees became the owners of the premises for school purposes in 1841, there was no time from 1852 until 1873, when they were not clothed with the power and charged with the duty of prosecuting an action to recover possession. 1 S. & C. 1577.

The plaintiffs insist, nevertheless, that the title to the premises, under the act of Congress of 1839, was in the State, and that the statute of limitations does not run against the State: We

have held, however, that the position that the title was in the State, under that act, is not tenable. But if the title had been vested in the State, the result would have been the same, for the State would have been estopped by its deed to Columbia. *Branson v. Wirth*, 17 Wall. 32, 42. And see 3 Pick. 224; 7 Cal. 527; 4 Peters 87. It is also said that the plaintiffs are the trustees of an express trust, and that the action is not barred for that reason. Civil Code, §§ 6, 27; Rev. Stats. §§ 4974, 4995. But this is not an action between trustees and beneficiaries.

The remaining question, then, is whether the statute of limitations applies, assuming that the plaintiffs, as trustees of Oxford township, acquired title to the premises, by donation from the general government, in 1841, for the benefit of schools. That the maxim, *nullum tempus occurrit regi*, is applicable to the general and State governments, is not denied; but it was held in *Cincinnati v. First Presbyterian Church*, 8 Ohio 298, upon the fullest consideration, that the maxim did not apply where a city prosecuted an action of ejectment to recover possession of lots dedicated to public use, the defendants in the action having been in the adverse possession of the lots for more than twenty-one years. I am aware that cases may be found in opposition to that decision. Several of them are collected in a note to the case as reported in 32 Am. Dec. 718, 721. But that decision has been repeatedly approved in this court, and, as applied to a case like the one under consideration, it is amply supported here and elsewhere. *Williams v. First Presbyterian Church*, 1 Ohio St. 478, 510; *Trustees v. Campbell*, 16 Ohio St. 11; *School Directors v. Georges*, 50 Mo. 195; 2 Dillon on Mun. Corp. (3d ed.) §§ 668, 674; and see note above referred to. As to the application of the rule to adverse possession of public ways, see *Cincinnati v. Evans*, 5 Ohio St. 594; cf. *Fox v. Hart*, 11 Ohio 414; *Lane v. Kennedy*, 13 Ohio St. 42; *McClelland v. Miller*, 28 Ohio St. 488; *Railroad v. Commissioners*, 31 Ohio St. 338.

Judgment affirmed.

[This case will appear in 38 O. S.]

QUO WARRANTO—POWER OF MAYOR TO REMOVE MUNICIPAL OFFICER.

SUPREME COURT OF OHIO.

THE STATE OF OHIO EX. REL. ATTORNEY GENERAL.

v.
HENRY HEINMILLER.

April 25, 1882.

Under section 1749, of Revised Statutes, the mayor of a city has power to suspend officers appointed by him under an ordinance, for neglect of duty, misconduct in office or other sufficient cause, "and may appoint other persons to fill the temporary vacancy occasioned thereby; and all such suspensions, and the cause thereof, and all such appointments, shall be by him reported to the council for their action at the next regular meeting thereafter." Held: 1st. That the council may, in its discre-

tion, approve or disapprove such suspension. 2d. That the action of the council may be had upon such information as may come to its knowledge. 3d. That disapproval of such suspension by the council terminates the vacancy occasioned thereby. 4th. Upon the termination of such vacancy, the person appointed to fill it, ceases to be an officer of the city.

2. A petition in quo warranto prosecuted on behalf of the State by the Attorney General to oust an incumbent of an office, need not set forth the name of the person claiming to be entitled thereto, as is required by section 6766 of the Revised Statutes in cases prosecuted by a person claiming to be entitled to the office.

Quo Warranto.

The case is stated in the opinion.

McILVAINE, J.

By this proceeding, the defendant is called upon to show by what authority he assumes to hold and exercise the office of Fire Engineer of the city of Columbus.

This office was created by an ordinance of the city, passed on the 8th of May, 1871, which was amended June 8, 1874. This ordinance, which was fully authorized by the statutes of the State relating to the organization and government of municipal corporations, provides, among other things as follows:

"SECTION 1. Be it ordained by the City Council of Columbus, That it is deemed expedient to create, and there is hereby created, the office of fire engineer of the city of Columbus; that such officer shall be appointed by the mayor, by and with the advice and consent of the city council of said city, on the first Monday of June, A. D. 1871, and annually thereafter, and shall hold his office for the period of one year, and until his successor is appointed and qualified, and all vacancies in said office shall in like manner, immediately upon the vacancy occurring, be filled by appointment for the unexpired term, and until a successor is appointed and qualified. The mayor shall immediately upon making any such appointment, report the name of such appointee to the city council of said city for its action thereon; the fire engineer shall perform the duties prescribed in the act entitled, "An act to provide for the organization and government of municipal corporations, passed May 7, 1869, and the acts amendatory thereof, and supplementary thereto, as well as the duties prescribed by this or any other ordinances of the city; the person so appointed shall be an elector of the city of Columbus, and before entering upon the duties of his office shall take an oath or affirmation to support the Constitution of the United States and the State of Ohio, and also an oath or affirmation of office, and shall also execute a bond to the city of Columbus in the sum of \$5,000, to be approved by the mayor, conditioned for the faithful performance of the duties of his office, which bond shall be deposited with the clerk of the corporation and shall be by the clerk, with the approval endorsed thereon, recorded, filed and preserved in his office: the said fire engineer shall receive as compensation for his services the sum of \$1,000 payable monthly from the city treasury."

The facts in the case are agreed upon, and, in so far as they are deemed material, are as follows;

On the 6th of September, 1880, one David Tresenrider was duly appointed, confirmed and qualified as Fire Engineer, whose term of office would have expired in June following, if a successor had been appointed and qualified; but inasmuch as no successor was appointed, *confirmed and qualified*, he continued to exercise the functions of the office until the following occurrences, which are thus stated in defendant's answer:

That previous to the second day of March, A. D. 1882, specific charges of neglect of duty and misconduct in office on the part of said David D. Tresenrider, were filed with George S. Peters, then the duly elected and qualified and acting mayor of said city, and that thereupon such proceedings were had before said mayor after reasonable notice to said David D. Tresenrider to appear and answer said charges; and after a hearing upon testimony, at which the said David D. Tresenrider was present in person and by counsel, that said mayor, upon the testimony adduced before him, found said charges to be true, and on said 2nd day of March, A. D. 1882, for such neglect of duty and misconduct on the part of said David D. Tresenrider, suspended him from said office of fire engineer; and immediately thereafter appointed this defendant, who was then and is now an elector of said city, to fill the vacancy occasioned in said office by such suspension; and that said defendant immediately after said appointment accepted said office, and immediately took an oath to support the Constitution of the United States and the state of Ohio; and an oath of office faithfully and impartially to discharge all and singular the duties pertaining thereto, and immediately gave bond with good and sufficient sureties to said city of Columbus in the sum of \$5,000, conditioned according to law and the ordinances of said city, which bond was approved by said mayor as required by said ordinance regulating and defining the duties of said office, and that immediately thereafter said defendant entered upon the discharge of all and singular the duties pertaining to said office of fire engineer of said city of Columbus, and has ever since continued, and now continues to discharge such duties under and in pursuance of said appointment.

In reply to this answer, the relator states the following facts, among others, to wit:

"That on the 6th day of March, A. D. 1882, at a regular meeting of the city council of said city of Columbus, duly and lawfully assembled and held, being the next regular meeting of said council after said 2d day of March, A. D. 1882, the said George S. Peters, mayor of said city of Columbus, reported to said city council in writing the said suspension of said David D. Tresenrider as fire engineer of said city, the cause thereof, and the appointment by him of said Henry Heinmiller, the defendant, to fill the temporary vacancy in said office caused thereby; that the said city council thereupon entered upon the investigation and consideration of the matter of said suspension, the cause thereof, and said appointment so reported as aforesaid, and,

pending said investigation and consideration, the council adjourned its said session until the succeeding day, March 7, 1882; that on said 7th day of March, A. D. 1882, at said adjourned meeting of said city council, duly and lawfully assembled and held, the said council resumed and continued the investigation and consideration of said matters aforesaid, and upon the conclusion thereof, the said council, on the 7th day of March, 1882, by a majority vote of all the members elected thereto, passed and adopted a resolution, of which the following is a true and correct copy, to wit:

"*Resolved by the City Council of the City of Columbus*, That the order of the mayor of said city suspending D. D. Tresenrider from his office of fire engineer of said city, and appointing Henry Heinmiller to fill the temporary vacancy occasioned thereby, be not concurred in; that said order be set aside and held for naught, and that said D. D. Tresenrider be, and he is hereby directed to proceed at once to discharge the duties of said office and take control and command of the fire department of said city the same as if said order had not been made."

The facts stated in reply are admitted to be true; but it is agreed that the testimony heard by the mayor, was not reported by him to the council. A large portion, however, but not the whole, of such testimony reported by an unauthorized stenographer, was considered by the council, but no witnesses were examined before the council, nor is it known what inquiry, if any, was made by individual members of the council, concerning the truth of the charges preferred against Tresenrider.

Upon this state of facts, the question is, has the defendant shown a right to hold the office?

In the first place it is claimed on behalf of the defendant that the finding and judgment of the mayor on the hearing of the charges preferred against Tresenrider were the exercise of judicial powers. Wherefore the finding that Tresenrider was guilty of neglect of duty in office and the order of his suspension from office can not be reviewed by this court upon this proceeding in *quo warranto*.

Whether the powers exercised by the mayor were judicial or administrative is wholly immaterial, as it is not sought in this proceeding to review his acts for the purpose of approving or disapproving them. His finding and order must stand as incontrovertible facts in the case. The sole question before us as far as his actions are concerned, is as to their force and effect. And this brings us to consider section 1749 of the Revised Statutes, which constitutes the sole authority of the mayor for his action in the premises. This section provides as follows:

"Section 1749. He shall, unless otherwise provided, have power to suspend from office any lieutenant of police, or any officer appointed by him under the authority of any law or ordinance, for neglect of duty, misconduct in office, or other sufficient cause, and may appoint other persons to fill the temporary vacancy occasioned thereby; and all such suspensions, and

the cause thereof, and all such appointments, shall be by him reported to the council for their action at the next regular meeting thereafter."

That a suspension under this section cannot be rightfully ordered without cause, may be admitted; but the existence of sufficient cause will be presumed until it appears otherwise. But whenever a suspension is ordered, whether rightfully or wrongfully, it operates, as between the officer and the municipality, until the order be set aside, or the term of suspension expires. An exigency calling for the exercise of the power exists, whenever the existence of sufficient cause comes to the knowledge of the mayor, and the means of acquiring such knowledge is not prescribed or limited by the statute: so that the exercise of the power is left to the sound discretion of the mayor, who is also responsible for its abuse.

That the duration of the suspension authorized by this section is to be measured by the duration of the vacancy occasioned by it, is a proposition too plain for discussion; and it is expressly declared that the vacancy occasioned by the suspension is temporary. A suspension from office and a removal from office convey very different ideas; and it is very clear that the legislature recognized the difference, as by section 1685 of the same act, the power of removal from office in municipalities is conferred on the council alone. In the case of suspension it is contemplated that the suspended officer may be restored to his office and hold the same by virtue of his original title, while in case of removal the title of the removed officer is permanently lost to him. The vacancy in this case being temporary, and the suspension being for the same time, of course, the suspended officer is restored to his office at the expiration of that time, unless his right and title be impaired or taken away by some other cause.

It has not and cannot be disputed that the title of the defendant to this office terminated with the termination of the vacancy which he was appointed to fill. The question therefore arises, when did such vacancy terminate? The statute requires the mayor to report "to the council for their action" at the next regular meeting thereafter, "all such suspensions, and the cause thereof, and all such appointments" to wit: appointments to fill temporary vacancies occasioned by such suspensions. Now, it is claimed on behalf of defendant that the only action upon the report of the mayor, which the council is authorized to take, is to approve the suspension and to approve or disapprove the appointment. We are unanimous in the opinion that this claim cannot be maintained. The action of the council is unrestricted. It may act upon its own absolute discretion in approving or disapproving the whole or any part of the report. Discretion to approve implies discretion to disapprove. The action of the council is confided to its judgment and that judgment may be based upon such information and knowledge as it may obtain. No restriction or limitation is imposed

upon the council as to means of acquiring the knowledge by which its action must be controlled.

Whatever may be the effect of the action of the council in approving the action of the mayor in ordering a suspension, in the light of section 1685, which provides:

"Sec. 1685. An officer or agent, appointed by authority of this title, except as otherwise provided therein, may be removed from office at the pleasure of the council by a vote of a majority thereof; an officer elected may be removed from office by a concurrent vote of two-thirds of all the members elected to the council: and in case of elective officers, provisions shall be made by ordinance for preferring charges, and trying the party complained of upon the same; but in no case shall such removal be made, unless a charge in writing is preferred and an opportunity given to make defense"—a subject we need not now inquire into—it is quite clear to us, that the action of the council disapproving of the order of suspension, *ipso facto*, terminates the vacancy occasioned by it, and also terminates the suspension itself; so that, an appointee to fill such vacancy can no longer rightfully exercise the functions of the office.

It is also claimed on behalf of defendant, that the petition in this case is defective in not setting forth the name of the person who claims to be entitled to the office, as required by section 6766 of the Revised Statutes. This section applies only to proceedings prosecuted by the person who claims the office as provided in section 6764, and such showing is certainly necessary when a judgment of induction as well as ouster is sought. The case before us, however, is prosecuted by the Attorney General on behalf of the State, as authorized by statutes in relation to the duty of the Attorney General, and the only remedy sought is a judgment of ouster.

Judgment accordingly.

[This case will appear in 38 O. S.]

THE LAW OF LIBEL—MATTER PUBLISHED IN GOOD FAITH IN WHICH THE PUBLIC HAS AN INTEREST.

U. S. C. C.—DIST. OF MASSACHUSETTS.

EDWARD CRANE

v.

THE BOSTON ADVERTISER.

This was an action to recover damages for an alleged libelous publication. A demurrer was interposed by the defendant to the plaintiff's declaration, which presented the question whether as a matter of law, the publication complained of was libelous.

LOWELL, J.

For the purpose of deciding this demurrer it must be assumed that the plaintiff had conceived and begun to carry out a plan for making a railroad from Boston

to New York by the consolidation of certain shorter lines and otherwise, and that it was a part of his plan to obtain control of the New York and New England, by electing directors favorable to his scheme; that the publication of the article complained of, interfered with this plan to his prejudice, and that the statements of the article were not true, but were published in good faith, without express malice, and were, upon reasonable inquiry by the defendants, believed by them to be true. The contention then, is, on the part of the defendants, that the subject matter is one in which the public has an interest, and that, in discussing a subject of that sort, a public speaker or writer is not bound at his peril to see that the statements are true, but has a qualified privilege, as it has been called, in respect to such matters. The modern doctrine, as shown by the cases cited for the defendants, appears to be that the public has a right to discuss in good faith the public conduct and qualifications of a public man, such as a judge, an ambassador, etc., with more freedom than they can take with a private matter, or with the private conduct of any one. In such discussions they are not held to prove the exact truth of their statements, and the soundness of their inferences, provided that they are not actuated by express malice, or that there is reasonable ground for their statements or inferences, all of which is for the jury. Some of the affairs of a railroad company are public and some are private. For instance, the honesty of a clerk or servant in the office of the company is a matter for the clerk and the company only. The safety of a bridge on the line is a subject of public moment. The public, in this sense, is a number who are or will be interested and yet who are at present unascertainable. All the future passengers on the road are the public in respect to the safety of the bridge, and as they can not be pointed out you may discuss the construction of the bridge in public, though you thereby reflect upon the character of the builder. If this definition of the public is a sound one, the commonwealth, considered as a stockholder, is not the public, for its interests are entrusted to certain officers, who are easily ascertained; nor would the interests of the shareholders become a public matter merely by reason of their number, unless it were proved that it would be virtually impossible to reach them individually. If, therefore, the question was merely of the effect of the scheme upon the shares of the New York and New England Railroad Company, a corporation already chartered and organized, I should doubt somewhat whether it would be of a public nature. But, inasmuch as the project was one which affected a long line of road, as yet only partly built, and the consolidation of several companies, it assumes public importance. Perhaps the right of legislative interference may be taken as a fair test of the right of public discussion, since they both depend upon the same condition. The legislature can not interfere in the purely private affairs of a company, but it may control such of them as affect the public. It can not be doubted

I apprehend, that the legislatures of Massachusetts and Connecticut would have power to permit, or to prohibit, or to modify a scheme such as is now in question. It interests the public, consisting of the unascertained persons who will be asked to take shares in it and those through whose lands it may pass, or whose business will be helped or hindered by it, that such a line should be well; and even that it should be honestly laid out, built and carried through. For this the character of the plaintiff as a constructor and manager of railroads seems to me to be open to public discussion when he comes forward with so great and important a project, affecting many interests besides the shareholders of one road, and that, therefore, the defendants, or any other persons, have the qualified privilege which attaches to the discussion of public affairs. The distinction is that when a railroad is to be built, or a company to build it is to be chartered, the question whether it shall be authorized is a public one; when the company is organized and the stock is issued, anything which merely affects the value of the stock is private. The demurrer to the answer is overruled.

PUBLIC OFFICER—WRONGFUL DISMISSAL
—OFFICE FILLED—SALARY
DURING DISMISSAL.

N. Y. COURT OF APPEALS.

TERHUNE v. THE MAYOR.

February 28, 1882.

A public officer, appointed by a department of a municipal government, who has been dismissed from his office by the department, though without any hearing, for any alleged cause of dismissal, and whose office has been filled by an appointee who has performed the duties of the office and received the stipulated salary therefor, cannot after his reinstatement recover the salary for the time he was out of position.

Under §§ 28 and 76 of the Act, c. 335 of the Laws of 1873, the fire commissioners of the city of New York were authorized to appoint an inspector of combustibles, who was to be the principal officer of a bureau in the fire department, charged with the execution of all laws relating to the storage and sale and use of combustible materials in the city of New York, and they had power to remove such officer at pleasure, provided prior notice of the cause of removal, and an opportunity for making an explanation, were first given. Under these provisions of law the plaintiff was appointed inspector of combustibles in June, 1873, at a salary of \$2,500 per year, and he held his office until August 31, 1877, when he was dismissed by the fire commissioners, either without sufficient cause or without having had the prior notice and opportunity for explanation which the law entitled him to. He subsequently took proceedings to have the action of the fire commissioners in removing him reviewed, and the supreme court decided that his removal was unauthorized and illegal, and he was reinstated in his office. Immediately upon his removal the

fire commissioners appointed in his place Peter Seery inspector of combustibles, at the same salary, and he immediately entered upon the discharge of the duties of the office and received the salary thereof until the plaintiff was reinstated in the office. This action is to recover the salary of the office during the time the plaintiff was kept out of the office by the action of the fire commissioners. At the trial term it was held that the plaintiff could recover, and judgment was rendered in his favor for the amount of salary claimed. The defendant then appealed to the general term of the court, and it reversed the judgment and granted a new trial.

Roswell D. Hatch for appellant.

D. J. Dean contra.

EARL, J.

(After stating the facts.) We are of opinion that the judgment was properly reversed. The office of inspector of combustibles was a public, salaried office, and during the period for which the salary is claimed, the office was actually held, and duties thereof were discharged by Seery, and the salary was paid to him. He was in office under color of appointment by competent authority. He possessed the office and discharged its duties. That, under such circumstances, he took on the character of an officer *de facto* cannot be doubted. *People v. White*, 24 Wend. 540; *People v. Cook*, 14 Barb. 259; *S. C. 8 N. Y.*, 67; *Lambert v. The People*, 76 Ib. 220. It is no longer open to question in this state that payment to a *de facto* officer, while he is holding the office and discharging its duties, is a defence to an action brought by the *de jure* officer to recover the same salary. *Dolan v. The Mayor*, 68 N. Y. 278; *McVeany v. The Mayor*, 80 Ib. 15. But the plaintiff claims that his action may be treated as one to recover of the city damages for his wrongful dismissal from office. It is a sufficient answer to this claim that the city did not dismiss him from his office. The fire commissioners were public officers and not agents of the city. *Maximilian v. The Mayor*, 62 N. Y. 160; *Tone v. The Mayor*, 70 Ib. 157; *Ham v. The Mayor*, Ib. 459; *Smith v. Rochester*, 76 Ib. 513. The city is no more liable for their wrong in dismissing the plaintiff than it would have been if they had committed an assault and battery upon him: If the plaintiff has any remedy for the damages he has sustained, it must be by an action against the fire commissioners for his wrongful dismissal, or by an action against Seery to recover the salary which, as between him and the plaintiff, he wrongfully received.

Order reversed, and judgment absolute against defendant.

AN ENGLISH JUDGE ON CONJUGAL TROUBLES.

A painful case came before Sir James Hannen in the English probate and divorce division a few days ago. In 1870 the widow of Sir P. Hesketh-Fleetwood, baronet, a woman of nearly 60, married a tutor of 31, Henry Wills. After living

with him for nearly six months she left him, alleging cruelty and neglect, and having a private income of £130 a year, offered him £50 a year or £300 cash if he would let her alone. The man has now brought suit for the restitution of his conjugal rights denying that he is actuated by mercenary motives, and alleging that what he desires is the society of his wife, who is dear to him. Sir James Hannen asked, with slightly obvious contempt: "What would compensate you for the loss of a wife who has lived apart from you since 1870?" But as the plaintiff insisted, the judge had no option but to give judgment, which he did in the following words: "This jurisdiction which I am asked to exercise is one which is unknown in any other country in the world, and I am never called upon to exercise it but I do so with greatest reluctance. I have never had a question of the kind before me which was not a question of terms, and I think the present case is of that nature. However, as I am called upon to exercise my jurisdiction in the matter, I must pronounce a decree for the restitution of conjugal rights as asked for. The decree, however, will stand over for three months before being enforced. I allow no costs."

SUPREME COURT RECORD.

[New cases filed since last report, up to April 25, 1882.]

1123. *Squire & Homer v. C. & F. Nachtrieb*. Error to the District Court of Crawford County. S. R. Harris for plaintiffs.

1124. *Proctor Thayer v. Continental Life Insurance Company*. Error to the District Court of Cuyahoga County. R. J. Winters and C. E. Pennewell for plaintiff.

1125. *Robert Kerr et al. v. Charles Young et al.* Error to the District Court of Crawford County. S. R. Harris for plaintiff.

1126. *George W. Nelson v. John W. Vogan*. Error to the District Court of Columbiana County. Clark & MeVicker and W. J. Jordan for plaintiff; Frost & Morrison for defendant.

1127. *City of Steubenville v. George W. McGill*. Error to the District Court of Jefferson County. C. A. Reynolds for plaintiff.

1128. *Christopher Butler v. John Shearer*. Error to the District Court of Scioto County. Moore & Newman for plaintiff; W. A. Hutchins for defendant.

1129. *Amos Christy et al. v. Commissioners of Ashtabula County*. Error—Reserved in the District Court of Ashtabula County. Hutchins & Tuttle and R. P. Ranney for plaintiffs; E. Lee and E. C. Wade for defendants.

1130. *Pittsburgh, Cincinnati & St. Louis Railway Company v. Emily E. Staley*. Error to the District Court of Warren County. Charles Darlington for plaintiff.

1131. *Nancy Pepple et al. v. Franklin Pricer et al.* Error to the District Court of Auglaize County. F. C. Layton and Harrison, Olds and Marsh for plaintiffs.

SUPREME COURT ASSIGNMENT.

FOR ORAL ARGUMENT.

April 27th—No. 1045. *Ohio ex rel. v. The Middleburgh Mutual Aid and Life Association*. Quo warranto.

April 28th—No. 1047. *Ohio ex rel. v. The Standard Life Association of America*. Quo warranto.

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

Tuesday, April 25, 1882.

GENERAL DOCKET.

No. 75. Lloyd v. Moore. Error to the District Court of Scioto County.

LONGWORTH, J., *Held*:

Where the judge, at defendant's request, gave to the jury a certain special charge, in addition to his general charge, which said special charge was erroneous, and afterwards having been requested by the jury to repeat his charge to them, repeated the general charge, but declined to repeat the special charge, there was no error in refusing to repeat the erroneous instruction.

Judgment affirmed.

1076. The State of Ohio ex rel. Attorney General v. Henry Heinmiller. In Quo Warranto.

McILVAINE, J., *Held*:

1. Under section 1749 of Revised Statutes, the mayor of a city has power to suspend officers appointed by him under an ordinance, for neglect of duty, misconduct in office or other sufficient cause "and may appoint other persons to fill the temporary vacancy occasioned thereby; and all such suspensions, and the cause thereof, and all such appointments, shall be by him reported to the council for their action at the next regular meeting thereafter." *Held*: 1st. That the council may, in its discretion, approve or disapprove such suspension. 2d. That the action of the council may be had upon such information as may come to its knowledge. 3d. The disapproval of such suspension by the council terminates the vacancy occasioned thereby. 4th. Upon the termination of such vacancy, the person appointed to fill it, ceases to be an officer of the city.

2. A petition in quo warranto prosecuted on behalf of the State by the Attorney General to oust an incumbent of an office, need not set forth the name of the person claiming to be entitled thereto as is required by section 6766 of the Revised Statutes in cases prosecuted by a person claiming to be entitled to the office.

Judgment of ouster.

33. Otis B. Little v. The Eureka Fire & Marine Ins. Co. Error to the Superior Court of Cincinnati.

JOHNSON, J., *Held*:

A policy of insurance, having one year to run, was delivered to the insured, without payment of the premium agreed on. In a few days, the note of the insured at sixty days was accepted for the premium, which was not paid at maturity, and remained in the hands of the insurer. After this, and within a reasonable time before the loss, the insurer cancelled the policy, and notified the parties interested therein of such cancellation, and credited on the note, a sum less than the pro rata proportion of the unearned premium.

The conditions of the policy provided, that it was not to be binding until actual payment of the premium, and that the insurance should be terminated at the request of the insured, in which case the company was to retain only the customary short rates for the time the policy was in force, also that the company might, at its option, terminate the insurance upon giving notice to that effect, and tendering a pro rata proportion of the premium for the unexpired term. *Held*: 1st. That by delivering the policy without actual payment of the premium, and by taking a note of the assured for the same, the company waived the condition that the policy was not binding unless the premium was actually paid. 2d. On failure of the assured to pay the note, the company might, on giving reasonable notice thereof before the loss, exercise its option to cancel the policy. 3d. As the note was past due and in the hands of the company at the time of such cancellation, it was not necessary to tender

back the pro rata proportion of the unearned premium in cash, nor to credit the same on the note. The note was thereafter subject to such credit.

Judgment affirmed.

950. Cleveland, Columbus, Cincinnati & Indianapolis Railway Company et al. v. Hugh J. Jewett et al. Error to the Court of Common Pleas of Franklin County.

WHITE, J., *Held*:

1. A railroad company may be sued in any county through or into which its road passes, without regard to the nature of the cause of action.

2. The appointment of a receiver to take from the defendants the possession of his property, cannot be lawfully made without notice, unless the delay required to give such notice will result in irreparable loss.

3. In an action to prevent the consolidation of railroad companies, the election of directors for the new company, at a meeting of the stockholders held under sec. 3383 of the Revised Statutes, will not justify, such an appointment against either of the companies, on the ground that part of the stockholders participating in the meeting have been inhibited from doing so by injunction.

Whether any of the stockholders were subject to the jurisdiction of the court allowing the injunction, is a question not now before this court.

The order appointing the receiver and the orders entered in aid of such appointment are reversed and set aside.

48. Andrew Warner, administrator of Lucius Bartlett, v. Brighton Tanner, in person and as administrator of Chester Tanner. Error to the District Court of Geauga County.

OKEY, C. J.

T. & B. executed an instrument under seal, signed by two witnesses, and acknowledged by T. before a justice of the peace, in which instrument it is covenanted that T. leases to B. two acres of land (described in the instrument), with the use of water in adjoining lands of T. and privilege of conducting it in pipes "to a cheese house to be erected on said premises, T. reserving enough water to accommodate the stock kept on the farms of T. And B. is to build a cheese house on the premises, and agrees to pay T. for the use of the premises and the privileges aforesaid, thirty dollars per annum on the first day of October, in each year, while the premises shall be used as and for the manufacture of cheese; and when the premises shall no longer be used for such purpose, the premises, together with the privileges aforesaid, shall revert to T., said B. having the privilege of removing all buildings and fixtures put upon said premises by him."

Held, that this was a lease to B. for life, provided he continued to use the premises for the manufacture of cheese thereon and paid rents, with the right at any time to remove the buildings and fixtures placed on the premises by such lessee.

Judgment affirmed.

79. Leroy Orr v. Henry Kelton et al. Error to the District Court of Licking County. Judgment of the district court reversed and that of the common pleas affirmed. There will be no further report.

83. S. J. Hubbard v. T. Z. Riley, assignee &c. Error to the District Court of Hamilton County. Dismissed for want of preparation.

84. Marvin Porter v. James H. Laws. Error to the District Court of Hamilton County. Dismissed for want of preparation.

86. Bevington & Holles v. Hugh Bleakly. Error to the District Court of Stark County. Dismissed for want of preparation.

88. Texas Building Association No. 2 v. Aurora Fire and Marine Insurance Company. Error to the District Court of Hamilton County. Dismissed for want of preparation.

MOTION DOCKET.

68. William McGuire v. The State of Ohio. Motion for leave to file a petition in error to the District Court of Paulding County. Motion granted.

69. Patrick Kelly v. The State of Ohio. Motion for leave to file a petition in error to the District Court of Paulding County. Motion granted.

Ohio Law Journal.

COLUMBUS, OHIO, : : MAY 4, 1882

THE Supreme Court was engaged most of last week, in hearing the cases of the State on relation of Chas. H. Moore, Supt. of Insurance against the Middletown Mutual Aid and the Standard Life Association of America. A large number of witnesses were examined, and the cases caused considerable interest. The court makes no report this week.

MALPRACTICE.

The Supreme Court of Pennsylvania has recently wrestled with a case of malpractice wherein the court below—Common Pleas of Mercer County—following a common custom in the Keystone State, warned the jurors that they must not allow any sentiment of sympathy for the plaintiff to penetrate their breasts, simply because he was crippled for life, but must attend strictly to what the doctors swore to. The jurors gave the plaintiff only \$1,000 for the wrong inflicted by the surgeon and he appealed. The Supreme Court reversed and remanded the case. It was re-tried in the lower court and a verdict of \$1,500 obtained by the plaintiff.

The plaintiff, Haslet, was injured in an accident, suffering a fracture of the leg. He called in one Byles who doctored him after a fashion and allowed kind nature to heal the wound; but had reduced the fracture so unskillfully as to shorten the broken limb about two inches—which on the end of a man's leg is a long distance—and to turn the foot into a left oblique forward march position. The same old defense was made in the action that is always made in such cases. As many members of the "Medical Society" as was thought necessary were brought in, to testify and did testify that the treatment had been scientific—such as had always been practiced and approved by "Our School of Surgery!" etc. etc. One of the witnesses in this case began his professional career with a pound of blue mass and now is worth half a million. His practice was entirely among farmers, and when he was once called the farmer and the farm were practically his meat. He was himself tried for malpractice a few years ago, having treated a dislocation as a fracture and crippled his victim for life. Every doctor who testified on his behalf on that trial, had been previously consulted

by the victim and had been led to believe the healing art had been applied by an *Eclectic* physician, and each had denounced the job as an outrage and the work of a butcher. But when they found it had been done by one of "*our own school*" they came promptly to the rescue and cheerfully testified that dislocations of that kind were *always* treated as fractures, &c., *ad nauseum*. Of course the jury found for the defendant. We presume his cheerful testimony in this case sprang from his gratitude for a similar favor on the former occasion.

We hail this verdict in *Haslet v. Byles*, as the dawn of an era wherein a blundering, butchering sawbones must respond in damages for the wrongs inflicted upon his victims by his ignorance and lack of skill. And wherein the villainous *esprit du corps* that too often makes up the burden of so called proof, allows the aforesaid butchers to go free when brought into court as defendants in malpractice cases. The fact of the business is, that no matter how a so-called surgeon bungles a job, from taking out a wrong tooth, to cutting off the wrong leg, any number of other so called surgeons may be found to swear that the course of treatment pursued was all that science and skill could suggest. For this reason these cases have very rarely been won, and consequently are seldom commenced. We hope, however, that the future will make a different showing. If a lawyer were to bring an action of trespass *quare clausem fregit, de bonis asportatis* to recover damages for breach of contract, he would hardly find other lawyers to swear that that was the proper form of action. Yet that case would be no more criminally absurd than the case we have above referred to where the brother sawbones swore that a pistol splint was the proper thing for a dislocation of a metacarpal bone. Let doctors beware.

CONTRACT—LEASE—FAILURE OF SUBJECT MATTER OF CONTRACT.

SUPREME COURT OF OHIO.

SCIOTO FIRE BRICK COMPANY.

v.

ERASTUS POND.

April 18, 1882,

A., by an agreement in writing, "leased" to B., "all the clay that is good No. 1 fire clay, on his land" described, for a term of three years, subject to the conditions that B. "shall mine, or cause to be mined, or pay for, not less than 2,000 tons of clay every year, and shall pay therefor, twenty-five cents per ton for every ton of clay monthly, as it is taken away." *Held:*

1. That this was a contract, which gave B. the exclusive right to mine and remove all the good No. 1 fire clay that was on the land, and not a *lease* of the land itself.

2. If clay of that quality, and in quantity sufficient to justify its being mined existed, B., on failure to mine at least 2,000 tons per year, each year while the contract was in force, was bound to pay for that amount, at the agreed price per ton.

3. But if, in fact, clay of that quality and in quantity sufficient to justify its being mined could not, by the use of due diligence be found on the land, then there was no obligation to pay the amount agreed on, in case of failure to mine. *Cook v. Andrews*, 38 O. St. 178 followed and approved.

4. Where it is an open question, whether such clay, was to be found on the land, and the exclusive possession of the clay lands was vested in the lessee or purchaser of the clay, for the purpose of ascertaining the fact, the burden is upon him, in order to defeat a recovery for the annual sums to be paid in case of a failure to mine and remove the same, to prove that such clay as is contemplated in the contract did not exist in minable quantity. *Cook v. Andrews*, *supra*.

Error to the District Court of Scioto County.

The defendant in error brought an action to recover \$2,000, less certain credits, under a contract of which the following is a copy:

"This agreement, entered into this 25th day February; A. D. 1873, between Erastus Pond, of Portsmouth, Ohio, of the first part, and the Scioto Fire Brick Company, of Sciotoville, Ohio of the second part, witnesseth, that the said party of the first part hereby leases all the clay that is good No. 1 fire clay, on his land, situate in Clay Township, Scioto County, Ohio, for the term of three years, from and after this date, subject to the following conditions, that is to say, providing said parties of the second part shall mine, or cause to be mined, or pay for not less than two thousand tons of clay every year, and shall pay therefor twenty-five cents per ton for every ton of clay monthly, as it is taken away. The party of the first part reserves the right, in case he should sell or dispose of said property on which the clay above leased is found, to cancel this lease any time after the first year shall have expired; but, in case the land is not sold, then, and in that case, this lease is to remain in force for the three years. The party of the first part agrees, should he conclude to sell or dispose of the property, to allow the parties of the second part to purchase it, providing they will pay as much for it as any other good and responsible parties. The party of the first part agrees to give the right of way for any roads necessary to get clay away."

"To the true performance of the foregoing agreements, we, the parties, affix our signatures, the day and date first above written.

"SIGNED.] "ERASTUS POND."

"SCIOTO FIRE BRICK COMPANY."

"Per W. Q. ADAMS, President."

The petition, as amended alleged:

1. The defendant is a corporation duly organized under the laws of this State, and carrying on business at the said county.

2. The plaintiff, on the 25th day of February, A. D. 1873, was, and has since been the owner of a tract of land situate in Clay Township, in said County, containing about one hundred and seventy acres, and upon which were large deposits of fire clay; viz: *Over six thousand tons of good*

No. 1 fire clay, and over six thousand tons of other good fire clay. The last clause being the amendment made necessary by the ruling of the court on a demurrer to the petition for want of such allegation.

3. That defendant desiring to secure to itself the sole privilege of mining fire clay for a term of years, on said land, entered into said contract.

4. That defendant took possession of said land, and mined and took away large quantities of fire clay, but not to exceed six thousand tons.

The prayer is for a judgment for \$1,347.72, with interest from February 25th, 1876, that amount being the difference between \$1,500, which was three years rent for said land in case of failure to mine, and \$152.28, payments received on the amount due on said contract.

Three defenses are pleaded.

1. It is denied that there was any good number one fire clay on said land, or that defendant received or took away any such, or any other clay that it was required to take and pay for.

2. It admits that shortly after the making of said agreement, the defendant entered upon said tract of land of the plaintiff for the purpose of mining and taking away the good No. 1 fire clay thereon, and proceeded to open the strata of fire clay on said premises, in order to mine and take away therefrom whatever good No. 1 fire clay could be found, or was thereon. In opening said fire clay banks, it was ascertained that the fire clay was not good No. 1 fire clay, but with the expectation that the quality would improve as said banks were more fully opened and developed, a small quantity of the fire clay mined on said premises was taken away and hauled to the works of defendant for the purpose of testing the same. The whole quantity so taken away from said premises was 456½ tons. It avers further, that upon testing said fire clay so taken from said premises, it was ascertained that the same was almost worthless; and for the purpose of making fire brick was, in fact, entirely worthless. Defendant avers that said fire clay so received and taken away from said premises was not good No. 1 fire clay; nor was the same received or taken by defendants as such; nor was the said fire clay so taken of any value.

3. Is a counter-claim to recover back the above payments acknowledged in the petition, on the ground that the clay taken and paid for was worthless. As no question is here made on the action of the court below, on this counter-claim a further statement of it is unnecessary.

On the issues joined, evidence was offered on each side, the tendency of which is disclosed in the bill of exceptions. The jury found for the plaintiff for the full amount claimed.

The bill of exceptions does not purport to set out all the evidence, but only what it tends to prove. Certain charges, and refusals to charge are stated, which are assigned as grounds for reversing the judgment.

Upon the issue made by the denial, that there was any good number one fire clay on the land, the court charged, that the burden of proof was

on the defendant below; and, if the jury found from the evidence that there was good number one fire clay on the lands, in such quantities, as would warrant its being taken out having regard to the expense ordinarily incurred in mining fire clay, they need enquire no further, the verdict must be for the plaintiff.

The court further instructed the jury: "That if they found, from the evidence, that there was no good No. 1 fire clay on the said lands of plaintiff, it did not follow that they must find the issues for defendant; they must inquire further." And to guide the jury in their further enquiries in such an event, at the request of the attorney for plaintiff, the court gave to the jury the following instructions, to wit:

1. "Under the written contract it was the duty of the defendant to examine and determine, within a *reasonable time*, whether or not there was such clay on the land as it was willing to accept and pay for under the agreement."

2. "If defendant did not, within one year from the date of the contract, examine and test the clay sufficiently to determine its quality and quantity, and continued mining and taking away clay the second year, under the lease, then it became liable to pay to plaintiff at the end of the year for two thousand tons of clay at the contract price, whether it received that amount or not."

3. "If defendant, during the second year, mined and took away clay under the lease, and did not abandon the lease before the commencement of the third year, and so notify plaintiff, it is liable to pay for 2,000 tons for that year, whether it took away that quantity or not."

4. "A simple verbal notice by the defendant, or its attorney to the plaintiff, that it should not take any more clay under the lease, is not sufficient; before defendant could release itself from its liability under the written lease, it was required to tender to the plaintiff a written release in writing, executed by the defendant, unless there was a waiver upon the part of the plaintiff of the execution of a written release."

Exception was taken to these charges, and then at the request of the defendant, the court gave the following instructions, to wit:

1. "Before the plaintiff can recover in this case, the jury must be satisfied, by a preponderance of evidence, that there was upon the said lands of the plaintiff good No. 1 fire clay in quantities that could, and would, by the use of such usual and ordinary means as are ordinarily adopted by careful and prudent men in that business, have been taken out."

2. The following instruction was asked by defendant to be given, to wit:

"If the jury shall find, from the evidence, that there was to be found on the lands of the plaintiff *some* good No. 1 fire clay, but that the same was found in such small quantities, or was so mixed up with other fire clay unfit for use, or other ingredients that rendered it unfit for use as a good No. 1 fire clay, that it could not be taken out and made fit for use except at an ex-

pense exceeding the value of the clay so obtained, and would not, for that reason, have been mined by any man of ordinary care and prudence in that business, the defendant was not required to take such fire clay as a good No. 1 fire clay, nor is he required to pay for the same, if he should refuse to take it."

But the court refused to give the same without omitting the words, "nor is he required to pay for the same if he should refuse to take it," and gave said instruction omitting said words.

To which ruling of the court, in refusing to give said instruction as asked, and except by omitting said words, and also in giving the same with said words omitted, defendant, by its counsel, excepted.

The defendant asked the court to give the following instruction, to wit:

3. "If, during the first year, the defendant made a reasonable examination of the land, and was unable to find a good No. 1 fire clay on the same and so reported to plaintiff, and the plaintiff thereupon requested the defendant to make a further examination of the land the next year, and at his request defendant made a further examination of the land the next year and could not, after a full and reasonable examination of the same, find any good No. 1 fire clay on the tract, and the jury shall also find, from the evidence, that there was no good No. 1 fire clay upon the tract, the verdict must be for defendant."

Which instruction the court refused to give, and for so refusing, defendant by its counsel, excepted.

The grounds relied on for a reversal are: that the court erred in its charge, and in its refusal to charge as requested.

Moore & Newman and J. W. Bannon for plaintiff, in error.

W. A. Hutchins for defendant in error.

JOHNSON, J.

The agreement, which is the foundation of the action, is, we think, properly pleaded, as a *contract*, securing to the plaintiff in error "the sole privilege of mining fire clay" on the land for a term of three years.

The agreement itself, is not a lease of the *land*, but of "all the clay that is good No. 1 fire clay," on the land.

If that kind of clay was on the land, the plaintiff in error was bound to mine not less than 2,000 tons each year, the same to be paid for monthly as it was taken away. The exclusive right to possession of the land so far as was necessary to mine and remove such clay was granted.

This was not an exclusive possession of the whole tract, but only for mining purposes. The ownership of the land, with the right to the possession of the same, subject only to the right of possession for the purpose of mining and removing the clay, was in the owner. This, was therefore a *contract* for the privilege of mining and removing the kind of fire clay specified, as distinguished from a *lease* of the land.

This right or privilege commenced February

25, 1873, and unless sooner terminated, ended February 25, 1876.

The action is for three years *rent* or compensation to be paid on failure to mine, and not for so much clay actually mined. It is founded on that clause of the agreement which provides that the plaintiff in error, "shall mine or cause to be mined, *or pay for, not less than two thousand tons of clay every year, and shall pay therefor twenty-five cents per ton for every ton of clay monthly as it is taken away.*"

The petition does not aver, that any particular quantity of clay was taken away. It is alleged that possession of "said clay lands," was taken, and "large quantities of fire clay mined and taken away, but not to exceed 6,000 tons."

As this was not a lease of the land at an agreed rent per annum, but a contract for the exclusive privilege of mining and removing during the term "all the clay that is good No. 1 fire clay," it follows, we think, that unless there was such clay on the land, nothing was payable under the contract.

The clause of the contract, termed therein a condition, which binds the party of the second part, to mine or cause to be mined *or pay for, not less than 2,000 tons of clay every year*, is not an obligation to mine or pay for any other clay, than that leased to the party. The word "clay" in this clause, means the kind of clay contracted for, viz: "Good No. 1 fire clay."

The defendant bound itself, in consideration of the privilege granted, to mine and pay for this kind of clay, at the rate specified, payable monthly as it is taken away. It was to mine or pay for, at least 2,000 tons per year.

It could not monopolize this clay for three years, without compensation, nor take a less amount than two thousand tons per year, but was to mine at least that amount. If it did not, it was to pay for that amount each year. If it failed to mine this quantity each year, it obligated itself to pay for that amount. To hold that the plaintiff below, was entitled to an annual rent of \$500 per year, if there was no clay of the quality, or in quantity sufficient, that was minable, would do violence to the terms of the agreement, and to principles of justice. It would be paying for a worthless privilege.

1. Did the court err in its charge, as to the burden of proof?

The original petition did not allege that there was any good No. 1 fire clay on the land. For want of such an averment, a demurrer was sustained, and an amendment was made, containing this allegation. It was put in issue by the first defense. The issue thus tendered, naturally cast the burden on plaintiff, if determined by the form of the pleadings, merely.

On the trial the general charge was that the burden on this issue was on defendant, but the first request of the defendant, was given, which was to the effect that the plaintiff must satisfy the jury, by a preponderance of proof that such clay was on the land in minable quantity.

Without attempting to harmonize these dif-

ferent rulings, let us assume that the plaintiff in error is correct in saying the effect of the charge was to cast the burden on defendant.

Upon general principles, applicable to cases of this kind, and in accordance with the opinion in *Cook v. Andrews*, 36 O. St., 178, we think the burden was properly on defendant. It is admitted in the pleadings, that possession of these clay lands was taken by defendant under the contract. This was an exclusive possession for all purposes embraced in the contract, and included the right to test the lands for such clay if such test was necessary.

From the bill of exceptions, it appears to have been an open question whether there was such clay to be found. It was the duty of defendant to mine and remove same, if found, or pay the amount stipulated per year.

The exclusive right to test these lands being in the defendant, the burden is on him to prove the non-existence of such clay in minable quality and quantity. *Cook v. Andrews. Supra.*

The court charged, that if there was good No. 1 fire clay on the land in such quantities as would justify mining it, the jury need not enquire further, but must find for the plaintiff, that is if the clay was there, of the quality and quantity, that should have been mined and taken away, the defendant must pay for at least 6,000 tons, whether mined and removed or not. In this, we think there was no error. They were, however, further charged, that if such clay was not on the land, it did not follow that the issues should be found for the defendant, but the jury must enquire further: In this further inquiry, they were instructed; 1st That it was the duty of defendant to test the land in a reasonable time, for such clay. 2d If it did not do so in one year, sufficiently to determine its quantity and quality, and continued mining and taking away "clay," during the *second* year, then it became liable at the end of the year for 2,000 tons, whether it received that amount of clay or not. And 3d If during the second year it mined and took away "clay," under the lease, and did not abandon the lease before the commencement of the third year, it was liable to pay for 2,000 tons for that year, whether it took away that quantity or not.

The plain import of these instructions were, that although there was no such clay on the land as defendant had contracted for, yet, if the defendant failed to make a test during the first year, and held over into the second year, mining and taking away clay, (whether of the quality contracted for, is not stated,) then the defendant was liable to pay for 2,000 tons for that year, *whether there was any good No. 1 fire clay there or not*, and the same rule was given to guide the jury, for the second and third years.

Notwithstanding this, the court, at the request of defendant, charged, that before the plaintiff could recover, the jury must be satisfied by a preponderance of evidence, that there was upon said lands, good No. 1 fire clay, in such quantities, as would justify its being taken out, but at

the same time and in the same connection, refused to give the following charge without omitting therefrom the words, "nor is he required to pay for the same if he should refuse to take it," and gave said instruction, omitting said words.

"If the jury shall find, from the evidence, that there was to be found on the lands of the plaintiff some good No. 1 fire clay, but that the same was found in such small quantities, or was so mixed up with other fire clay unfit for use, or other ingredients that rendered it unfit for use as a good No. 1 fire clay, that it could not be taken out and made fit for use except at an expense exceeding the value of the clay so obtained, and would not, for that reason, have been mined by any man of ordinary care and prudence in that business, the defendant was not required to take such fire clay as a good No. 1 fire clay, nor is he required to pay for the same, if he should refuse to take it." That is if there was no No. 1 fire clay of sufficient quantity, that could be taken out and made fit for use, except at such great expense as would not justify a man of ordinary care and prudence in that business in doing it, the defendant, though not required to mine it, is yet bound to pay for it if taken out though not of the quality contracted for.

This modification of the request is irreconcilable with the prior request of the defendant, which was given, but is in harmony with the main charge of the court, which we have found to be erroneous in holding defendant liable, during his possession and while searching for the kind of clay he had contracted for, although none was on the land. In view of the fact that the jury rendered a verdict for the full quantity of the kind of clay that defendant was bound to take out, if there in minable quantity, for the whole term, and of the fact that the evidence put in issue the existence of such clay, we think this judgment should be reversed. It was likely to confuse and mislead the jury upon the most important issue in the case. For this reason alone the judgment should be reversed. *Wash. Ins. Co. v. Mer. & Mar. Ins. Co.* 5 O. St. 450.

By the charge of the court, and by the modification of the second request of the defendant, this issue became immaterial, if there was any quantity of the required kind of clay, however small, on the land, or, indeed, if none at all.

Judgment reversed and cause remanded.

[This case will appear in 38 O. S.]

LEASE FOR LIFE.

SUPREME COURT OF OHIO.

ANDREW WARNER, ADMINISTRATOR,

v.

CHESTER TANNER AND BRIGHTON TANNER.

April 25, 1882.

T. & B. executed an instrument under seal, signed by two witnesses, and acknowledged by T. before a justice of the peace, in which instrument it is covenanted that T. leases to B. two acres of land (described in the instrument), with the use of water in adjoining lands of T. and privilege of conducting it in pipes "to a cheese house to be erected on said premises, T. reserving enough water to accommodate the stock kept on the farms of T. And B. is to build a cheese house on the premises, and agrees to pay T. for the use of the premises and the privileges aforesaid, thirty dollars per annum on the first day of October, in each year, while the premises shall be used as and for the manufacture of cheese; and when the premises shall no longer be used for such purpose, the premises, together with the privileges aforesaid, shall revert to T., said B. having the privilege of removing all buildings and fixtures put upon said premises by him."

Held, that this was a lease to B. for life, provided he continued to use the premises for the manufacture of cheese thereon and paid rents, with the right at any time to remove the buildings and fixtures placed on the premises by such lessee.

Judgment affirmed.

Error to the District Court of Geauga County.

Chester Tanner and Lucius Bartlett signed and sealed the following instrument: "This indenture made at Chester, Geauga County, Ohio, this 1st day of February, 1864, by and between Chester Tanner of the first part, and Lucius Bartlett of the second part, witnesseth, that said Chester Tanner hath this day leased to said Lucius Bartlett the following described premises." Here follows the description, the premises containing two acres of land. "And said Tanner also leases to said Bartlett the privileges of conducting the springs, and the use of the same, in pipes or otherwise, on the brook that crosses said premises, commencing at the spring at the roots of the chestnut tree standing northerly of the premises aforesaid, and all available springs, to a cheese house to be erected on said premises, said Tanner reserving enough water to accommodate the stock kept on the farms of said Tanner. And said Bartlett is to build a cheese house on said premises, and agrees to pay said Chester Tanner for the use of said premises and the privileges aforesaid, the sum of thirty dollars per annum, to be paid on the first day of October, in each year, while said premises shall be used as and for manufacturing cheese; and when said premises shall no longer be used for such purpose, the premises, together with the privileges aforesaid, shall again revert to said Tanner, said Bartlett having the privilege of removing all buildings and fixtures put upon said premises by him."

The instrument was also subscribed by two witnesses, acknowledged by Tanner before a justice of the peace, and was delivered by Bartlett to the county recorder, who recorded it.

Bartlett immediately entered into possession

of the premises in pursuance of the instrument, erected thereon a cheese house, dwelling house and stable, and occupied the premises, conducting the business of manufacturing cheese thereon, and paid the taxes regularly, from that time until his death, which occurred on December 27, 1874. The amount which he paid to Tanner on October 26, 1874, was in full of the rent to February 1st, 1875.

On January 22, 1875, Chester Tanner requested Warner, administrator of Bartlett, to remove the buildings and fixtures from the premises, and informed him that the lease was terminated from and after the expiration of the time for which rent had been paid.

In February, 1875, Chester Tanner, with Brighton Tanner acting under his authority, entered into possession of the premises, against the protest of Warner, administrator of Bartlett, and on February 17, 1875, Warner, as such administrator, brought suit against them in the Court of Common Pleas of Geauga County. The petition contains a statement of the facts above mentioned, and concludes as follows: "The plaintiff further says that the said defendants, willfully and maliciously contriving and intending to injure said estate of said Lucius Bartlett, deceased, and to depreciate the value thereof, on the 11th day of February, 1875, wrongfully, wantonly, and against the remonstrance, opposition, and forbidding of the plaintiff, with force and arms, took possession of said land, the buildings thereon, as aforesaid, and appurtenances thereto, and the said defendants forbade this plaintiff and all persons to come upon said lands or take away said property or in manner to interfere therewith. That, on the 15th day of February, 1875, this plaintiff demanded said leased lands and the appurtenances thereto, being the the lands, buildings, utensils and appurtenances aforesaid, and the defendants then and there refused to deliver the same, or any part thereof, to this plaintiff, and, on the 16th day of February, 1875, at which time and place said property was by this plaintiff, as administrator, as aforesaid, advertised for sale, as provided by law, said defendants appeared with their attorney, and forbade the sale of said property, and claimed and declared that all and every part of said property belonged to said defendant, Chester Tanner, and publicly read a paper in the presence and hearing of this plaintiff and sundry persons assembled at said sale, to such effect; and so said plaintiff says the said defendants have converted said lease and property and effects to their own use, to the damage of said plaintiff, as such administrator, of six thousand dollars, for which he asks judgment against said defendants and for costs."

In the court of common pleas the cause was tried to a jury on the petition, answer and testimony, and a verdict was rendered in favor of Warner, as such administrator, for \$3,500. Among other witnesses called by Warner was O. Sanders, who testified as follows:

"I made cheese for Bartlett; worked for Tanner in 1866 and 1867; was at Bartlett's very often. I was there two weeks before he died. He lived in the house at the factory. The factory in 1874 was in good condition.—There were four vats, a boiler and engine, 30 presses, receiving can in good condition, steam churns. Do not know how many cows we had in 1874. The factory was in a good dairy country. There was a good supply of water. There was a house and barn on the premises."

Thereupon the plaintiff's counsel put to said witness the question following, to wit:

"What was the cheese factory building, in connection with the house and barn and appurtenances sufficient to manufacture into cheese the milk of from 800 to 1000 cows, together with a lease of two acres of land, to continue so long as the same should be used for the purpose of manufacturing cheese at an annual rental of \$30, worth, for the purpose of manufacturing cheese, on the 15th day of February, 1875?"

To which question the defendant objected, but the court overruled said objection, and allowed said witness to answer said question, and against the defendants' objection said witness answered said question, as follows:

"It was worth \$5,000."

To which ruling of the court, in overruling said objection, to said question and in permitting said witness to answer said question, and to the answer as given, the defendant by his counsel at the time excepted.

On cross-examination said witness, among other things, testified as follows: "The factory building and the dwelling house and barn were worth together from \$700 to \$1000."

No witness placed the value of the buildings higher than the witness Sanders, and no witness testified more favorably to Warner, the administrator.

The defendants requested the court to charge the jury as follows:

"That the said lease is in contemplation of the law, one that ends and terminates at and on the death of the lessee, and if you shall find from the evidence in the case, that the said Lucius Bartlett, the lessee, died on the 27th day of December, 1874, the said lease thereby ended, and all rights of the plaintiff as the administrator of the said Bartlett then ceased and determined, save and except the right and privilege to remove the fixtures, erections and improvements put and placed on said leased premises by the said Bartlett in his lifetime; and that, inasmuch as this suit is not instituted or brought to recover damages for preventing the plaintiff from taking off and removing from said leased premises the fixtures, erections and buildings so placed thereon by said Bartlett, I charge you that if you shall find the facts as in this proposition stated proven to your satisfaction, the plaintiff cannot recover."

But the court refused so to charge, and the defendants excepted; and thereupon the court

charged the jury, among other things, as follows:

"That said lease did not, in and by its terms, create and give to the lessee therein named a permanent leasehold estate, and that said lease is not real property, and did not, upon the death of said Bartlett descend to and vest in the heirs at law of said Bartlett." To which charge, so given, the defendant by his counsel then and there duly excepted.

And the Court further charged the jury "that in law said lease was, in its nature and character personal property, which upon the death of said Bartlett, vested in the administrator of said Bartlett, as part of the personal estate of said Bartlett, and said administrator, the plaintiff, had the right in law to sell the same to pay the debts of said Bartlett." To which charge of the court so given, the defendants at the time excepted.

And the court further charged the jury "that in law the said lease was a lease which continued and run for an *indefinite and unlimited* period of time, and so long as the said lessee or his assigns or personal representative should use the property covered by said lease for the purpose of manufacturing cheese thereon and therein, and that the extent and duration of said lease as to time was in law limited only upon the happening of the event that the owner and holder of said lease should cease to use and occupy the same for the purpose of manufacturing cheese." To which charge of the court so given to the jury, the said defendants by counsel at the time excepted.

And thereupon the court further charged the jury "that if they should find from the evidence in the case that the said lessor, Chester Tanner, undertook by notice to terminate and put an end to said lease under a claim of right so to do, and took possession of said leased ground and buildings erected thereon, under a claim that said lease was terminated and said leased property and buildings had reverted to said Chester Tanner, and did forbid the plaintiff as such administrator to sell the same or in any manner interfere with it, such facts so found in law, would be a conversion of said buildings and said lease, and the plaintiffs in this action, in such case, would be entitled to recover the full value of said buildings and said lease." To which charge of the court so given, the defendants by counsel at the time excepted.

And thereupon the court further charged the jury upon the question of damages, as follows: "That in determining the amount of damages the plaintiff is entitled to recover, if the jury should find in favor of the plaintiff, they should consider and take into account not only the value of the buildings on said leased ground disconnected from said lease, but also the value of the lease itself, and if they find for the plaintiff, they should allow the plaintiff, as damages, the value of the lease and buildings for the purpose of manufacturing cheese at the time they were

converted to their own use by the defendants." To which charge so given the defendants by their counsel excepted.

The plaintiff below having on suggestion of the court remitted from the verdict the sum of \$1,000.00, the court overruled the defendants' motion for a new trial, and rendered judgment in favor of Warner, as such administrator, for \$2,500. That judgment was reversed in the district court, and this petition in error is filed in this court by Warner to reverse the judgment of reversal.

Durfee & Stephenson, for plaintiff in error.

Tinker & Alvord, for defendants in error.

OKEY, C. J.

In the court of common pleas, the jury was charged that, by the instrument executed by the parties, an interest was acquired which would endure as long as the premises might be used for the manufacture of cheese thereon; and that this action, which is in its nature trover for the conversion of real estate, might be maintained by the lessee's administrator. To state such a position is to refute it. The only other instance of a similar action which I remember, was met in *Railroad Co. v. Robbins*, 35 O. St. 531.

The administrator had no right of action, in any view of this case, except with respect to property merely personal which may have remained on the premises when this suit was brought; nor had he a right of action as to such personal property, unless the defendants converted it to their own use. Leases of land of a chattel quality are chattels real, and go to the administrator; but he has no interest in the freehold terms or leases. All interests for a shorter period than a life, or, in other words, all interests for a definite space measured by years, months or days, are deemed chattel interests, and, independently of statutory provision, go to the administrator, (*Northern Bank v. Roosa*, 13 Ohio, 334; 30 Ohio St. 285;) while not only is a term for one's own life or the life of another deemed a freehold, but if one grant an estate to a man and woman during coverture, or as long as the grantee or lessee shall dwell in such a house or use the premises for the manufacture of cheese thereon, or for any like uncertain time, the grantee or lessee has in judgment of law a freehold, and upon the death of such grantee or lessee, his administrator will have no interest. 1 *Williams on Ex.* (6th Am. ed.) 749; *Taylor's L. & T.* § 52; *Beeson app., Burton, res.*, 12 C. B. (74 E. C. L.) 647.

This instrument was a lease to Bartlett for his life, subject to be defeated when the premises were no longer used for the manufacture of cheese thereon, or by the non-payment of rent. *Hurd v. Cushing*, 7 Pick. 169; *Bowles' case*, 11 Coke 79 b, S. C. *Tudors Lead. Cas. on Real Prop.* 27-100; 4 *Wait's Act. & Def.* 502.

Leases may be at will, for years, or for life. So, they may be of perpetual duration. *Foltz v. Huntley*, 7 Wend. 210; *Taylor's L. & T.* § 72. Indeed, they may be for any period which will not exceed the interest of the lessor in the premises. And

whatever the term may be under a lease, it can be made subject to a condition, which is a qualification annexed to an estate by a grantor (*Sperry v. Pond*, 5 Ohio, 387, 24 Am. Dec. 296,) or lessor (*Fritz v. Huntley*, *supra*.) whereby, among other things, the estate or term granted may be defeated or terminated.

The fact that Bartlett was required to, and did place upon the premises valuable structures, which he could remove only when the premises were no longer used for the manufacture of cheese thereon, satisfies us that this was not a lease at will, nor a lease from year to year. On the other hand, the instrument contains no words indicating an intention to grant a fee in the premises; and yet the construction which the court of common pleas placed upon it would render it, in effect, precisely the same as though the grant had been to Bartlett, his heirs and assigns. It would endure, according to that construction, until the premises were no longer used for the manufacture of cheese, or the lessee ceased to pay rent, precisely as in case of a grant in fee with such condition. Having regard to the whole instrument, and not overlooking the fact that the right to remove buildings, etc., is, in terms, limited to Bartlett, we are satisfied, as already stated, that a lease for life was granted to Bartlett, which interest might have been defeated during his life in the way stated. The cases relied on by the plaintiff in error, (*White v. Fuller*, 38 Vt. 194; *Lewis v. Effinger*, 30 Pa. St. 281; *Cook v. Bisbee*, 18 Pick. 527.) are in no respect inconsistent with the view here stated; and the statutes and decisions relating to permanent leasehold estates in this state, which are also cited and relied upon by the plaintiff in error, shed no light on this case.

The remaining question is as to the competency of the inquiry made of the witness Sanders as to the value of the premises. While the opinion of a witness as to the value of an estate is in a proper case admissible, (*Railroad Co. v. Ball*, 5 Ohio St. 568,) it may well be doubted whether the rule will warrant, in a case like this, such a lumping estimate as the court permitted to go to the jury. But we do not find it necessary to express any definite opinion upon the question. Judgment affirmed.

[This case will appear in 38 O. S.]

INJURY—CITY RESPONSIBLE FOR NEGLIGENCE OF ITS EMPLOYEES.

SUPREME COURT OF OHIO.

CITY OF IRONTON *v.* KELLY.

April 18, 1882.

Where the trustees of waterworks in a city, authorized and directed the digging of trenches in the streets for the purpose of laying water mains, in pursuance of a previous ordinance of council, and it is made the duty of the superintendent to cause such trenches to be dug and mains laid, the city is responsible for his negligent acts in doing the work causing injury, while such authority and direction remain unrevoked; notwithstanding

ing the trustees, individually, while said work was being done, notified the superintendent that they would have nothing further to do with the work.

Error to the District Court of Lawrence County.

W. A. Hutchins for plaintiff in error.

O. F. Moore and W. H. Enochs for defendant in error.

LONGWORTH, J.

The city of Ironton, by its council, resolved to extend its system of water works by laying additional pipes in several streets, among which was Chestnut street; and appropriated \$16,336.00, from the sale of bonds, to pay for the same.

The Trustees of water works ordered the extension to be made, and advertised for proposals to furnish the pipe necessary for the extension, and accepted the bid of Dennis Long & Co. of Louisville. Before, however, any written contract was executed, a dispute arose between the trustees and the finance committee of the council respecting the disbursement of the fund so appropriated; the former insisting that it should be under their sole control, while the latter claimed the right to audit all bills for work done and materials furnished.

The trustees were unwilling to go on with the work, under these conditions, and immediately notified Long & Co. that they would not receive or pay for any pipe furnished by them; and refused to have anything to do with the proposed extension.

They notified King, their superintendent, to this effect, although it does not appear that any formal, official action was taken by them; at least no record of such action is found in the bill of exceptions.

Certain members of council, being desirous that the work should be done, urged the contractors to send on the pipe and assured them that payment would be made therefor. The pipe was sent and subsequently paid for in some manner not apparent from the evidence. They also persuaded King to go on with the work and the pipe was laid accordingly. The trustees did not discharge King, or even order him to stop the work, although they individually notified him that he was doing a thing which he had no right to do, and cautioned him that he was acting upon his own responsibility. We do not think that it appears from the evidence that the trustees, at any time, really objected to the work being done; but that they simply refused to have anything to do with it themselves or to be in any way responsible therefor.

The evidence tends to show that on the night of November 16th, 1875, the ditch on Chestnut street at its intersection with Third street, which had been dug that day, was carelessly left open at the crossing, without any protection or guard and without light or precaution used to warn passers by of the danger; and that plaintiff, Mrs. Kelly, on the night in question, while walking up Third street, without any fault on her part, fell into the ditch and sustained serious injury.

To recover damages for this injury, suit was brought in the court of common pleas and verdict and judgment rendered in plaintiff's favor; which judgment was subsequently affirmed in the district court.

It is argued on behalf of plaintiff in this court that, upon this state of facts no recovery could be had against the city for the reason that the negligent act which caused the injury was not in any sense the act of the city or of its agents. It is insisted that King, acting without orders from the trustees, upon his own responsibility under the direction of certain members of the council, in their individual capacity, was simply a wrong-doer, and that neither he nor those under whom he acted could render the city responsible for their tortious doings.

We do not think this position tenable. Conceding, for the sake of argument, all that is claimed by plaintiff in error upon this point, it is manifest that the wrongful act which caused the injury was not the *digging* the ditch, but *leaving it unprotected*. It is clearly the duty of a municipal corporation, having the control of its streets to keep them in a condition safe for the passage of vehicles and foot passengers using ordinary care, at all times during the night as well as the day. This responsibility cannot be avoided by showing that the danger was caused, not by the acts of the city's authorized agents, but by mere trespassers or wrong-doers.

We concede where the ground of action is the neglect of the corporation to put the streets in repair, or to remove obstructions therefrom, or to remedy causes of danger occasioned by the wrongful acts of others, notice of the condition of street, or what is equivalent to notice, is necessary to give to the person injured a right of action against the corporation. (See 2 Dillon § 789). But in the case before us the work was done by a city officer whose duty, as such, it was to superintend the digging of all ditches for water-pipe, and who did not cease to be such public officer from the mere fact, (if fact it be), that in this instance he was acting without authority. The ditch having been dug, it then immediately became his duty to see that proper precautions against danger should be taken. More than this, the work was done with the full knowledge, if not with the consent of the trustees, who saw the work progressing; and under the direct order and supervision of members of council. What other or more complete notice could be given to the city it is difficult to determine.

However this may be, we are by no means prepared to say that the work was performed without authority.

The council had provided by ordinance, and the trustees by resolution, that this very work should be done, and this action had not been reconsidered or rescinded. The trustees simply *refused to carry it out*. They sought to shield themselves from responsibility by doing nothing. They did not, at any time, seek to prevent the work, although they had full knowledge of its

progress under the charge and superintendence of their own servant and officer.

We do not think it fair to say, under these circumstances, that the act of King was wholly unauthorized.

Numerous exceptions were taken at the trial to the action of the court in refusing special charges and to the charges given which we do not consider it necessary to review in detail. They are all covered by what we have already said; and whatever error may exist in any of them was to the prejudice of the plaintiff below and not of the defendant.

Judgment affirmed.

[This case will appear in 38 O. S.]

CHARGE TO JURY.

SUPREME COURT OF OHIO.

LLOYD v. MOORE.

April 25, 1882.

Where the judge, at defendant's request, gave to the jury a certain special charge, in addition to his general charge, which said special charge was erroneous, and afterwards having been requested by the jury to repeat his charge to them, repeated the general charge, but declined to repeat the special charge, there was no error in refusing to repeat the erroneous instruction.

Error to the District Court of Scioto County.

Defendants in error brought suit in the Court of Common Pleas of Scioto County against plaintiff in error upon four promissory notes executed by him payable to the order of Hess & Burke, and by them endorsed and delivered to defendants in error. Lloyd claimed that there had been, as between himself and the indorsees, a total failure of consideration, and that although the notes had been transferred before due they were not taken in the usual course of trade nor was any value given for them by plaintiffs.

The bill of exceptions does not contain all the evidence offered in the court below, and we are not advised what the facts of the transaction may have been. There was, however, evidence tending to show that Hess & Burke were largely indebted to Moore & Welch for purchase money for the sale of tracts of land which had been conveyed to them and which indebtedness they had secured by a deposit of certain collateral securities.

There was also evidence tending to prove that on the 18th of November, 1873, Hess had in his possession notes on parties in Sandusky, Ohio, amounting on their face to \$23,735.50, which he proposed to get discounted and apply to the payment of what he owed plaintiffs on the land purchased from them, if they (the plaintiffs) would stand the discount. But plaintiffs declined, and proposed to take the notes as money, to be credited on what Hess owed, if he would submit to the discount on the notes, leaving the net amount to be credited for the notes \$22,063.80. That this was agreed to by Hess, and the Sandusky notes were accordingly endorsed and trans-

ferred to plaintiffs, and the \$29,000 in collaterals, except about two or three thousand dollars in the notes, were returned to Hess.

Also evidence tending to prove that in December, 1873, at the request of plaintiffs, Hess conveyed to them 640 acres of land in Kansas; also 160 in Indiana, and his residence in Columbus, the latter subject to a mortgage for \$6,000. These deeds were all absolute on their face, but were intended as mortgages to secure plaintiffs for what Hess owed them for the land sold.

There was evidence also in the form of letters from plaintiffs and the depositions of Hess, offered in behalf of defendant, tending to prove that the plaintiffs refused to give Hess credit for the amount of the Sandusky notes, and has never in fact done so, and that subsequently, in March, 1874, it was agreed between plaintiffs and Hess that plaintiffs could hold said Sandusky notes, or those that they still had, as collateral only.

Also evidence in behalf of plaintiffs tending to prove that in February, 1874, Hess desired to get back a part of the Sandusky notes, but plaintiffs refused to return any part of them unless Hess would give other notes in lieu thereof. Thereupon, Hess, on the 26th of February, 1874, transferred to plaintiffs the Lloyd notes now sued on, and some notes against one Thos. T. Yeager, the whole amounting to about \$2,400; and the plaintiffs returned to Hess about \$5,000 of the Sandusky notes for the same, Hess agreeing to transfer other notes to make up the amount of the Sandusky notes.

The court charged the jury correctly upon the law of the case and in addition to the general charge gave to them a special charge asked by plaintiff in error. Some time after the jury had retired they came into court and requested the judge to repeat his charge to them. The court thereupon read over to the jury the instructions hereinbefore stated, as they were given originally, but omitting the said special charge given at the request of the defendant. And, at the request of one of the jury, read a second time the said instruction in respect to the sufficiency of proof as to the knowledge of plaintiffs to defeat a recovery. The defendant, Lloyd, being present after the court had concluded reading said instructions, inquired of the court if it was not proper to read also the said instruction given at the request of his attorney, and requested that the same should be read; to which the court replied that it was not necessary to read it again, and the same was not read.

The special charge was as follows:

"If the jury shall find from the evidence that Hess voluntarily delivered to plaintiffs certain notes, to be credited on a debt not yet due, but the same were not so credited, and plaintiffs refused to so credit them, and subsequently said notes so delivered were exchanged for the notes in controversy, the plaintiffs cannot be said to be the holders of the notes in suit for value."

The jury found for the plaintiffs and judgment was entered upon the verdict. This judgment was subsequently affirmed in the district court.

It is now claimed that there was such an abuse of discretion on the part of the judge as would warrant a re-trial of the case.

LONGWORTH, J.

Without doubt it was the duty of the judge at the trial, when he had undertaken to repeat his charge to the jury, to omit no material part of it, and it was defendant's right to insist that the special charge, which he claimed to be in his favor, should, if correct, be read to the jury together with the general charge; but whether or not this refusal was prejudicial to defendant in such manner as to warrant a new trial, we are relieved from the necessity of considering, being, as we are, unanimously of opinion that the special charge was not law.

There was evidence before the jury tending to show that when the notes sued on were transferred to plaintiffs to be credited upon their claim, they parted with valuable securities in consideration of the transfer. If this were true, defendant was not at liberty to rescind the contract, since he was not able to place his indorsees in *statu quo*. Under such a state of facts his right, and only right was to insist that the amount of the notes should be credited upon his indebtedness. If the endorsement was made simply as security for an antecedent debt the rule in *Roxborough v. Merrick*, 6 O. S., 448 would apply, but the evidence not being before us, we are in the dark as to the true state of the facts. By this special charge the jury were instructed that the plaintiffs were not the holders for value if they had broken their contract by refusing to credit the amount of the notes upon their claim.

The error made by the court was in giving this instruction in the first instance, and this was prejudicial to the plaintiff alone. There was no error in refusing to repeat it.

Judgment affirmed.

[This case will appear in 38 O. S.]

PRACTICE—DEATH OF PARTY DURING PENDENCY OF PROCEEDINGS IN ERROR.

SUPREME COURT OF OHIO.

JOHN D. WILLIAMS

v.

CHARLOTTE ENGLEBRECHT ET AL.

April 18, 1882.

A judgment of reversal is effective notwithstanding the death of the plaintiff in error during the pendency of proceedings in error. Such judgment takes effect, by relation, as of the date of the commencement of the proceeding in error; and it is competent for the court, to which the cause is remanded for a new trial, to order a revival of the action in the name of the proper representative of the deceased party.

Error to the District Court of Scioto County.
Motion to re-instate, &c.

At the last term of this court, a final judgment was rendered in this case, reversing the judgment of the district court and remanding the cause for a new trial.

It is now made to appear that John D. Williams, plaintiff in error, died during the pendency of the proceedings in error. The object of the present motion is to re-instate the case on the docket, set aside the judgment of reversal, revive the action in the names of the representatives of the deceased plaintiff in error, in order that the judgment of reversal may be entered in the name of such representatives.

J. W. Bannon and W. A. Hutchins for the motion.

F. C. Searl and O. F. Moore contra.

BY THE COURT.

Notwithstanding the death of the plaintiff in error after the assignment of errors and before final judgment, the judgment of reversal is valid and effective.

By relation, the judgment of reversal takes effect as of the date of the commencement of the proceedings in error.

True, the original action must be revived before a new trial can be had in the court below; but such revivor may be had in the court to which the cause has been remanded for a new trial. See *Black v. Hill*, 29 Ohio St. 86, and *Foresman v. Hang*, 37 Ohio St. 143.

Motion overruled.

[This case will appear in 38 O. S.]

ADVANCEMENT—GIFTS.

COURT OF APPEALS OF MARYLAND.

HARLEY v. HARLEY.

1. An advancement is the giving by anticipation of the whole or a part of what it is supposed the child or person advanced would be entitled to receive on the death of the party making the advancement. It is a pure and irrevocable gift.

2. Loose declarations of a parent that he intended an existing debt should be an advancement, not evidenced by writing, nor made to the child, nor assented to by him, nor accompanied by any act, are not sufficient to destroy the debt and to change it by way of gift into an advancement.

Upon a distribution of assets among the heirs at law of D. J. Harley, deceased, questions arose as to whether one of the sons (George) had been advanced by the intestate, and whether such advancement should not be brought into hotchpot with the fund. The son, said George, appealed.

ALVEY, J., in delivering the opinion of the court, said: An advancement in legal contemplation is simply the giving by anticipation the whole or a part of what it is supposed the child or party advanced would be entitled to receive on the death of the party making the advancement. It does not involve the elements of legal obligation or future liability on the part of the party advanced, but it is a pure and irrevocable gift, and must result from a complete act of the intestate in his lifetime, by which he divests himself of all property in the subject, though in some cases and under some circumstances it may not take effect in possession until after the intestate's death. *Clark v. Wilson*, 27 M., 700;

Edward v. Freeman, 1 P. Wms., 440, 446; 2 Williams on Ex., §§ 1289, 1261, 1262. Here the only proof relied upon to establish the fact of advancement are certain declarations of the intestate made to certain members of his family as to his intention or purpose to treat the debts due him from the son as advancements with reference to the general division of his estate. These declarations, giving to them the strongest construction that they will reasonably bear, are by no means precise and definite as to any complete consummate act of the intestate whereby he had divested himself of all right of property in the notes, and thereby excluded himself from the exercise of any further dominion and control over the notes or the debts due from the son; and without such divestiture and surrender of dominion and control of the debts, they could not be converted into advancements to the debtor. It is not pretended that any of the declarations of the deceased offered in evidence in regard to his purpose to treat the existing debts of the son as advancements were assented to by the son or even brought to his knowledge during the life time of the father. These declarations of the father were elicited, it would seem, in conversations had with his other children, and appear to have been made more to appease their complaints and apprehensions in regard to the division of his estate than anything else. What was said by the Supreme Court of Pennsylvania in deciding the case of *Haverstock v. Sarback*, 1 W. & S., 290—a case not unlike the present, in the character of the proof that was offered—applies here with entire fitness. That loose declarations of a parent that he intended an existing debt should be an advancement, not substantiated by writing, nor made to the child, nor assented to by him, nor accompanied by any act, are not sufficient to destroy a debt secured by a legal instrument in full force and to change it by way of gift into an advancement, whether offered by the son to defeat the recovery of the debt, or by the representation of the parent against the son to defeat his claim to a distributive share. See, also, *Levering v. Rittenhouse*, 4 Whart., 140; *Yundt's Appeal*, 13 Penn. St., 575. We shall, therefore reverse the order appealed from and remand the cause for further proceedings.

Reversed and remanded.

VIRGINIA.

SUPREME COURT OF APPEALS. JANUARY T., 1882.

BACHELDER & COLLINS v. RICHARDSON & Co.

A litigant's *pro rata* distributive share in a fund in court, under a decree, fixes the jurisdiction on appeal; although the original action was for a greater sum than that limiting the appeal.

This was an appeal from a decree pronounced by the Corporation Court of the city of Norfolk, in a suit in chancery, in which B. M. Bachelder and Wm. H. Collins, merchants and partners, trading under the style of Bachelder & Collins, were plaintiffs and Francis Richardson and Henry C. Percy, trustees, were defendants. The Corporation Court decided against the plaintiffs, and they appealed to this court. The facts on which the point decided is based are sufficiently stated in the opinion of the court.

STAPLES, J.

The appellants were the holders of two negotiable notes, amounting to \$520.16, and the appellee was the holder of three negotiable notes, amounting to \$428. These notes were executed by John W. Munden, and were secured by a deed of trust upon a house and lot in Norfolk county. A sale of the property was made by the trustee; the net proceeds of which amounted to \$566.20. The fund not being sufficient for the payment of all the notes, and a controversy having arisen between the parties, with respect to its distribution, the appellants filed their bill in the Corporation Court of Norfolk, claiming priority of payment upon certain grounds set forth by them, but it necessary to be stated here. The appellee did not deny the right of the appellants to participate in the fund. But he insisted upon a *pro rata* application to the notes in question. The corporation Court so decided, and at its December term of 1878, entered a decree, allowing the appellants the sum of \$286.70, and to the appellee the sum of \$228; the two sums being the aggregate of the net proceeds of the sale. From this statement, it will be perceived that the only matter in controversy here, and in the court below, is the sum of \$228 allowed the appellee by the decree of the court. The appellants' right to the \$286.70 has not been drawn in question. The first matter, therefore, for our consideration is with respect to the jurisdiction of this court to hear the case.

In a number of cases this court, following the decision of the Supreme Court of the United States, has held that where the plaintiff, in his bill or declaration, claims money or property of greater amount or value than \$500, but by the ruling of the court obtains a decree or judgment for less, he is entitled to his appeal or writ of error; because, as to him, the matter in controversy is the sum or amount claimed, and he may, upon a reversal or a new trial, obtain a decree or judgment for the whole amount so claimed. *Gage v. Crockett*, 27 Gratt., 735; *Harman v. City of Lynchburg*, 33 Gratt., 37; *Campbell v. Smith*, 32 Gratt., 288.

Upon examining these cases, it will be found they do not lay down the rule as universal, but as subject to exceptions and modifications, which must be applied from time to time as new cases arise.

This has been the course pursued by the Supreme Court of the United States in dealing with similar questions. Thus it was early laid down by that court, that its jurisdiction attached where the appeal or writ of error is applied for by the plaintiff if the damages laid in the declaration exceed the sum of \$2,000, although the recovery might be for a less sum. *Cork v. Woodruff*, 5. Cranch 13; *Wise v. Columbia Turnpike Company*, 7 Cranch; *Gorden v. Ogden*, 3 Peters 33; *Smith v. Henry*, *Ibid.* 469; *Wallace v. United States*, 4 Wallace 164.

It was, however, afterwards held that in determining the question of jurisdiction, the debt claimed and the amount stated in the declaration must be looked to and not merely the damages claimed in the prayer for judgment at its conclusion. *Lee v. Watson*, 1 Wallace 564. See also *Schader v. Hartford*, 3 Otto 241. And in *Gray v. Blanchall*, 7 Otto 564, the court still further modifying the application of the rule, said: "If the actual amount in dispute did not otherwise appear, they would look to the whole record, for the purpose of determining the jurisdiction. Ordinarily, this would be found in the pleadings. But the court would not necessarily confine itself to them. If, taking the whole record together, it appears there is no jurisdiction, the case must be dismissed. And in *Tinstman v. National Bank*, 10 Otto, 6, Chief Justice Waite said: "We find, on looking into the record, that the case was heard on an agreed statement of facts, in the nature of a special verdict, in which it appeared that the plaintiff claimed of the defendant \$8,283.79. The defendant admitted that he owed of this amount \$5,099.59, for which the plaintiff was entitled to a judgment. The only controversy was as to the liability of the appellant for the difference between what he admitted to be due and what the plaintiff claimed. This, then, is the amount actually in dispute, and as it is less than \$2,000, we have no jurisdiction."

These authorities seem to be decisive of the present case, for, as already stated, the only matter in dispute was the sum of \$286, although the plaintiff claimed the entire fund in his bill. That this modification of the rule is correct, cannot be for a moment questioned. For otherwise, if the plaintiff claimed a debt of \$500 in his bill or declaration and received \$465, with the consent of

the defendant, the plaintiff may bring his case here to reverse a judgment, involving the sum of \$5.00. Such a case is not likely to occur, but it seems to illustrate the point involved. We are, therefore, of opinion the appeal must be dismissed as improvidently allowed.

Appeal dismissed.

The line which the judges propose to take with regard to the defence of prisoners is gradually developing itself. In the case of *Regina v. Marwen*, at Chelmsford, in which the prisoner was not defended by counsel, but made statements of his own knowledge, Lord Justice Cotton carefully told the jury that they must "not regard these statements as evidence, but only as suggestions of a possible account of the matter." In *Regina v. Jones*, at Worcester, Mr Justice Lopez stated that counsel could not be allowed to give the prisoner's version except as an hypothesis. So far, we have a logical application of the present rules of evidence. But in *Regina v. Gerish*, at Devizes, the Chief Justice allowed the prisoner to make a statement after his counsel had been heard. It is difficult to base this proceeding on any existing rule of evidence or practice, but the judges apparently allow it in to banish henceforth from the courts the favorite topic of defending counsel that his client's mouth is shut. We are as yet in the dark as to the conditions on which the defendant is allowed to speak. If it is only after his counsel, the privilege is not of much value; and there seems no reason why the defendant should not be allowed to have his say first, his counsel still being forbidden to treat his statements as evidence. The existing state of affairs is not embarrassing to defending counsel. They know that the judges have come to certain decisions, but they half know what those decisions are.—*Law Times*.

SUPREME COURT RECORD.

[New cases filed since last report, up to May 2, 1882.]

No. 1132. *Byron W. Rees v. F. C. Sessions et al.* Error to the District Court of Franklin County. Charles E. Burr and Converse, Booth & Keating for plaintiff; G. G. Collins and W. E. Guerin for defendants.

1133. *Peter Hecker et al. v. City of Cleveland et al.* Error to the District Court of Cuyahoga County. Griswold & Starr for plaintiffs; Kain, Sherwood & Bunts for defendants.

1134. *Edward P. King, Ex'r &c. v. Lilla G. Horr.* Error to the District Court of Crawford County. Finlay & Eaton for plaintiff; Cahill Bros. for defendant.

SUPREME COURT ASSIGNMENT.

FOR ORAL ARGUMENT.

May 4th—No. 89. *Texas Building Association, No. 2, of Cincinnati v. Aurora Fire and Marine Insurance Co. No. 93.* Maratta et al. v. Coffin.

May 5th—No. 1137. *Robert C. Lindsay v. The State of Ohio.*

May 11th—No. 1067. *Wm. McHugh v. The State of Ohio.*

May 24th—No. 1117. *Charles Stoddard v. The State of Ohio.* No. 1118. *Jacob Ridenour v. The State of Ohio.*

May 25th—No. 111. *Bundy v. Ophir Iron Co.* No. 112. *Simpson et al. v. Greenfield Building and Savings Association.*

May 26th—No. 114. *Coffin v. The Greenless and Ransom Co.*

Ohio Law Journal.

COLUMBUS, OHIO, : : MAY 11, 1882.

THE MANTLE OF HON. GEO. K. NASH.

This honorable garment we are informed is to descend upon the shoulders of Hon. E. J. West of Wilmington, Ohio. We are not *au fait* in matters political, but we do know that Mr. West is serving his fourth term as Prosecuting Attorney of Clinton County; that he is a lawyer of undoubted ability and integrity, and is extremely popular in the southern counties of the State. We also know that he has achieved various great successes as a prosecutor, among which was the abatement of various slaughter-house nuisances in his county, which became a stench in the nostrils of all decent citizens. For his honesty and fearlessness in this matter alone, Mr. West deserves a high office, for it proves him to be neither a coward nor corruptible.

THE SMITH SUNDAY LAW.

The success of this christian scheme has not been phenomenal in the Capital City.

The proprietors of a beer garden announced last week that they would sell beer in spite of the law or the police, on Sunday, and they did. The law closed up all other saloons and gardens and drove the thirsty multitude to the open doors and foaming mugs of the defiant Germans who profaned the Sabbath by riotous revellings, and slandered the legal profession by claiming to be acting in obedience to the "advice" of a "lawyer." He would be a pretty lawyer who would give such counsel even upon grounds of common christian decency; or who would give such counsel unless he was sure of his ability to control the executive branch of public authority; for he must know that the sale of each glass of beer or whiskey is a distinct violation of the law, and that any officer who properly discharges his duty could ruin the aforesaid beer vendors for their one Sunday's proceedings as above. How long will the Capital City allow this insult to go unpunished?

COLUMBUS, OHIO, May 7th, 1882.

EDITORS OHIO LAW JOURNAL.

Gentlemen: In reading your editorial on "Malpractice" in the LAW JOURNAL of this date, I was surprised at the *text* which you selected as the basis for your note of warning to the doctors.

You cited the case of Haslet v. Byles which you say was recently decided by the Supreme Court of Pennsylvania. It may be that the same case and the same question was before the Supreme Court of that State before March 2d, 1882, or has been since that time, although the latter is hardly probable. On that date (see The Central Law Monthly for April, 1882, Vol. III, No. 4, p. 112), the case of Byles v. Hazlett, an action for damages for medical malpractice in a case where Huzlett had suffered a severe fracture of the leg, was decided in the Supreme Court of that State. In the charge to the jury the court below said: "The plaintiff, by his manner on the stand and his misfortune, has no doubt made inroads upon your sympathies—he certainly has upon mine. He is an intelligent man, and he appeared to be a candid witness upon the stand, so far as the court could observe." Certainly this charge instead of being condemned, would be highly approved by the writer of the editorial on "Malpractice." It is just what he hopes for and commends the Supreme Court for enunciating as the law governing such cases. But the Supreme Court say, and in my judgment rightfully, in speaking of this charge, "that this expression of sympathy by the court was *error*," and for this error, and for failure to refer in the charge, to important evidence in the case, the judgment for \$1,100 in favor of Hazlett was reversed and a new trial was awarded. It does not seem probable to me that there could have been two cases between parties having the same names, and involving the same questions *recently* decided by the same court so directly against each other. So if the case is correctly reported in the Central Law Monthly, you will have to transfer your commendations from the Supreme Court to the lower court, and your criticisms from the lower court to the Supreme Court, and consign the State of Pennsylvania to the ranks of those States which still adhere to the old fashioned doctrine of requiring juries to bring in their verdicts in accordance with the law and the evidence, and not in accordance with their sympathies or those of the court.

Yours Respectfully,

GILBERT H. STEWART.

There is evidently a difference between the report we have of the case referred to and the report as cited by Mr. Stewart. We apprehend the difference to be that his report is but a partial one, and that the court below went further than the quoted words and cautioned the jury against heeding the sympathy aroused by the pitiful condition of the plaintiff, notwithstanding the fact that that condition was directly brought about by the ignorance of the so-called surgeon. Be that as it may, however, the fact remains that the time is drifting by, wherein Dr. Bungle can relieve Dr. Blunder of the evil results of his mistakes by simply swearing that

Dr. Blunder is a good doctor and his treatment must therefore have been the correct thing. The visible results of the blunder, manifest in the crippled condition of a plaintiff, ought indeed to have weight as against such barren and selfish theories. This much we think our correspondent will concede, outside the rulings in Haslet v. Byles.

ASSIGNEE—ATTACHMENT—ALLOWANCES.

SUPREME COURT OF OHIO.

JAMES G. MILES ASSIGNEE OF ISAAC T. McLAIN,
v.
B. W. SIMINGTON ET AL.

A. assigned all his property to M. for the benefit of his creditors, having previously executed a mortgage on certain real estate to B, which real estate and certain personal property, the sheriff, at the suit of S., had seized in attachment and was in possession of at the date of assignment. By agreement between the parties, M. converted the attached property into money and held the proceeds to await the result of the attachment suit. The real estate was sold for less than the mortgage debt, and the attached personalty for less than the judgment subsequently recovered by S. In his account in the probate court, M. charged himself with the proceeds of the sale of the attached property and also other funds received by him as assignee; and credited himself with expenses paid in preserving and selling the attached property and in resisting the attachment suit.

Held, 1. It was proper for the assignee to account in the probate court for all moneys which came into his hands, as well the proceeds of the attached property as other funds.

2. As against the proceeds of the attached property, expenses incurred in resisting the attachment suit were not proper allowances.

3. Whether such expenses should be allowed the assignee out of other funds in his hands, depends on the fact whether they were reasonably and in good faith incurred for the benefit of the general creditors.

4. The expenses in preserving and selling the attached property should be paid out of the proceeds of such property.

5. The expenses (including commissions), of selling the mortgaged property should be paid out of the proceeds of the real estate so mortgaged.

Error to the District Court of Morrow County.

The questions, in this case, arise on exceptions to the report of the assignee filed in the probate court.

In July, 1877, Isaac T. McLain, assigned all his property to plaintiff in error, for the benefit of creditors, to be administered under the statute in such case made and provided.

Previous to the assignment the assignor placed a mortgage for five hundred dollars on certain real estate in favor of William McLain, and B. W. Simington had seized the same parcel of real estate and certain personal property, including a board yard in attachment and the sheriff by virtue of the writ of attachment was in possession of the property seized at the date of the assignment.

By a written contract between the attachment creditor, the assignee and assignor, the attached property was delivered to the assignee to be converted by him into money, and the pro-

ceeds held to await the event of the attachment suit. This suit was determined in favor of the attaching creditor. The attached property was sold by the assignee, the real estate was sold for less than the mortgage debt, and the balance of the attached property for less than the judgment recovered by the attaching creditor.

In accounting in the probate court, the assignee charged himself with the proceeds of the sale of all the attached property, and also with other funds which came into his hands as assignee separately. He credited himself with certain expenses paid in preserving and selling the attached property, also certain expenses incurred and paid in defending and resisting the attachment suit.

Exceptions were filed by the attaching creditor and other creditors, and on appeal to the court of common pleas, the exceptions to the matters of credit above stated were sustained. In the district court, the judgment of the common pleas was affirmed.

A. K. & J. C. Dunn and F. K. Dunn for plaintiff in error.

Dalrymple & Powell for defendant in error.

BY THE COURT.

1. It was proper for the assignee to account in the probate court for all moneys which came into his hands, as well the proceeds of the attached property, as other funds.

2. As against the proceeds of the attached property, expenses incurred in resisting the attachment suit were not proper allowances.

3. Whether such expenses should be allowed the assignee out of other funds in his hands, depends on the fact whether they were reasonably and in good faith incurred for the benefit of the general creditors.

4. The expenses in preserving and selling the attached property should be paid out of the proceeds of such property.

5. The expenses (including commissions), of selling the mortgaged property should be paid out of the proceeds of the real estate so mortgaged.

Judgment reversed and cause remanded to court of common pleas.

[This case will appear in 38 O. S.]

FIRE INSURANCE—PREMIUM—PAYMENT BY NOTE.

SUPREME COURT OF OHIO.

OTIS B. LITTLE,

v.

THE EUREKA FIRE AND MARINE INSURANCE COMPANY.

April 25, 1882.

A policy of insurance, having one year to run, was delivered to the insured, without payment of the premium agreed on. In a few days, the note of the insured at sixty days was accepted for the premium, which was not paid at maturity, and remained in the hands of the insurer. After this, and within a reasonable time before the loss, the insurer cancelled the policy, and notified the parties interested therein of such cancellation, and credited on the note, a sum less than the pro rata proportion of the unearned premium.

The conditions of the policy provided, that it was not to be binding until *actual payment* of the premium, and that the insurance should be terminated at the request of the insured, in which case the company was to retain only the customary short rates for the time the policy was in force, also that the company might, at its option, terminate the insurance upon giving notice to that effect, and tendering a pro rata proportion of the premium for the unexpired term. Held: 1st. That by delivering the policy without actual payment of the premium, and by taking a note of the assured for the same, the company waived the condition that the policy was not binding unless the premium was actually paid. 2d. On failure of the assured to pay the note, the company might, on giving reasonable notice thereof before the loss, exercise its option to cancel the policy. 3d. As the note was past due and in the hands of the company at the time of such cancellation, it was not necessary to tender back the pro rata proportion of the unearned premium in cash, nor to credit the same on the note. The note was thereafter subject to such credit.

Error to the Superior Court of Cincinnati.

The action was brought by Otis B. Little to recover under a policy of insurance, made in the name of Little, Carson & Bro., for a loss by fire—"loss, if any, payable to the Charter Oak Life Insurance Company, of Hartford," to whose rights the plaintiff claimed to be subrogated.

The conclusion reached by the court upon one of the many questions presented, is fatal to a recovery; therefore, such only of the facts as present this question will be stated.

May 17, 1869, the defendant, The Eureka Fire and Marine Insurance Company, in consideration of a premium of \$112.50, insured certain property for Little, Carson & Bro., for one year, loss, if any, payable to the Charter Oak Life Insurance Company.

The premium not being paid at the time, a note was taken on the 26th of May following, by defendant for the amount, payable in sixty days from date.

This note was not paid at maturity, and remained unpaid in the hands of the defendant at the commencement of the action and was treated as worthless. The makers were, shortly after it fell due, adjudged bankrupts, and were, at the time of its maturity insolvent. No offer to pay this note was ever made.

Among the conditions of the policy are these:

"5. No insurance, whether original or continued, shall be considered binding until the *actual payment* of the premium."

(The words 'actual payment' are italicized in the policy.)

"6. The insurance may be terminated at any time at the request of the insured, in which case the company shall retain only the customary short rates, for the time this policy has been in force, and the same may at any time be terminated at the option of the company on giving notice to that effect, and tendering a pro rata proportion of the premium for the unexpired term thereof."

The note became due July 28th, 1869, and on the 9th of September following, the defendant, in a letter to Little, Carson & Bro., called their attention to the 5th condition above, and notified them that it was in force, and on the same day cancelled the policy and credited \$75.00 on

the note, as the *pro rata* share of the unearned premium for the remainder of the year. This credit is some two or three dollars less than the *pro rata* proportion of the unearned premium, if the fractions of the months of May and September be not counted as a month.

Verbal notice of this cancellation was also given to all the parties interested in this policy, and in the property insured, in a short time thereafter, and some two months before the loss.

Upon this state of facts, the court charged the jury:

"That, if, after the said insurance was effected, the said William and Robert Carson, instead of paying the premium due therefor, gave their promissory note, payable in sixty days, which was received by the said defendants for and on account of said premium, and was held by them until after it became due, and is now held by them, and was never in any way used by them, and is now brought here into court, and if, after the said note became due, the said William and Robert Carson, and the other parties interested in the said insurance, had notice that the said note had not been paid and neglected to pay the same, and thereupon, and within a reasonable time before the fire, the defendants elected to cancel the same, and gave the said parties reasonable notice before the fire that the policy was cancelled, then the plaintiff cannot recover."

Also, "that in case of non-payment of said note, or for any other reason, defendants elected to end the risk, and did so, nothing more was required of them, than to notify the insured within a reasonable time before the fire."

To reverse a judgment for defendants on the foregoing facts and instructions, is the object of the present petition in error.

It is assumed for the purposes of this case, that the plaintiff is entitled to be subrogated to the Charter Oak Insurance Co., and to recover on this policy, if the same was not legally terminated upon the loss.

JOHNSON, J.

This policy was delivered and took effect May 17th, and by its terms was good for one year unless sooner terminated in accordance with its terms and conditions. On its face, the premium was payable in cash, and one of the conditions was, that "no insurance * * * shall be considered binding until the *actual payment* of the premium." By the delivery of the policy without such payment, and by taking a note of the insurer, nine days thereafter, payable in sixty days, this condition was waived and the policy was in force, notwithstanding this condition, until lawfully cancelled, under this or some other condition contained therein, or under the option reserved in the sixth condition.

The note not being paid, and its makers being insolvent, the company, after waiting some forty-five days, cancelled the policy, and notified the insured and the Charter Oak Co. and others interested of the fact. This was in September. In December the loss occurred. This policy was good for one year, unless terminated lawfully.

The 6th condition, provided that the insured might terminate the insurance at any time on request, in which case the company should retain only the customary short rates for the time the policy had been in force. This is an unqualified right reserved to the insured to terminate the policy at any time during the year for any cause. If the premium had been paid in cash, the insurer would have been compelled to refund the unearned premium, after charging for the time the policy was in force at the customary short rates. As a note had been given, and was still in the hands of the payee, the insured could have terminated the policy by paying or tendering the amount due, at short rates, and demanding a return of the note, but as no payment had been made, no money had to be returned by the insurer under this clause. This right to terminate the policy was mutual. The company reserved the option to at any time put an end to the policy; "on giving notice to that effect, and tendering a pro rata proportion of the premium for the unexpired term thereof." In case the premium had been actually paid for the year, the pro rata share thereof from September 9th to the end of the year, must have been tendered back before this option could be exercised. In the present case, no money had actually been paid. The company still held a past due note for the premium, on which there was due the amount earned to the date of cancellation. It was claimed, and the evidence tended strongly to support that claim, that this note was not collectible. The company credited \$75 on the note, being the amount of the unearned premium, if the pro rating is computed by months, and if the fraction of May, 14 days, and of September, 9 days, are counted as a month, but if the pro rating is by days, that amount is too small by two or three dollars.

On this state of facts, the court in effect charged that it was not necessary to tender back the cash for the unearned premium, nor was the right to cancel defeated by a failure to credit the exact amount, or indeed any amount.

In this we concur. The effect of taking the note, was to give the policy life, notwithstanding the 5th condition, but it did not divest the company of its right reserved in the 6th condition to terminate the insurance at any time, on giving notice, and in case the premium had been paid, tendering back the unearned proportion thereof.

As nothing had been paid, nothing was to be tendered back. The only duty imposed on the company, when the premium had not been paid was, to give notice in reasonable time before the fire. This the jury found was done.

The contract of insurance is a contract of indemnity upon the terms and conditions specified in the policy. The insurer undertakes for comparatively small premium, which good faith requires should be paid, to guarantee against loss or damage, upon the terms and conditions agreed upon, and upon none other. He may, therefore justly insist upon the fulfillment of those terms.

We cannot make a new contract for the parties. Good faith is the life breath of the contract. The payment of the premiums is an essential element of the contract, to enable the company to meet its obligations. Whatever may have been the right of the company before the maturity of this note, to terminate the insurance for other causes, we think it clear, that after the note became due and was not paid, this option might be exercised upon giving reasonable notice thereof before the loss occurred.

Again it is said, the amount credited on the note was too small. Concede this, the note was part due, and had not been negotiated. In any action brought thereafter for the earned premium, the correct credit could have been computed and allowed. This note was subject to such credit, in whosever hands it should be found.

Judgment affirmed.

[This case will appear in 38 O. S.]

CONVEYANCE IN FRAUD—MORTGAGE—ATTACHMENT—EQUITIES.

SUPREME COURT OF OHIO.

SHORTEN v. DRAKE ET AL.

April 18, 1882.

1. Where a debtor purchases real estate and causes it to be conveyed to his wife in fraud of his creditors, a bona fide mortgagee from the husband and wife, will not be affected by the fraud.

2. The possession of the husband and wife at the time of taking the mortgage will not charge the mortgagee with notice of the fraud; nor will he be affected by notice of levies made upon the property as that of the husband subsequent to the conveyance to the wife.

3. The levy of an order of attachment, in the absence of process of garnishment, has no greater operation than the levy of an execution.

4. Where, in a court of equity the fund in controversy is held for distribution, and the equities of the respective claimants are equal in point of merit, the distribution will be ordered according to the maxim, *qui prior est tempore potior est jure*.

Error to the District Court of Hamilton County.

This case was before this court at a former term and is reported in 34 Ohio State 645, under the name of Shorten v. Woodrow. In that case the judgment below was reversed and the cause remanded for the ascertainment of the priorities of liens upon the premises in controversy in the case and for distribution of the proceeds of the sale of such premises. Upon the trial of the case for that purpose, in the superior court, upon the answer and cross petition, and supplemental answer and cross petition of Samuel Shorten and his amended answer and cross petition, the answer of Alexander McMillan, and Eleanor, his wife, and the amendment to their amended answer and cross petition, and the answer of said Shorten thereto, the answer and cross petition of William S. Grant, administrator of Samuel Grant, deceased, and the proof and exhibits submitted by the parties, in addition to the findings of fact reported in 34 Ohio State 645, that court found: That said Sargent and wife

continued to occupy said premises until the sale in this suit; that the judgment in favor of Samuel Grant was based on an indebtedness of said Sargent occurring prior to the said conveyance to Drake, and that at the time of the making of the mortgage hereinafter mentioned by said Sargent and wife to Shorten, the said Shorten had actual notice of the levying of said execution on said premises as the property of said Sargent; that the order of attachment in the suit of McMillan and wife against said Sargent, was grounded on the statement verified by affidavit, that Samuel A. Sargent had property and rights which he concealed for the purpose of defrauding his creditors, and that the indebtedness in said action sued upon arose and was a subsisting cause of action in 1864. At the time of the making of the mortgage by Sargent and wife to Shorten, hereinafter mentioned, the said Shorten had actual notice of the levying of said attachment on said premises, as the property of said Sargent. And as to the Sargent mortgage that court found as follows:

That on the 4th day of January, 1872, the said Sargent and wife executed, in due form of law, a mortgage deed to Samuel Shorten of the premises in controversy to secure the payment of a debt therein mentioned, which said mortgage was recorded on the day last mentioned; that at the time of the giving of said mortgage the said Shorten was the owner of certain promissory notes given to him by the said Sargent for money loaned to him by the said Shorten; that on giving of said mortgage the said Shorten surrendered said notes to said Sargent and received in lieu thereof, from said Sargent, the notes described in said mortgage; that at the time of the making of said mortgage the notes, first held by said Shorten, were due and the amount due thereon was the full amount mentioned in said mortgage, and that by the giving of said mortgage to said Shorten the time for the payment of the amount due, from the said Sargent to the said Shorten, was extended by the said Shorten, and that at the time of receiving the mortgage said Shorten did not in fact have notice, that said conveyance from Clarke to Drake was made or received in the manner and with the purpose and intent therein set forth, but that the said Shorten at the time of the taking of said mortgage deed believed Mrs. Sargent to be the bona fide owner of said premises described in said mortgage deed.

As conclusion of law from the facts, the superior court found, that McMillan and wife by reason of said attachment acquired a lien on the premises in controversy prior to the claims of all other defendants except Steele, who was a prior lien holder, and ordered that the unpaid balance of the proceeds of the sale of the premises be distributed as follows: 1st. To the payment of the unpaid costs; 2nd. To Steele the sum of \$1,500, with interest from October 27, 1873; 3d. The remainder to McMillan and wife.

On error to the district court, that court af-

firmed the judgment of the superior court, as to Shorten, and reversed it as to William Grant, and ordered that out of the proceeds of the property there be paid, 1st. All unpaid costs except those adjudged against Samuel Shorten. 2nd. To the payment of the judgment in favor of George W. Steele. 3rd. To William Grant the amount of his judgment. 4th. The balance to Alexander McMillan and wife.

This proceeding is on the petition in error of Samuel Shorten and the cross-petition of Alexander McMillan and wife, prosecuted to obtain the reversal of the judgment of the district court.

WHITE, J.

This case was before this court at a former term, and is reported in 34 Ohio S. 645. It was then held that the conveyance from Clark to Drake, and the subsequent one from Drake to Mrs. Sargent are not within the operation of Sec. 17 of the act regulating the mode of administering assignments in trust for the benefit of creditors, as amended February 12, 1863. S. & S. 397; 1 Sayler 354. The judgment of the court below was reversed and the cause remanded for distribution of the proceeds of the sale of the property.

The question now before the court is as to the respective rights on distribution of Grant, a judgment creditor, whose judgment was recovered March 8, 1870, and execution levied April 12th, following; McMillan and wife, attachment creditors, whose attachment was levied May 27, 1870; and Shorten, a mortgagee, whose mortgage was executed by Sargent and wife January 4, 1872, and recorded the same day.

1. As to the priority of the mortgage. At the time of taking the mortgage the legal title was held by Mr. Sargent, and the findings show that the mortgagee had no notice of any fraud or infirmity in it. The mortgage is supported by a valuable consideration passing at the time of its execution, and the mortgagee took it, as is said in the finding, believing "Mr. Sargent to be the bona fide owner of said premises described in said mortgage."

The mortgagee therefore stands on the footing of a bona fide purchaser for value of the legal title, and is entitled to be protected as such.

This position of the mortgagee is sought to be impugned on two grounds; (1) that Sargent, the judgment debtor, was in possession at the date of the mortgage, and that the mortgagee was chargeable with notice of such possession; (2) that he had notice of the levies of the execution and of the attachment.

As to the first ground. The possession of Sargent was not adverse to the title in his wife, but consistent with it, and in the absence of fraud, his possession was referable to his marital rights in her property. The notice of possession with which the mortgagee was chargeable was the possession as it existed at the time of taking his mortgage, and not as it may have ex-

isted anterior to the conveyance to Mrs. Sargent.

As to the second ground. The execution and the attachment were not against Mrs. Sargent, in whom was vested the legal title, but against her husband, a stranger to the title, except as respects his possession in his marital right, which, under the statute concerning the rights of married women, was not subject to be taken in payment of his debts. The levies were subsequent to the conveyance to the wife and could not affect a bona fide purchaser or mortgagee under such conveyance.

2. After satisfying the mortgage, the remaining question is as to the priority between the execution and the attachment.

In the first place it may be remarked that no question arises as to what rights may be acquired by the creditor under the process of garnishment in the proceeding in attachment. No such process was had in the present case. The levy of the attachment like that of the execution was made as upon the lands and tenements of the debtor; and where the attachment is thus executed, its operation is no greater, in our opinion, than the levy of an execution. It has the like effect before judgment that an execution has after judgment.

The present suit is in equity.

The fund in controversy was raised by a sale made in a court of equity, and is now held for distribution upon the principles by which such courts are governed. The only parties that can be supposed to have any interest in the distribution are the execution and the attachment creditors, the debtor and his wife. The title of the wife is held in fraud of the rights of the creditors; hence cannot be set up to defeat those rights. In equity, as against these creditors, she stands on the same footing as though her title had not been acquired. The debtor himself can of course assert no claim to the fund, neither as against his wife nor the creditors. The question then simply is as to the respective rights of the execution creditor and the creditors in the attachment. Their equities are equal in point of merit; and where the equities are equal, the law or analogy of law will prevail. The maxim in such case is, *qui prior est tempore, potior est jure*.

In Adams' Equity (p 162), it is said: "If there be no legal right, or, in respect of equitable subject matter, no perfect equitable right in any of the claimants, as, for example, if the estate be still outstanding in the original owner, or in some third person not constituted a trustee for any claimant individually, the claims will be satisfied in the order of date."

In Brewster v. Power (10 Paige, 562), the application of the principle is thus declared: "Where there is a resulting trust in favor of the creditors of the person who pays the consideration for real estate and takes a conveyance in the name of another, in fraud of their rights, it seems that a judgment recovered by one of such creditors is in equity a lien upon such real estate, except as against bona fide purchasers with-

out notice; although such estate cannot be sold under an execution upon the judgment." The same principle is applied in Lynch, et. al. v. The Utica Insurance Company, 18 Wend. 236, 253.

In the present case, the equities of the creditors were perfect against Mrs. Sargent to have the property subjected to the payment of their judgments; and they were entitled to share in the proceeds according to the dates at which their respective equities accrued.

Judgment reversed and distribution ordered in accordance with the foregoing opinion.

[This case will appear in 38 O. S.]

CRIMINAL LAW—OBSTRUCTING PUBLIC ROAD.

COURT OF APPEALS OF KENTUCKY.

CINCINNATI SOUTHERN R. R. Co.

v.

COMMONWEALTH.

February 28, 1882.

The offence of obstructing a public road is committed when, by actual obstruction or impediment, the road is rendered by any person inconvenient or dangerous to pass. It is not necessary that any actual injury be suffered by any person.

Indictment for public nuisance. The particular circumstances of the offence charged in the indictment are, that the defendant did, on October 16, 1880, unlawfully obstruct a public road in Mercer County, at a point where it crosses the Cincinnati Southern Railway, by leaving a hand-car upon said road, and hanging upon said car buckets and clothing, by reason of which, and the location of said car upon the road, the horses of people using and passing upon the road were frightened, and the lives of persons endangered, and the road obstructed. The defendant appealed.

LEWIS, C. J., in delivering the opinion of the court, said: "Public or common nuisances," as defined by Blackstone, "are a species of offences against public order and economical regimen of the state; being either the doing of a thing, to the annoyance of all the king's subjects, or the neglecting to do a thing, which the common good required. * * * Of this nature, an annoyance in highways, bridges, or public rivers, by rendering the same inconvenient or dangerous to pass, either positively, by actual obstruction, or negatively, by want of reparation." A public road is a way established and adopted by proper authority for the use of the public, and over which every person has a right to pass, and to use, for all purposes of travel or transportation, to which it is adapted and devoted. "And though any temporary use of a highway or street, that is rendered absolutely necessary from the necessities of trade or erection of buildings, that do not unnecessarily or unreasonably obstruct the same, is lawful, and temporary obstructions, arising from accidental causes, do not render a person liable for a nuisance, provided no unreasonable or unnecessary delay is permitted; still

no cause whatever will justify any unreasonable use of a public road or street." Wood on Law of Nuisance, § 258. To secure the full use and enjoyment of a public road, it is necessary that it be always open and unobstructed. The offence of obstructing it is not, therefore, determined necessarily by the length of time the thing that worketh hurt, inconvenience, or damage to the public continues, or by the number of times it may be repeated; nor is it necessary, in order to constitute the offence, that actual injury be suffered by any person. It is no more necessary that a public road shall be repeatedly, continuously, or habitually obstructed by a person, to render him guilty of the offence of a public nuisance, than that any other violation of law shall be, in order to make the offence complete. But, subject to the exemptions arising from absolute necessity and accidental causes before mentioned, the offence is committed where, by actual obstruction or impediment, a public road is rendered by any person inconvenient or dangerous to pass.

To secure the reasonable and proper use and enjoyment of the public road by the public, and of the railroad by its owners, each must be required to observe the maxim of law, that every person is restricted against using his property to the prejudice of others. And, as it is plain that the railroad and the public road cannot, at the crossing place, both be occupied and used at the same time, even partially, the law, for manifest reasons, makes it the duty of persons traveling upon the public road to stop until an approaching train or car passes that point. But the public, on the other hand, is entitled to the unobstructed use of the public road at the crossing place, when it is not actually occupied, or about to be occupied by moving trains or cars. To concede to the owners of railways the right to stop their trains or cars at the place the public road crosses the railroad, would not merely render the latter inconvenient and dangerous, but, in many cases, useless. Not even business necessities will authorize the owners of railroads thus to obstruct the public roads. In this case the hand-car appears to have been stopped and left stationary at the crossing place, and was an actual impediment and obstruction of the public road, and as such obstruction was intentionally created, and did not arise from accidental causes, the offence of the public nuisance was complete.

Judgment affirmed.

FIRE INSURANCE.

SUPREME COURT OF IOWA.

HOWER v. STATE INS. CO.

April 18, 1882.

Where a policy of insurance against fire was taken out on a stock of goods by the owner under a policy which provided that "if, without written consent hereon, there is any prior or subsequent insurance, * * * this policy shall be void," and the agent of the company gives his oral consent that additional insurance may be

taken, and the goods are subsequently sold to plaintiff, to whom is also assigned the policy of insurance, with the consent of the insurance company, such assignment does not carry with it the oral consent of the insurance agent that the original owner might increase the risk, although made to plaintiff personally, he being at the time the agent of the insurer.

Appeal from Webster Circuit Court.

Action upon a policy of insurance upon a stock of goods. The policy was issued to one Nicholas Hower, who was at the time of its issuance the owner of the goods. Afterwards Nicholas sold the goods to the plaintiff, and with the consent of the company assigned to him the policy in suit. In the policy is a condition against other insurance. The condition is in these words: "If, without written consent hereon, there is any prior or subsequent insurance, * * * this policy shall be void." After the assignment of the policy by Nicholas to the plaintiff, the latter obtained in another company additional insurance in the sum of \$300, and within a month thereafter the goods were burned. No consent of the defendant company to the subsequent insurance was indorsed upon the policy. The defendant for answer avers that the obtaining of the subsequent insurance was a violation of the policy. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

ADAMS, J.

The plaintiff contends that notwithstanding the fact that he obtained additional insurance, and without the written consent of the company indorsed upon the policy, it was not violated. He claims that the company's agent gave him permission orally to have additional insurance, and that that is sufficient. The policy was issued at Fort Dodge. The company's agent at that place was one Beecher. The permission relied upon, if given, was given by Beecher. The company insists that Beecher was merely authorized to receive and forward applications, and had no power to give such permission. Some evidence was introduced upon this point. We shall not consider it, because in the view which we take it is unnecessary. For the purposes of the opinion it may be conceded that Beecher had the power to give the permission. A question is raised as to the admissibility of the evidence introduced to prove that Beecher gave the permission. The decision must turn upon that question. Before proceeding to consider it we will state a few additional facts concerning which there is no controversy. The policy was issued in February, 1880. It was obtained by the plaintiff as the agent of the insured, the owner of the goods, Nicholas Hower. The plaintiff was at that time in charge of the goods as the agent of Nicholas. In August of the same year the plaintiff purchased the goods of Nicholas and took an assignment of the policy. The additional insurance was obtained in December of the same year. The oral permission relied upon, if given, was given before the sale of the goods and assignment of the policy to

the plaintiff, and while he was acting merely as the agent of the insured.

The evidence introduced, the admissibility of which is drawn in question, consisted of the testimony of the plaintiff in regard to what Beecher said as constituting the alleged permission. The plaintiff testified, against the defendant's objection, that at the time the policy was issued Beecher said to him, speaking of the insurance, "You can increase it at any time." He also testified, against the defendant's objection, that subsequently, in June, he informed Beecher that he wanted \$300 additional insurance, and Beecher said, "Go and take it." The defendant insists that this evidence is immaterial, and ought not to have been admitted, and we have to say that we think that the defendant's position is well taken. If there was any permission given to the plaintiff to obtain additional insurance, it was given him as the agent of the insured. The plaintiff could not obtain additional insurance for himself at that time because he had no insurance to which other insurance could be added. Besides, he had no insurable interest in the goods upon which insurance could be affected.

The plaintiff doubtless supposed that if, as agent, he was permitted to obtain additional insurance for his principal before the assignment, he was, after the assignment, permitted to obtain additional insurance for himself. But we cannot so hold. The objection, where there is any, to additional insurance arises by reason of what is called the moral hazard, and the moral hazard depends mainly upon the character of the insured. The defendant, we can conceive, might be willing that Nicholas Hower should have additional insurance, and not be willing that his assignee, the plaintiff, should. The plaintiff contends, however, that the permission was actually given to him. His position is that when he took an assignment of the policy he took the permission with it; or, in other words, that the permission, though oral, ran with the policy. No authority is cited in support of such position, and none, we think, can be found, nor are we able to discover any principle which would justify such a ruling.

In our opinion the court erred in admitting the evidence, and the judgment must be reversed.

INJUNCTION—MALICIOUS ERECTION OF STRUCTURE.

SUPREME COURT OF ERRORS OF CONNECTICUT.

GALLAGHER v. DODGE.

The statute (Gen. Stat. tit. 19, c. 17 p. 9, § 4) provides that an injunction may be granted against the malicious erection by any owner or lessee of land of any structure intended to injure and annoy an adjoining proprietor. *Held*, that under the statute the malicious quality of the act must be the predominant one, and give it character, and that the question whether a structure was maliciously

erected is to be determined rather by its character, location, and use, than by an inquiry into the motive of the person erecting it.

This is a petition for an injunction under the statute (Gen. Stat. p. 477, § 4), which provides that "an injunction may be granted against the malicious erection by an owner or lessee of land of any structure upon it intended to annoy and injure any proprietor of adjacent land in respect to his use or disposition of the same." The structure which it is sought to enjoin the defendants against erecting is a show-case in front of their store and upon their own premises, but to be so placed as to obstruct a side window in the plaintiff's store, which store projects several feet beyond that occupied by the defendants, and thus has space for a side window looking out upon the platform constructed from the front of the defendants' store to the street line. This side window is upon the line between the premises of the two parties, and serves the occupant of the plaintiff's store both for light and for the display of his goods. It was found that the object of the defendants in procuring the show-case was two-fold: first, to display their own goods to the best advantage; and second, to prevent the public from seeing the goods of the occupant of the plaintiff's store through his side window. The finding below was for defendants, and plaintiff brought the record up by motion in error.

LOOMIS, J.

It was the right of the defendants, and the exercise of the right could not be regarded as unreasonable, to occupy the space between the front of their store and the street line in the way most advantageous to their business. They were under no obligation to consult the interests of an adjoining proprietor. So far as he was availing himself of the open space to secure to himself more light by a window looking out upon it, or an opportunity to display his goods by exposing them in the window, he was availing himself of an opportunity that he held, and must have known that he held, by mere sufferance, for the defendants' store could at any time have been built out in front up to the street line, and so as completely to darken his side window, with no invasion of his rights and no ground of complaint on his part. If possibly a building line established by the city would have prevented them from building out to the street line, the mere fact that the plaintiff's building was erected before the building line was established was one that gave him no rights against the defendants as to the open space in front of their premises. What they might have done so effectually by building out over this space they had an equal right to do in any other mode no more injurious to the adjoining proprietor. We cannot see why they might not reasonably do it in the mode which they adopted. But it is claimed that the whole character of the act as to its legality is changed by the fact that an element of malice went into it. And this brings us to the difficult question where the line shall be drawn

between structures that are useful and proper in themselves, but into the erection of which a subordinate malicious motive enters, and those where the malicious intent is the leading feature of the act, and the possible usefulness of the structure a mere incident.

The only case in which this statute has come up for construction is that of *Harbison v. White*, 46 Conn. 106, in which it was held that a coarse structure erected for the malicious purpose of darkening the windows of a neighbor fell within the intent of the statute, although it might serve as a useful purpose in screening the defendants' premises from observation. Here the malicious purpose was altogether the predominant one, and the usefulness of the structure very limited and merely incidental. In the present case these conditions are reversed, and it is found that the primary purpose was the reasonable and proper one of displaying the defendants' goods, while the malicious part of the motive was secondary. While we are not prepared to say that this relation of the two motives should always determine the court against the granting of an injunction, and the opposite relation in favor of granting one, yet we regard the predominance of the malicious motive as generally essential to a case in which the court will think itself justified in interfering. The statute speaks of the structure intended as a "malicious erection," and one the intent of which is "to annoy and injure any proprietor of adjacent land." We think we do not go too far in saying that this malicious intent must be so predominating as a motive as to give character to the structure. It must be so manifest and positive that the real usefulness of the structure will be as manifestly subordinate and incidental. The law regards with jealousy all attempts to limit the use to which a man may put his own property. This right to use is always subject to the wholesome limitation of the common law, that every one must so use his own property as not to injure another's, and the person who violates this rule is liable to the person injured whether he has any malicious intent or not; but here the new principle is introduced, that the land-owner may erect no structure on his own premises, however lawful it would otherwise be, if he does it maliciously, with intent to annoy his neighbor. The common law has always regarded the existence of malice in the exercise or pursuit of one's legal rights as of no consequence, just as its absence is of no consequence in the cases of injury caused by wrongful acts. The inquiry into and adjudication upon a man's motives has always been regarded as beyond the domain of civil jurisprudence, which resorts to presumptions of malice from a party's acts instead of inquiring into the real inner workings of his mind. When, therefore, we inquire how far a man was actuated by malice in erecting a structure on his own land, we are inquiring after something that it will always be very difficult to ascertain, unless we adopt, as in other cases where the courts inquire after malice, a presumption of

malice from the act done. And in this view of the matter we think no rule can be laid down that is on the whole more easy of application, and more likely to be correct in its application, than that the structure intended by the statute must be one which from its character, or location, or use, must strike an ordinary beholder as manifestly erected with a leading purpose to annoy the adjoining owner or occupant in his use of his premises. If the defendant has erected a house or block on his own land so close to the dividing line between his lot and his neighbor's as to darken the side windows of his neighbor's house, no one would say that he had done a thing that was mainly intended to annoy his neighbor, and yet in his heart there may have been a malicious delight at the damage he was doing his neighbor. In such a case the obvious propriety of such an erection should determine the question in favor of the party making it, without putting him under oath as to his motives. In the same way, if a land owner should locate a privy or pig-sty directly on his line, and as close as possible to the rear parlor windows of his neighbor, or should erect a rough screen of boards before his windows to darken them, the very character and location of the structures would strike every beholder as decisive evidence of an intent to annoy, and of this intent as an entirely predominant one; and a court might very properly so determine without leaving the case to rest on proof, generally the party's own oath, that there was no malice in the case.

No error.

IS A LUNATIC LIABLE FOR SLANDER?

A writer in the current number of the *American Law Review*, in a notice of *Odgers on Libel and Slander*, remarks: "We pass by the statement that 'even a lunatic is liable for a libel,' with simply advising any one who is disposed to accept it to examine the authorities." The statement is startling, for the natural reflection is that a lunatic is incapable of the malice which is an essential of the offense.

Odgers says (*Lib. and Slander*, 353): "Lunacy is in England no defense to an action for slander or libel. *Per Kelly, C. B.*, in *Mordaunt v. Mordaunt*, 39 L. J. Prob. and Mat. 59. In America, however, insanity at the time of speaking the words is considered a defense, 'where the derangement is great and notorious, so that the speaking the words could produce no effect on the hearers,' because then 'it is manifest no damage would be incurred.' But where the degree of insanity is slight, or not uniform, there evidence of it is only admissible in mitigation of damages." Citing *Dickinson v. Barber*, 9 Mass. 218; *Yeates v. Reed*, 4 Black. 463; *Horner v. Marshall's Admx.*, 5 Munf. 466.

The citation from *Mordaunt v. Mordaunt* is entirely *obiter*, and a mere casual remark in the course of the argument. The question was whether lunacy was a defense to an action of divorce, and counsel in arguing said a lunatic is

liable to an action for false representation, and Kelly, C. B., interrupted to say, "and also for a libel." This is the only authority cited to this doctrine in the text-books, and the only one we can anywhere find.

In *Dickinson v. Barber*, 9 Mass. 225, evidence of the insanity of the defendant after the speaking of the words was held inadmissible. The court added that "they gave no opinion in this case how far, or to what degree, insanity was to be received as an excuse in an action for defamatory words. Where the derangement was great and notorious, so that the speaking the words could produce no effect on the hearers, it was manifest no damage would be incurred. But where the degree of insanity was slight, or not uniform, the slander might have its effect; and it would be for the jury to judge upon the evidence before them, and measure the damages accordingly."

In *Horner v. Marshall's Adm.*, 5 Munf. 466, it was held that proceedings on a judgment for slander may be perpetually enjoined, by proof that at the time of the speaking and of the judgment the defendant was insane or in a state of partial mental derangement on the subject to which the words related. It appeared that the plaintiff in the judgment had expressed an intention not to enforce it, but to hold it as security for good behavior. This element however does not appear to have influenced the decision.

In *Bryant v. Jackson*, 6 Humph. 199, it was held that insanity is a good plea to an action for slander. This doctrine was not debated; the court said it "is not controverted." The question was whether the proof offered and rejected was sufficient to make out the insanity.

On the authority of the *Dickinson* and *Horner* cases, it was briefly held in *Yeates v. Reed*, 4 Blackf. 463, that insanity may be shown in excuse or mitigation according to circumstances.

In *Gates v. Meredith*, 7 Ind. 440, it was held competent to prove that the defendant's mind was so besotted by a long course of dissipation and his character so depraved, that no one would regard or believe what he said. The court said: "Slander must be malicious. An idiot, or lunatic, no matter from what cause he became so, cannot be guilty of malice. He may indulge the anger of the brute, but not the malice of one 'who knows better.'"

There is no carefully expressed consideration of the question in any of these cases, and no other authorities are cited. In the text-books on Slander and Libel there is little said on the subject. Mr. Townshend says, "insanity is a complete defense," citing the above American authorities. This, as we have seen, is going rather too far. Starkie has nothing to say on this point, so far as we can discover. Neither Addison nor Underhill considers the point in his work on Torts.

Dr. Ordronaux says (Jud. Aspects of Insanity, 333): "It is a well established principle that a lunatic is liable for a trespass or a tort, because the matter of discretion or free moral agency is not inquirable into in a civil action. Yet in re-

spect to torts to the reputation, as by oral or written slander, some special considerations are due to the state of mind of the party which may justly be offered in mitigation of damages. One of the earliest symptoms of an unbalanced mind is often found in an unjust suspicion of others, which by repeated meditation provokes an emotional excitement in its subject, disabling him from speaking either calmly or justly of the one thus suspected. The thought of this person at once revolutionizes the judgment; the ideas habitually entertained concerning him crowd tumultuously forward, and as any violent thinking when accompanied by emotional fervor tends to break out into speech or even writing, a party may in such a condition utter defamatory words without any ulterior purpose than that of relieving the tension of his own thought."

Judge Cooley says (Torts, 103): "Legal malice certainly cannot be imputed to one who in law is incompetent to harbor an intent. It would seem a monstrous absurdity, for instance, if one were held entitled to maintain an action for defamation of character for the thoughtless babbling of an insane person to his keepers, or for any wild communication he might send through the mail, or post upon the wall. There can be no tort in these cases, because the wrong lies in the intent, and an intent is an impossibility. The rules which preclude criminal responsibility are strictly applicable here, because there is an absence of the same necessary element. And if in the case of defamatory publications, it be said that after all the requirement of malice as an element in the wrong is only nominal, still there can be no tort, because presumptively the utterances, or rather publications, which proceed from a diseased brain, cannot injure."

The citation from the *Mordaunt* case illustrates how common law has frequently been made, and why it is so "flexible" and "elastic." A judge drops a remark in an oral opinion, or interjects one in an argument, having nothing to do with the case. Somebody notes it down; and afterward, when the case arises, to which it might apply, it is quoted as authority. Frequently it is bad law and bad sense, like the *dictum* in the *Mordaunt* case, but it may answer to hang a decision on until some strong judge arises, who will contest it and pronounce the contrary. An intelligent text-writer ought to know better than to set down and perpetuate what President Garfield called "the staggerings of the mind."—*Ab. Law Journal*.

Blank Endorsement.—The contract entered into by a blank indorsement of a promissory note will receive such a construction as will give effect to the intentions of the parties, and parol evidence will be admitted to show and explain what liabilities were intended to be assumed at the time of the transaction. [*Owings v. Baker*, Supreme Court of Md.]

ADMITTED TO PRACTICE.

Out of a class of forty-six applicants, the Supreme Court last week admitted to the bar thirty-nine, as follows:

W. S. Holmes, Hillsboro.
 Olin J. Ross, Hillsboro.
 George M. Phiel, Toledo.
 Parks Hone, Toledo.
 Chauncey F. Cook, Toledo.
 A. M. Ensminger, Bucyrus.
 L. C. Feighner, Bucyrus.
 L. L. Teal, Bucyrus.
 T. W. Shreve, Martin's Ferry.
 Robert P. Scott, Cambridge.
 Peter F. Koontz, St. Louisville.
 W. D. Smyser, Springfield.
 Lowrey Jackson, Springfield.
 Sheldon Parks, Salem.
 Frank P. Fouts, Salem.
 Frank E. Ballard, Findlay.
 Grafton C. Kennedy, Dayton.
 Howard W. Luccock, Hilmolton.
 Charles H. Masters, Bryan.
 John B. White, Montpelier.
 C. C. Layman, Lucky, Wood County.
 Frank W. Harrington, Warren.
 Fred F. Thomas, Elyria.
 Barnet Wager, Akron.
 W. E. Allen, New Straitsville.
 Harvey Musser, Akron.
 James O. Browder, Van Wert.
 T. P. Browder, Wilmington.
 G. W. Allen, Van Wert.
 James A. Mumma, Dayton.
 Charles Moorman, Cincinnati.
 L. E. Taylor, Kenton.
 Adin T. Hills, Mansfield.
 Walter S. Mitchell, Mansfield.
 C. W. Morriatt, Mansfield.
 James J. Grant, Canton.
 Arlington G. Reynolds, Painesville.
 Paschal L. Moorman, Xenia.
 George U. Sharp, Elyria.
 S. A. Bowes, Medina.

Professor O. W. Aldrich, M. A. Daugherty and E. L. Taylor, of Columbus, and J. B. Brannon, of Cincinnati, composed the Examining Committee.

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

Tuesday, May 9, 1882.

GENERAL DOCKET.

No. 80. Scioto Valley R. R. Co. v. Cronin. Error to the District Court of Ross County.

LONGWORTH, J., *Held*:

1. Under the act of March 31st, 1874, entitled "an act to secure pay to persons performing labor and furnishing materials in constructing railroads," (71 O. L. 51), a substantial compliance with the conditions of the statute providing for the service of written notice upon the owner of the road is essential to create any obligation on the part of such owner toward the person performing labor

or furnishing materials under a contractor or sub-contractor, or to give to such person any right of action against such owner.

2. Where from the nature of the action defendant has notice that the plaintiff intends to charge him with the possession of a written instrument, formal notice to produce the same at the trial is not essential as a foundation for the introduction of parol testimony touching its contents.

3. The limitation of time within which suits under this statute must be brought, applies to controversies arising between the contractor or sub-contractor and the person furnishing materials or work, and not to rights of action on the part of the latter against the owner of the road.

Judgment affirmed.

82. Farmers' Insurance Company v. Joseph R. Butler. Error to District Court of Holmes County.

McILVAINE, J. *Held*:

A policy of insurance for \$800.00 on a certain dwelling house, which sum does not exceed two-thirds of the value of the house as appears from the application that was made a part of the policy, which also contains a stipulation that the company will pay to the assured "all loss or damage," not exceeding the sum assured, within ninety days after due notice and "proofs" of such loss or damage, is an open and not a valued policy.

Judgments of the district court and court of common pleas reversed and cause remanded.

81. George W. Boling v. Andrew J. Young. Error to the District Court of Knox County.

JOHNSON, J. *Held*:

1. A surety on a judgment is discharged from liability thereon, by a valid contract for an extension of time for the payment thereof, made by the judgment creditor with the principal judgment debtor, without the knowledge or consent of the surety.

2. An undertaking for stay of execution of a judgment on the docket of a justice of the peace, executed after the time allowed by law, in pursuance of an agreement of the parties is valid as a common law contract, if supported by a sufficient consideration, though it may not be effective as a statutory undertaking.

3. One who executes such an undertaking at the instance of the principal judgment debtor, without the knowledge or consent of the sureties thereon, knowing that they are such, is liable on the undertaking to the creditor, if his principal makes default, although the sureties are thereby released from liability.

4. Where, after stay of execution has expired on such a judgment, a surety, who has been thus released, is compelled to pay the judgment to save his goods and chattels from forced sale by an officer who has seized them on execution issued on said judgment, he may recover back from the judgment creditor the amount so paid. Such compulsory payment is not a satisfaction of the judgment or of the undertaking, and the creditor may, after recovery back against him, maintain an action on the undertaking, if the principal makes default.

Judgment of the district court affirmed.

86. Edward Keating v. City of Cincinnati. Error to the District Court of Hamilton County.

WHITE, J.

A municipal corporation in making a street along a hillside, so excavated the ground in the street as to cause the land above to slide and injure the lot of the plaintiff. *Held*:

1. That the fact that the plaintiff's lot did not abut immediately on the street did not exempt the corporation from liability. Its liability did not depend upon the ownership of the injured property, but upon the extent of the injury of which its removal of the lateral support of the hill was the efficient cause.

2. That the liability extends to damages to buildings as well as to the land in its natural state, where the owner is not chargeable with negligence in making such improvements, and such damages result from want of due skill and care in making the street.

Judgment of the district court reversed and that of the common pleas affirmed.

Longworth, J., did not participate in the decision.

474. The Lake Shore and Michigan Southern Railway Company v. Milo Sharpe and Joshua M. Nettleton. Error to the District Court of Ashtabula County.

OKEY, C. J.

A railroad company exercising its powers subject to the provisions of the present constitution, and required by

the act of 1874 (71 Ohio L. 85), passed since its incorporation, to construct and maintain cattle-guards at places on its road where public highways are or may be constructed across its track, is not entitled to compensation for making or maintaining such cattle-guards.

Judgment affirmed.

89. Joseph G. Gibbons et al. v. Catholic Institute of Cincinnati. Error to the Superior Court of Cincinnati. Judgment affirmed. There will be no further report.

141. John C. Schnell v. J. Freeman Going. Error to the District Court of Hamilton County. Dismissed by plaintiff in error and at his cost.

1007. Merchants' Mutual Fire Ins. Co. v. August Gereke. Error to the District Court of Clermont County. Dismissed by agreement of parties, at the cost of plaintiff in error, as per papers on file.

MOTION DOCKET.

No. 31. John T. Wilson v. Harvey Conner, Treasurer, &c. Motion to take cause No. 627 on the General Docket out of its order for hearing. Motion overruled.

71. Waldemir Otis v. Euclid Avenue Opera House. Motion to extend time for filing printed record in cause No. 1004 on the General Docket. Motion granted.

72. James T. Black et al. v. Asa Davis et al. Motion for stay of execution in cause No. 1035 on the General Docket. Motion granted, staying further proceedings in the court below when the plaintiffs in error give an undertaking to be approved by the Court of Common Pleas of Franklin County in the sum of \$2,000, conditioned for the payment of the damages which said Asa Davis shall sustain by reason of the delay, and costs, in case the judgment of the district court shall be affirmed.

73. Henry P. Sabbert v. Antonius Zeivernick. Motion for leave to re-instate cause No. 994 on the General Docket, heretofore dismissed upon motion No. 58 for want of printed record. Motion overruled and former order modified so as to direct that the petition in error in said cause No. 994 be stricken from the files as improvidently filed without also filing therewith the original papers, bill of exceptions, and transcript of journal entries in the cause.

74. Sarah K. Miller v. Wm. P. Hurlburt, Executor, &c. Motions to file petitions in error and to file cross-petitions in error to Superior Court of Cincinnati. Motions overruled.

75. Nancy Pepple et al. v. Franklin Pierce et al. Motion for an order staying execution in cause No. 1133 on the General Docket. Motion granted, and undertaking fixed at \$600.

76. Josephus Martin et al. v. Orson Lapham et al. Motion to advance cause No. 747 to its original position on the General Docket. Motion granted.

77. Nelson B. Stone et al. v. Henry C. Veile, Treasurer. Motion to take cause No. 1138 on the General Docket out of its order. Motion granted.

78. William F. Brown v. The State of Ohio. Motion for leave to file a petition in error to reverse the judgment of the District Court of Ashtabula County. Motion granted.

79. The State ex rel. Daniel Roth v. Wm. Rebbett, Treasurer of Crawford County. Application for mandamus. Motion to take out of order for hearing. Motion granted and cause set for hearing May 23, 1882.

80. The State ex rel. Daniel Roth v. Frederick Hipp, Probate Judge of Crawford County. Application for mandamus. Motion to take out of order for hearing. Motion granted and cause set for hearing May 23, 1882.

81. J. Addison Tenney et al. v. Robert V. Pearson. Motion to dismiss cause No. 887, on the General Docket, for want of printing within rules. Motion overruled.

— A. B. & H. M. Johnson, administrators &c. v. L. Connoble et al. Motion for order of revivor in cause No. 1081, on the General Docket, one of the defendants in error, Thomas R. Little, having died and Joseph N. Dean having been appointed administrator. Motion granted.

SUPREME COURT RECORD.

[New cases filed since last report, up to May 9, 1882.]

1135. James T. Black et al. v. Asa Davis et al. Error to the District Court of Franklin County. P. B. Case and H. J. Booth for plaintiffs.

1136. Charles T. Norton v. Tabitha Dunn. Error to the District Court of Cuyahoga County. Gary, Ever-

ett & Dellenbaugh for plaintiff; W. S. Kerruish for defendant.

1137. Robert C. Lindsay v. The State of Ohio. Error to the Court of Common Pleas of Jefferson County. Ong & Mansfield and J. F. Daton for plaintiff; W. H. Blim, Harris & Cook and General Nash for defendant.

1138. Nelson B. Stone et al. v. Henry C. Veile, Treasurer &c. Error to the District Court of Summit County. Hall, Watters & Stuart for plaintiffs; C. S. Cobbs and E. P. Green for defendant.

1139. Perry D. Veach v. Noah Karr et al. Error to the District Court of Perry County. P. D. Veach for plaintiff.

1140. Augustus Wilhelmi et al. v. The Michigan Mutual Life Insurance Co. et al. Error to the District Court of Guernsey County. Ferguson & Ferguson for plaintiffs; Taylor & Anderson for defendants.

1141. Nicholas Wagner et al. v. John F. Freeman. Error to the District Court of Cuyahoga County. Jackson & Athey for plaintiffs; W. S. Kerruish for defendant.

1142. William McGuire v. The State of Ohio. Error to the District Court of Paulding County. W. J. Beers for plaintiff; General Geo. K. Nash for the State.

1143. Patrick Kelley v. The State of Ohio. Error to the District Court of Paulding County. W. J. Beers for plaintiffs; General Geo. K. Nash for defendant.

1144. Philo Tilden v. S. O. Edison et al. Error to the District Court of Lorain County. Johnston & Leonard for plaintiff; P. H. Boynton for defendants.

1145. Morgan, Root & Co. v. Joseph B. Miller. Error to the District Court of Medina County. Bostwick & Barnard and Estep & Squire for plaintiffs.

1146. Francis McBride et al. v. Priscilla Morrow. Error to the District Court of Carroll County. Hays & Black for defendants.

1147. John Spayth v. Commercial Bank of Tiffin. Error to the District Court of Seneca County. George E. Seney for plaintiff; Lutes & Lutes for defendant.

1148. Alfred G. Sneath v. Edward McCarty et al. Error to the District Court of Seneca County. George E. Seney for plaintiff; Lutes & Lutes for defendants.

1149. Eliza Dillienbach v. City of Xenia. Error to the District Court of Greene County. F. P. Cunningham for plaintiff.

1150. Jesse Kepner v. Mary Graham. Error to the District Court of Columbiana County. W. A. Nichols and W. J. Jordan for plaintiff; J. W. & H. Morrison for defendant.

1151. Diantha Richards et al. v. Nancy May et al. Error to the District Court of Sandusky County. Bucklands & Zeigler for plaintiffs; Lemmon, Finch & Lemmon for defendants.

1152. Henrietta E. Armstrong v. Simon Garrett et al. Error to the District Court of Franklin County. R. D. Robinson for plaintiff; Lorenzo English and Jones & Jones for defendants.

1153. Jackson Holloway v. J. H. Bertram. Error to the District Court of Darke County. Riffel, Otwell & Clark for plaintiffs.

1154. W. J. Kelley et al. v. The Woodstock Bank. Error to the District Court of Darke County. Riffel, Otwell & Clark for plaintiffs.

1155. William F. Brown v. The State of Ohio. Error to the District Court of Ashtabula County. Leonard, Cushing & Ruggles for plaintiff; General Nash for the State.

1156. Mark Bloomingdale v. S. Stein & Co. Error to the District Court of Franklin County. J. H. Bowman and O. W. Aldrich for plaintiff.

SUPREME COURT ASSIGNMENT.

FOR ORAL ARGUMENT.

May 11th—No. 1067. Wm. McHugh v. The State of Ohio.

May 24th—No. 1117. Charles Stoddard v. The State of Ohio. No. 1118. Jacob Ridenour v. The State of Ohio.

May 25th—No. 111. Bundy v. Ophir Iron Co. No. 112. Simpson et al. v. Greenfield Building and Savings Association.

May 26th—No. 114. Coffin v. The Greenless and Ramsom Co.

Ohio Law Journal.

COLUMBUS, OHIO, : : MAY 18, 1882.

THE following is a summary of the work done by the Supreme Court of the United States during the term just closed.

Number of cases on the docket at the close of the October term of 1880 (May 2, 1881), 837; number of cases filed since, 399; number of cases argued orally, 178; number of cases submitted, 92; number of cases continued, 27; number of cases passed, 18; number of cases disposed of, 399, as follows: Affirmed, 161; reversed, 88; dismissed, 30; settled and dismissed, &c., by the parties, 88; docketed and dismissed, 22; questions answered, 2; dismissed in vacation, 8; total, 399; number of original actions on the docket at the close of October term of 1880 (May 2, 1881), 6; number filed since, 12; number argued orally, 10; number submitted, 5; number disposed of, 13.

NEW PUBLICATIONS.

We have received the first and second numbers of a new legal periodical entitled, "The Journal of Banking Law," published in New York, with George H. Stever, Esq., as Editor. It is announced as a Quarterly magazine, Devoted to reporting Legal Decisions upon Banking and Financial cases, and is a publication that will be welcomed to the ranks of periodicals as a specialty in an entirely new field of profit and usefulness. Each number contains over one hundred pages and several hundred well digested cases printed in exceptionally good style, on good paper and in clear, beautiful type. The terms are \$5.00 per annum, and the address of the publisher is Francis E. Fitch, 75 Fulton St. New York City

The *Texas Law Journal* has been purchased by Muir & Armstrong, and transplanted to Austin, Texas, from Tyler, Texas, and will be hereafter *The Texas Law Reporter*. The first number of the new publication is in book form and contains a portrait of Hon. Royall T. Wheeler, which we presume is a fair likeness of a worthy man. While we wish the publishers all kinds of good fortune and success, we are constrained to venture a word of advice and warning. Drop the portrait business Brother Muir. Lawyers, although the best men in the world, are the most

morbidly, foolishly and sensitively jealous of all created beings. We made personal mention of a few excellent gentlemen who called in to see us and wish us success in the infancy of our undertaking—the OHIO LAW JOURNAL—but we were obliged to quit it. So many of those who did not get in to see us and get a notice in our paper, got mad and discontinued, that we began to fear the entire brotherhood would forsake us if we did not forego the personals. Of course all the better class of lawyers were above such petty jealousy, but we can name a great many who could not endure the sight of the name of a rival lawyer in print, and a well meant personal—harmless and well deserved—was like a red rag to a bull, and the bulls bellowed terribly.

We therefore say, drop the picture business.

THE AMERICAN DECISIONS.

Volume 32 of this valuable series has been received from the publishers, Messrs. A. L. Bancroft & Co., San Francisco, California.

The cases re-reported are the leading cases decided in 1837-8-9 and 1840, in all the then organized States, and which are still cited as unquestioned authority by law writers, and recognized as such by all courts.

All the authorities upon the questions involved, running down to the present time, are collected and systematically set forth in appended notes to various cases as follows:

Unlawful Gaming; (State v. Smith, Meigs R., 99), pages 132-140.

Liability of Infants for their Torts; (Humphrey v. Douglas, 10 Vt. 71), pages 177-185.

Probate of Wills when void for want of jurisdiction; (Fisher v. Bassett, 9 Leigh 119), pages 227-243.

Alluvion—Title to; (Hagan v. Campbell, 8 Porter 9), pages 267-281.

Power of Court to issue Mandamus against Governor; (Hawkins v. Governor, 1 Ark. 570), pages 346-368.

Levy necessary to sustain Sale; (Walters v. Duval, 11 G. & J. 37), 693-670.

Voidable Sale—Reclamation of Goods; (Thurston v. Blanchard, 22 Pick. 18), 700-711.

These are but the most extensive collection of authorities. There are very many more fully as valuable cases and notes which are in keeping with the plan and scope of this great work.

SURETY—STAY OF EXECUTION—EXTENSION OF TIME.

SUPREME COURT OF OHIO.

GEORGE W. BOLING

v.

ANDREW J. YOUNG.

May 9th, 1882.

1. A surety on a judgment is discharged from liability thereon, by a valid contract for an extension of time for the payment thereof, made by the judgment creditor with the principal judgment debtor, without the knowledge or consent of the surety.

2. An undertaking for stay of execution of a judgment on the docket of a justice of the peace, executed after the time allowed by law, in pursuance of an agreement of the parties is valid as a common law contract, if supported by a sufficient consideration, though it may not be effective as a statutory undertaking.

3. One who executes such an undertaking at the instance of the principal judgment debtor, without the knowledge or consent of the sureties thereon, knowing that they are such, is liable on the undertaking to the creditor, if his principal makes default, although the sureties are thereby released from liability.

4. Where, after stay of execution has expired on such a judgment, a surety, who has been thus released, is compelled to pay the judgment to save his goods and chattels from forced sale by an officer who has seized them on execution issued on said judgment, he may recover back from the judgment creditor the amount so paid. Such compulsory payment is not a satisfaction of the judgment or of the undertaking, and the creditor may, after recovery back against him, maintain an action on the undertaking, if the principal makes default.

Error to the District Court of Knox County.

The question involved arises on a demurrer to an amended petition of defendant in error.

It is alleged by Young that on the 24th of April, 1874, he commenced an action before a justice of the peace, on a promissory note against Joseph Brown, principal, and Joseph Jenkins and William King, sureties, and on the 2nd of May, 1874, recovered a judgment thereon against Brown and Jenkins for \$108.75. The case was continued as to King until May 9th, 1874, when a like judgment for the same amount was rendered against King.

On the 18th of May, the plaintiff consented that Brown might stay the execution. Accordingly he, without the knowledge or consent of Jenkins or King, procured Boling, the plaintiff in error, to execute the following undertaking:

I, G. W. Boling, resident of Knox County, as surety for stay of execution in the above cause of Andrew Young against Jos. Brown, James Jenkins and William King, do undertake to said plaintiff that in default of payment by defendants, I will pay the judgment, with interest and costs, and costs that may accrue.

G. W. BOLING.

Approved by me and signed before me, this 18th day of May, A. D., 1874.

B. A. F. GREER,

Justice of the peace.

Bail allowed by order of plaintiff.

Boling executed this undertaking at the sole request of Brown, with full knowledge that Jenkins and King were sureties only, and after being indemnified for so doing by Brown.

When the stay expired, plaintiff caused execution to issue against all the defendants to the judgment, and for want of property of Brown to satisfy the same, the constable seized and was about to sell the property of Jenkins, to save which, he paid to the constable \$138.45, being the judgment with interest and costs on the writ. He immediately brought suit in the Knox Common Pleas against Young to recover back the same, on the ground that he had been discharged from all liability on the judgment, by the acts of Young and Brown, as before stated, and such proceedings were had that he recovered a judgment against Young, for the amount he had paid the constable, with interest, and \$10.20 costs, making an aggregate of \$154.41.

Young now seeks to recover this amount with interest, from the time judgment was rendered against him in favor of Jenkins.

Upon this state of facts the common pleas held there was no cause of action. The district court reversed this holding, and the case is here to review the decision of the latter court.

JOHNSON, J.

More than ten days had elapsed after the judgment against Brown and Jenkins had been rendered, before this undertaking for stay of execution was given by Boling. It was done without the knowledge or assent of Jenkins, who was known to Boling and Young as surety only, and with the permission and consent of Young, the judgment creditor, at the request of Brown, the principal to the judgment.

If the same effect is to be given to this undertaking, as if given within the ten days allowed by law for entering stay, then it follows, that, as between Boling, and Jenkins who was surety, only, the former was primarily liable on the judgment, the assent of the latter to giving such undertaking being wanting. S. & S. 424. R. S. 6654.

If this undertaking be regarded as a statutory obligation, then in case of compulsory payment of the judgment by Jenkins, he could have maintained an action, on the undertaking, by reason of this primary liability of Boling.

The compulsory payment by Jenkins would not be a satisfaction of the condition of the stay bail. It was so held in *Dernier v. Jenkins*, 20 O. St. 336.

For equally cogent reasons, Jenkins had a right of action against Young, the judgment creditor, to recover back the amount he was compelled to pay to release his property. As to Young, the compulsory payment was not a satisfaction of the judgment in his favor.

But the undertaking was given after the time had elapsed, within which it could be taken.

It was competent, however, for the parties to secure the extension of time for payment by a contract valid at common law. If supported by a sufficient consideration, such a contract is mutually binding on the parties to it.

In legal effect, Boling promised to become surety for the payment of this judgment if Young would wait eight months. Young agreed

to this and fully performed the promise on his part.

Boling was therefore liable on this undertaking as a common law contract unless he was discharged by the payment by Jenkins, under compulsory process to save his property. *Duchwall v. Rogers*, 15 Ohio St. 544.

It was a binding contract, between Young, as judgment creditor, and Brown, the principal debtor and Boling as his surety, that if Young would extend the time of payment eight months, Boling would pay the judgment in default of payment by his principal.

As Jenkins, the surety in the judgment, was not a party to this contract, and did not assent to it, he was discharged from all liability. *Blazer, Corwin, Gregg & Co. v. Bundy*, 15 O. St. 57.

It remains to inquire, what was the effect of the compulsory payment by Jenkins?

It is claimed that this payment satisfied the judgment, and therefore the condition of the undertaking was not broken.

That condition was, that in default of payment of the judgment by defendants, he would pay the same. The defendants were Joseph Brown, James Jenkins and William King. The two latter, Boling had aided to discharge from liability, so that in fact, Boling was surety for Brown only.

The payment by Jenkins was made under duress of goods and chattels, and gave him a right of action to recover the amount, either on the undertaking, as was held in *Dernier v. Jenkins, supra*, or against Young. Such a payment did not operate as a satisfaction of the judgment, as between the parties to it, who had not been discharged by the extension of time, it was still in full force. Boling was liable to Young for the default of his principal. As Brown had made default he was liable to Young, and the compulsory payment by Jenkins, which he recovered back in an action against Young was not a satisfaction of the judgment, nor a performance of the condition of the undertaking. Boling remained liable thereon, to the extent of the judgment, interest and costs thereon, but not for costs adjudged against Young in the action against him by Jenkins to recover back the amount paid.

Baker v. Cincinnati, 11 O. St. 534. *Dernier v. Jenkins*, 20 O. St. 336; *Stephen, Treas. v. Daniels*, 27 O. St. 527.

Judgment of the district court affirmed.

[This case will appear in 38 O. S.]

RAILROAD—CATTLE-GUARDS.

SUPREME COURT OF OHIO.

THE LAKE SHORE AND MICHIGAN SOUTHERN
RAILWAY COMPANY

v.

MILO SHARPE AND JOSHUA M. NETTLETON.

May 9th, 1882.

A railroad company exercising its powers subject to the provisions of the present constitution, and required by the act of 1874 (71 Ohio L. 85), passed since its incorporation, to construct and maintain cattle-guards at places on its road where public highways are or may be constructed across its track, is not entitled to compensation for making or maintaining such cattle-guards.

Error to the District Court of Ashtabula County.

James Mason, Ashley Pond, Cyrus D. Roys, and O. G. Getzen—Danner, for the plaintiff in error.

71 Ohio L. 86; Const. Art. 1, sec. 19; *Railroad Co. v. Bloomington*, 76 Ill. 447; Stats. of Ill. Ed. of 1880, 1152; *Railway Co. v. Maurer*, 21 Ohio St. 421; *Potter v. Bunnell*, 20 Ohio St. 150; *Ferris v. Bramble*, 5 Ohio St. 109; *Railroad Co. v. Clinton Co.*, 1 Ohio St. 77; *Bridgeport v. Railroad Co.*, 36 Conn. 255; *Crossley v. O'Brien*, 24 Ind., 325; *Mills on Em. Dom.* § 33, 43, 214; *1 Redfield on Rail.*, 400 *People v. Railroad Co.*, 67 Ill. 118; *Reg. v. Ely*, 69 E. C. L. 843; *Railroad Co. v. Moffitt*; 75 Ill. 524; *Driver v. Railroad Co.*, 32 Wis. 584; *Welch v. Railroad Co.*, 27 Wis. 108; *State Railroad Tax cases*, 92 U. S. 698; *Old Colony, etc. Co. v. Plymouth*, 14 Gray, 155; *Railway Co. v. Ogilvy*, 2 Maeg. 229; *Metropolitan Board Works, v. McCarty*, L. R. 7 H. of L. 256; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. of L. 418; *Selbourne v. Fishmonger's Co.* L. R. 1 App. Cas. 662. They also commented on *Railroad Co. v. Railroad Co.*, 30 Ohio St. 604, and cases there cited.

Theodore Hall and Edward C. Wade for the defendants in error.

Railroad Co. v. Railroad Co., 30 Ohio St. 604; 71 Ohio L. 86; *Railway Co. v. Dayton*, 23 Ohio St. 517; 27 N. Y. 345; 21 O. S. 586; 26 Vt. 717, 27 Vt. 140; 2 *Redfield on Rail.* sec. 232; 2 S. & C. 1289; 66 Ohio L. 68; 69 Ohio L. 187.

OKEY, C. J.

In 1878, the commissioners of Ashtabula County, in pursuance of proper proceedings for the purpose, made an order for the establishment and construction of a county road in that county, which county road crosses the track of the plaintiff in error, the Lake Shore and Michigan Southern Railway Company, on a level, and a further order was made awarding damages to the railway company, from which order the company appealed to the probate court. In that court the question was, whether the company was entitled to compensation for making and maintaining two cattle-guards across its track, one on each side of the county road. The probate court excluded evidence tending to show the cost to the company in furnishing material

and constructing such guards, and also the cost of maintaining the same, and the company excepted. On petition in error the court of common pleas reversed the judgment of the probate court for excluding such evidence, the district court reversed the judgment of the court of common pleas, and affirmed that of the probate court, and this petition in error is prosecuted by the company to reverse the judgment of the district court.

The proceeding for the establishment of this county road, and the assessment of damages to the owners of lands injured by the establishment of the road, and the trial in the probate court, were regulated by the act of 1853 (2 S. & C. 1289), as amended (S. & S. 671; 66 Ohio L. 68; 68 Ohio L. 111, § 10; 69 Ohio L. 186), which no doubt, in a proper case, extended the right to damages as well to a corporation as to a natural person. See Rev. Stats. § 4699 *et seq.*

The Lake Shore and Michigan Southern Railway Company is a corporation having a line of railway in Ashtabula and other counties of this State, and exercising its powers subject to the provisions of the present constitution, and the laws relating to or affecting railways, enacted in pursuance of the constitution.

Among the provisions of the constitution are the following: "No special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the general assembly." Art. 1, § 2. "Corporations may be formed under general laws, but all such laws may, from time to time, be altered or repealed." Art. 13, § 2.

The act of 1874 (71 Ohio L. 85), which remained in force until 1880 when it was re-enacted in substantially the same form (Rev. Stats. § 3324), provided as follows: "That any railroad company, or other party having control or management of a railroad, the whole or a part of which is now or shall be in this State, is hereby required at their own expense, * * * to make and maintain safe and sufficient crossings of good width, at every point where any public road, street, lane or highway may cross said railroad, that is, or may be used by the public, with the necessary cattle-guards on each side of said crossings, to prevent cattle or other domestic animals from endangering themselves and the lives of passengers by getting upon such railroads; and every such railroad company or party shall be liable for all damages sustained in person or property in any manner by reason of the want or insufficiency of any such * * * crossing or cattle-guard, or any carelessness or neglect of said company, their agent or agents, in constructing or keeping the same in repair."

The provision that the company shall construct and maintain the cattle-guards at its own expense, is too plain for construction, and, looking to the whole act, manifestly applies to public roads thereafter, as well as to roads theretofore constructed; and with respect to companies organized, as this is, under our present constitution, the validity of such a provision is no longer sub-

ject to doubt or question. Railroad companies are clothed by the state with important powers and privileges. They employ locomotives which pass along their roads with great force and rapidity, and this necessarily, to some extent, places the persons and property of others in peril. Hence, the requirement that companies shall furnish and maintain such cattle-guards, is not to be regarded, in any just sense, as an invasion of their property rights, but a burden justly imposed for the public convenience and welfare. *Railroad Co. v. Railroad Co.*, 30 Ohio St. 604; *Pennsylvania Co. v. Wentz*, 37 Ohio St. 333, 338; *Buckley v. Railroad Co.*, 27 Conn. 479; *Pierce on Rail.* (ed. of 1881), 456 *et seq.* Plaintiffs in error rely on *Railway Co. v. Bloomington*, 76 Ill. 447, as opposed to this view. See also *Morris Canal, etc. v. The State*, 24 N. J. L. 62. But it does not appear that the constitution of Illinois or New Jersey, existing when the questions arose, contained any such provisions as those above quoted.

Judgment affirmed.

[This case will appear in 38 O. S.]

FIRE INSURANCE—OPEN POLICY.

SUPREME COURT OF OHIO.

FARMERS' INSURANCE COMPANY

v.

JOSEPH R. BUTLER.

May 9, 1882.

A policy of insurance for \$800.00 on a certain dwelling house, which sum does not exceed two-thirds of the value of the house as appears from the application that was made a part of the policy, which also contains a stipulation that the company will pay to the assured "all loss or damage," not exceeding the sum assured, within ninety days after due notice and "proofs" of such loss or damage, is an open and not a valued policy.

Error to the District Court of Holmes County.

The original action was brought by Joseph R. Butler against The Farmers' Insurance Company, in the Court of Common Pleas of Holmes County, on a policy of insurance, wherein it was stipulated, among other things, as follows: "The Farmers' Insurance Company, by this policy of insurance, and in consideration of a cash premium of twelve dollars received of J. R. Butler, do hereby insure unto the said J. R. Butler the sum of twelve hundred dollars, on the following property, situate in Killbuck Township, Holmes County, Ohio, and more particularly described in application and survey No. 11974, which is hereby made a part of this policy, to wit: On Dwelling House. \$800.00; Barn, \$400.00. And said Farmers' Insurance Company hereby agrees to make good unto the said assured, his heirs executors, administrators, or assigns, all such loss or damage, not exceeding in amount the several sums insured, as shall happen by fire or lightning to any of the aforesaid property, from the 28th day of March, one thousand, eight hundred and seventy-three, at 12 o'clock at noon, to the 28th day of March,

one thousand, eight hundred and seventy-eight, at 12 o'clock at noon, and to be paid ninety days after due notice and proofs of the same shall have been made by the assured and received at this office, with the terms and provisions of this policy."

The application thus made a part of the policy contained among other things the following representation:

"The above description and diagram contains a full and accurate description of the buildings and property insured and the insurance on the buildings does not exceed two-thirds their actual cash value. J. R. BUTLER."

During the life of the policy, the dwelling house insured was totally destroyed by fire. The petition prayed for a judgment for \$800.00, the full amount of insurance on the dwelling house.

The answer denied that the dwelling house destroyed was of the value of \$800.00.

During the trial in the court of common pleas, the following bill of exceptions was filed:

"Be it remembered that at the trial of the above case, the defendant, to maintain the issue on her part, offered evidence tending to show that the dwelling house mentioned in plaintiff's petition, was not worth, at the time the same burned, more than the sum of four hundred dollars, and that the plaintiff was not damaged by the burning of the same more than the said sum of four hundred dollars, and that to said evidence the plaintiff, by his attorneys, objected; which objections the court sustained, to which ruling and decision the defendant excepted, and now comes in open court with this, her Bill of Exceptions, and prays that the same may be allowed, signed and sealed, and ordered to be made a part of the record in this case, which is accordingly done."

Trial to the court. Judgment for plaintiff for \$800.00 and \$34.80 interest, and also for costs.

On proceedings in error in the district court it was assigned for error that the court of common pleas erred in excluding evidence as set forth in the bill of exceptions; but the district court affirmed the judgment below.

This proceeding is now prosecuted to reverse the judgments of the district and common pleas courts.

McILVAINE, J.

Whether the policy of insurance in this suit is valued or open, is the sole question in this case.

A policy of insurance is essentially a contract for indemnity in case of loss. Wager policies are contrary to public policy. The insured must have an interest in the subject of the insurance—an interest in its preservation. In case of loss, his contract rightfully entitles him to compensation—nothing more. The reason upon which this principle rest, is the prevention of fraud and crime, by removing all inducement and temptation to commit them, which would naturally arise from the great disparity between the consideration paid and the indemnity re-

ceived by the insured. This disparity, however, does not amount to inadequacy, or even a suspicion of fraud; because of the supposed remoteness of the contingency of loss; nevertheless its existence requires the utmost good faith on the part of the insured.

While these considerations do not, in the least, exempt the insurer from liability on his contract they do show that in the absence of a contract to the contrary, the amount of recovery on a policy of insurance should be limited to the actual loss sustained by the assured on account of the risk against which the policy was taken. In other words, a policy of insurance must be regarded as an open one, unless it appears to have been the intention of the parties to the policy, upon a fair and reasonable construction of its terms, to value the loss, and thereby fix, by contract, the amount of recovery.

Mr. Wood, in his treatise on fire insurance, section 41, says: "Valued policies are those in which both the property insured and the loss are valued, and which bind the insurer to pay the whole sum insured, in case of total loss. They may be said to be policies in which the insurer himself, at the time of making the policy, assesses the damages in case of total loss, unless fraud, inducing an over-valuation on the part of assured, is established." And further along in the same section, he says: "If there is anything in the policy that clearly indicates an intention on the part of the insurer to value the risk and the loss, in whatever words expressed, the policy is valued, otherwise it is open." Again, "No particular form of expression is necessary; the intention of the parties, gathered from the whole instrument, must determine the matter." *Fuller v. Boston etc. Ins. Co.*, 18 Pick. 523.

It has been decided that a policy of a company whose charter limited its liability to a certain proportion of the actual value of the property insured, which refers to the value of the property as stated in the application of the insured, is a valued policy. 10 Cushing, 351. Other cases go so far as to hold generally, that a policy which refers to the valuation of the property as it appears in the application which is made a part of the policy, is a valued one. 1 Allen 63, 100 Mass. 475.

Without expressing an opinion as to the soundness of such construction when nothing further appears in the policy, we are satisfied that the policy before us, which contains the further stipulation, that "said Farmers' Insurance Company hereby agrees to make good unto the said assured, his heirs, executors, administrators or assignees, all such loss or damage, not exceeding in amount the several sums insured, as shall happen by fire or lightning to any of the aforesaid property, from the 28th day of March, 1878, at 12 o'clock at noon, to the 28th day of March, 1878, at 12 o'clock at noon, and to be paid ninety days after due notice and proofs of the same shall have been made by the assured and received at this office, with the terms and provisions of this

policy," shows, that it was not intended by the insurer to make the sum assured the measure or value of the damages, although the loss might be total. Proofs of loss or damage here required as a condition precedent to the payment, refer to cases of total as well partial loss. The amount of liability on the policy was left open to inquiry, limited, however by the amount of insurance named in the policy.

The court of common pleas, therefore erred, in rejecting testimony offered by the defendant below, as to the amount of actual loss. And the district court erred in affirming the judgment of the common pleas.

Judgments reversed and cause remanded.

[This case will appear in 38 O. S.]

BAIL BOND IN STATE COURT EXONERATED FOR FORFEITURE THROUGH INTERVENTION OF THE UNITED STATES COURT.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH

v.

OVERBY.

April 1st, 1882.

A bail bond having been executed in the Christian Circuit Court, for the appearance of Jno. H. Overby at the ensuing term, to answer the charge of passing a counterfeit United States treasury note, but the defendant having failed to appear because of the fact that the day following the execution of the bail bond, he was arrested by an officer of the United States and carried before a United States Commissioner, and by him held to appear and answer at the next term thereafter of the United States Circuit Court, by which tribunal he was, in due time, tried on the same charge for which he had been required to appear in the State Court, convicted and imprisoned.

Held: That the bail should not be liable upon the bail bond, because he was by the United States officer deprived of the power to surrender the defendant to the State Court; and, furthermore, because the defendant in this case could not have been tried and convicted, even if present in the Christian Circuit Court, after having been tried and convicted of the same offense by the United States Circuit Court.

Appeal from Christian Circuit Court.

Chief Justice LEWIS.

On the 19th of November, 1880, appellee, executed a bail bond for the appearance of John H. Overby in the Christian Circuit Court, at its ensuing February term, to answer the charge of passing a counterfeit United States treasury note, but the defendant having failed to appear, the bond was forfeited, and summons issued against appellee.

In his response he alleged the following facts which are conceded: That on the day following the execution of the bail bond, Overby was arrested by an officer of the United States and carried before a United States Commissioner, and by him held to appear and answer at the next term thereafter of the United States Circuit Court, held in the city of Louisville, the same charge for which he had been required to appear and answer in the State Court; that failing to give bail he was committed to the jail of Jeffer-

son County, where he remained until February, 1881, when he was indicted, tried and convicted in the United States Court for the offense, and sentenced to confinement in the penitentiary of the State of New York for the term of five years.

The court below having overruled the demurrer to the response, and dismissed the proceeding against appellee, the Commonwealth prosecutes this appeal.

By the terms of the bail bond in such cases, the bail undertakes that the defendant shall appear in court at the time and place designated, to answer the charge upon which he is in custody, and at all times render himself amenable to the orders and process of the court in prosecution of the charge; or if he fail to perform either of these conditions, that the bail will pay to the Commonwealth the sum at which the penalty is fixed.

But it is expressly provided by law that the bail may, at any time before the forfeiture of the bond, surrender the defendant to the jailer of the county in which the prosecution is pending, and be thereupon exonerated. And for the purpose of surrendering him the bail, at any time before judgment against him, and at any place within the State, may arrest the defendant or by an endorsement upon a certified copy of the bail bond, may direct the arrest to be made by any peace officer of the State, or by any other person over twenty-one years of age, designated in the endorsement. And it is also provided that, if, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may at its discretion, remit the whole or part of the sum specified in the bail bond.

There is, therefore, in the bail bond, an implied undertaking on the part of the Commonwealth, that the bail shall not be hindered or prevented by herself, or any other authority within the limits of the State, in surrendering the defendant before the forfeiture of the bond, and the farther undertaking that the Commonwealth has the power through her peace officers, to arrest the defendant, if within the State, and will so arrest him at any time before judgment against the bail, when he shall so direct.

It has accordingly been held by this court that, when the Commonwealth, by her own act, prevents the appearance of the defendant in discharge of the bail bond or recognizance, she should not enforce the penalty against the bail for non-compliance. *Alquin v. Commonwealth*, 3 B. M., 349; *Kirby v. Commonwealth*, 1 Bush, 114.

Although in this case the bail was not deprived of his right to surrender the defendant, and thus to become exonerated by the Commonwealth, he was effectually prevented exercising that right, as was the defendant prevented appearing in discharge of the bail bond by the United States government. And, in our opinion, it does not make any difference whether the non-appearance of the defendant in compliance with the bail bond, be caused by the Commonwealth, or by the United States government, for

the authority of neither can be resisted by the bail or by the defendant, and in both cases the bail is deprived of the aid and protection of the Commonwealth, to which under the contract, he is entitled.

Upon principle, as well as according to the weight of authority in this State, the facts set forth in the response by appellee constitute a sufficient defense to the proceeding against him, and the demurrer was properly overruled.

In the case of the Commonwealth *v. Terry*, 2 Duval, 383, it was held by this court that, in a proceeding against the surety upon a forfeited recognizance, it was a sufficient defense that the defendant, being a soldier in the Federal army, was refused a furlough, and by reason thereof was unable to appear in discharge of the recognizance. And in the case of the Commonwealth *v. Webster*, etc., 1 Bush, 616, it was held that the defendant having been arrested by a provost marshal, and taken from the county where the prosecution against him was pending, the bail should not be made liable upon the bail bond, because he was, by the United States officer, deprived of the power to surrender the defendant.

But the case of the Commonwealth *v. House*, 13 Bush, 680, though the facts are not fully set forth, appears to be somewhat in conflict with the two just referred to. In that case it is conceded that if the Commonwealth, before the time stipulated for his appearance, arrests the principal and detains him at another place, so that he cannot appear at the time and place mentioned in the bail bond, the bail is exonerated. But it is intimated that the bail would not be exonerated when the principal is arrested and detained by the United States government. Perceiving no reason why the bail should be exonerated in the one case and not in the other, we must adhere to the doctrine announced in the two cases in 2 Duval, and 1 Bush, *supra*, and overrule the case in 13 Bush, *supra*, so far as it is inconsistent with this opinion. But there is another ground upon which the bail in this case should be exonerated. The object of a bail bond or recognizance is to secure the appearance of the defendant in the court having jurisdiction, that he may answer the charge against him, and, if convicted, render himself in execution thereof. Manifestly, the defendant in this case could not have been tried and convicted even if present in the Christian Circuit Court, after having been tried and convicted of the same offense in the United States Circuit Court, still it was the same offense, for which he was held to answer in the State Court, denounced alike by the laws of the United States and of this State.

The judgment is affirmed.

CHURCH DISCIPLINE.

SUPREME COURT OF NORTH CAROLINA.

THE STATE

v.

WM. LINKHEAW.

The disturbance of a religious congregation by singing, when the singer does not intend so to disturb it, but is conscientiously taking part in the religious services, may be a proper subject for the discipline of his church, but is not indictable.

Defendant was indicted for disturbing a religious congregation. The evidence as detailed by several witnesses was substantially this: Defendant is a member of the Methodist Church; he sings in such a way as to disturb the congregation; at the end of each verse, his voice is heard after all the other singers have ceased. One of the witnesses being asked to describe defendant's singing, imitated it by singing a verse in the voice and manner of the defendant, which "produced a burst of prolonged and irresistible laughter, convulsing alike the spectators, the Bar, the jury and the Court."

It was in evidence that the disturbance occasioned by defendant's singing was decided and serious; the effect of it was to make one part of the congregation laugh and the other mad; that the irreligious and frivolous enjoyed it as fun, while the serious and devout were indignant. It was also in evidence (without objection) that the congregation had been so much disturbed by it that the preacher had declined to sing the hymn, and shut up the book without singing it; that the presiding elder had refused to preach in the church on account of the disturbance occasioned by it; and that on one occasion a leading member of the church, appreciating that there was a feeling of solemnity pervading the congregation in consequence of the sermon just delivered, and fearing that it would be turned into ridicule, went to the defendant and asked him not to sing, and that on that occasion he did not sing. It also appeared that on many occasions the church members and authorities expostulated with the defendant about his singing and the disturbance growing out of it. To all which he replied: "That he would worship his God, and that as a part of his worship, it was his duty to sing." Defendant is a strict member of the church, and a man of exemplary deportment.

It was not contended by the State upon the evidence that he had any intention or purpose to disturb the congregation; but on the contrary it was admitted that he was conscientiously taking part in the religious services.

Defendant prayed the Court to instruct the jury that if the defendant did not *intend* to disturb the congregation he was not guilty.

This instruction his Honor refused, and among other things, told the jury that it would not excuse the defendant to say that he did not intend to disturb the congregation. The question is, did he intend to commit the act which *did* disturb the congregation? The jury must be satisfied

that there was an actual disturbance occasioned by the defendant's act. It is a general principle that every man is presumed to have intended the necessary consequences of his own acts.

There was a verdict of guilty. Judgment, and appeal by the defendant.

SETTLE, J.

The defendant is indicted for disturbing a congregation while engaged in divine worship, and the disturbance is alleged to consist in his singing, which is described to be so peculiar as to excite mirth in one portion of the congregation and indignation in the other.

From the evidence reported by his Honor who presided at the trial, it appears that at the end of each verse his voice is heard after all the other singers have ceased, and that the disturbance is decided and serious; that the church members and authorities expostulated with the defendant about his singing and the disturbance growing out of it; to all of which he replied that he would worship his God, and that as a part of his worship it was his duty to sing. It was further in evidence that the defendant is a strict member of the church, and a man of most exemplary deportment.

"It was not contended by the State upon the evidence that he had any intention or purpose to disturb the congregation, but on the contrary, it was admitted that he was conscientiously taking part in the religious services."

This admission by the State puts an end to the prosecution. It is true, as said by his Honor, that a man is generally presumed to intend consequences of his acts, but here the presumption is rebutted by a fact admitted by the State.

It would seem that the defendant is a proper subject for the discipline of his church, but not for the discipline of the Courts. 1—69 N. C. Reports.

LIABILITY OF INNKEEPER FOR LOSS OF GUEST'S PROPERTY.

What great events from little causes spring. The original and ostensible cause of the Crimean war was, in the words of her Majesty, "the key of the back door of a mosque." Leaving a bedroom door unbolted was the origin of the conflict in *Herbert v. Markwell*. But, like the heroes of the chill heights of the Tauric Chersonese, the litigant innkeeper and his guest, who figure in the *Law Times Reports* of the 28th ult., are now at peace—concluded, let us trust, not on the principle of "leaving the door open," against which Mr. Disraeli inveighed, when he called upon her Majesty's Government, in 1855, to "shut the door, and let those who want to come in knock at the door, and then we shall have a safe and honorable peace."

Is a guest at an inn negligent in not locking his door? Such was the question presented in the case referred to (45 L. T. N. S. 649), on which three learned judges delivered elaborate judgments. The plaintiff, who was a solicitor, and his wife were staying at the defendant's

hotel, and it is recorded that, on the eventful night of Sunday, the 8th of May, the plaintiff went to bed about a quarter to twelve, while his good lady had retired about an hour and a half before. Under such circumstances, we are clearly of the opinion that it was, at all events, not the wife's duty to bolt the bedroom door. But, was that duty imposed on the husband? There was no necessity for having recourse to the feeble protection of "a wooden or iron pin, used to keep meat in form," as Dr. Johnson defines the instrument which was applied by the "little maid," whom Wilks has immortalized; for the door—though it had no handle on the outside, but a key that acted as a handle, and might have been prudently removed—was properly provided with a bolt. The plaintiff deposed on the virtue of his oath that he bolted the door when he went into the room, but opened it again to put out his boots. Did he then re-bolt it? He swore he did, but he exhibited some uncertainty in his evidence, and admitted that, shortly after the occurrence which gave rise to the action as next to be narrated, he said, in reply to an observation, that it was impossible to unbolt the door from the inside, "If that is so, I must have made a mistake;" and he certainly showed an absence of caution in other respects, by not removing the key from the outside, and by not depositing any valuables under lock and key in the wardrobe or elsewhere in the room. Be this as it may, it was discovered next morning that his watch, which he had left on a table near the bed, and his wife's watch and some jewelry, which she had left on the dressing-table, had been abstracted. The action was brought to recover the value of the stolen property; and the jury found that the loss would not have happened if the plaintiff had used the ordinary care that might be expected from a prudent man under the circumstances, and did not happen through any wilful act or default on the part of the defendant or any servant in his employ. They assessed the value of the property at £19 10s; and a verdict was entered for the defendant, which the plaintiff sought to have set aside, on the grounds that there was no evidence of negligence on the part of the plaintiff to go to the jury, and that his negligence (if any) was not the proximate cause of the loss, which might have been avoided if the defendant had himself used proper care and diligence.

Now in *Calve's case* (8 Coke 32, 1 Sm. L. 122), it was said, "It was no excuse for the innkeeper to say that he delivered to the guest the key of the chamber in which he is lodged, and that he left the chamber door open; but he ought to keep the goods and chattels of his guest there in safety." Again, in *Morgan v. Ravey* (6 H. L. N. 267), the defendant was held liable, though the plaintiff had forgotten to lock his door, notwithstanding notices posted up cautioning travelers to lock their doors. And in *Oppenheim v. White Lion Hotel Co.* (L. R. 6 C. P. 515), we find one of the judges saying, "I agree that there is no obligation on a guest at an inn to lock his

bedroom door. Though it is a precaution which any prudent man would take, I am far from saying that the omission to do so alone would relieve the innkeeper from his ordinary responsibility." Those cases were cited; but there are others that might be mentioned. For instance, in *Mitchell v. Woods* (16 L. T. N. S. 676), we find Kelly, C. B., holding that there was no obligation on a guest to lock his door, and that, consequently, his omission to do so was not negligence. And in the American case of *Classen v. Leopold* (2 Sweeny, 705), we find the court saying, "Calye's case has not thus far been overruled or questioned in this State. Nor do I perceive any reason why it should be. The doctrine of the case was that the sole object of the giving to and acceptance by the guest of the key of his chamber (there being no attendant circumstances to show a different one), was to enable him to secure privacy at his pleasure; that the entrance of thieves or suspicious characters into the inn without the knowledge or consent of the innkeeper, was to be provided against by the outer door, which was under the care and control of the innkeeper, and which it was his duty so to keep as to prevent such entrance; while as to those guests who obtained entrance with the knowledge and consent of the innkeeper, as well as to the servants, it was his duty to see that they were not thieves or suspicious characters, and if he entertained doubts as to their character, to take proper precautionary measures to preserve his other guests from loss; and that guests had a right to rely on the faithful performance of these duties by the innkeeper, and to believe that they might repose in security in their chambers, with unlocked doors, and that no necessity existed for locking the doors except for the purpose of securing privacy when they might desire it. There is no reason to be derived from the present state of society, civilization and commerce, why the doctrine should not still hold good. The only reason why a guest should be held guilty of negligence in not locking his door is that it is easier to rob a room, the door whereof is unlocked, than one, the door of which is locked. This reason existed at the time of Calye's case, and it is no more apparent to courts and guests at this present day than it was then."

But, truly, the common law liability of innkeepers, on which Calye's case is the leading case, originated at a time when your Boniface was ordinarily the accomplice of cut-throats and highwaymen, while even locking your door was no protection against "a rat" in the arras, or the entry of some grim cut-purse through a secret panel in the wainscot. And as Wiles, J. observed in *Oppenheim's case*, Cōke, in the passage already quoted from Calye's case, "evidently means that the fact that the guest having the means of securing his door, and neglecting to avail himself of them, affords the innkeeper no excuse by way of plea as a matter of law." "I thought," said Bowen, J. in *Herbert's case*, "that, if it was any authority, it had long been killed

by the judgment of Willes, J. in *Oppenheim's case*." And certainly, *Oppenheim's case*, and the still later case of *Spice v. Bacon* (36 L. T. N. S., 896), are distinct authorities establishing that, while there is no absolute duty or obligation on a guest to lock or bolt his door, and his omission so to do is not *per se* negligence, it is an element to be considered by the jury with other facts which might be proved, and which, taken together might amount to negligence. In accordance with this, is also, the American case of *Bohler v. Owens* (60 Ga. 185); and why such questions should be treated as questions of fact is well shown in *Burgess v. Clements* (4 M. & S. 311), where we find Lord Ellenborough saying: "I agree that if an innkeeper gives the key of his chamber to his guest, this will not dispense with his own care, or discharge him from his general responsibility as innkeeper. But if there be evidence that the guest accepted the key and took on himself the care of the goods, surely it is for the jury to determine whether this evidence of his receiving the key proves that he did it *animo custodiendi*, and with a purpose of exempting the innkeeper, or whether he took it merely because the landlord forced it on him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room." And see *Cashill v. Wright* 2 E. & B. 891; *Armistead v. Wilde*, 17 Ad. & E. 261; *Jones v. Jackson*, 29 L. T. N. S. 399. But, as Montague Smith, J. said in *Oppenheim's case*: "The law in Calye's case may remain untouched. But the fact of the guest having the means of securing himself, and choosing not to use them, is one which, with the other circumstances of the case, should be left to the jury. The weight of it must, of course, depend upon the state of society at the time and place. What would be prudent in a small hotel in a small town, might be the extreme of imprudence in a large city like Bristol, where, probably three hundred bedrooms are occupied by people of all sorts." For those reasons, we ourselves are quite of the opinion arrived at in *Herbert v. Markwell*—that it cannot be laid down as a proposition of law that leaving the door unbolted is not evidence of negligence, but each case must depend on its own circumstances, and not bolting the door is one of those circumstances; and that here, even if leaving the door unbolted was not in itself sufficient evidence of negligence to be left to the jury, there were other circumstances which, coupled with it, would be sufficient. Nor is it to be regretted if, apart from 26 and 27 Vic., c. 41, this case should give a lesson to any future guest "who forgot to bar the door, O."—*Irish Law Times*.

PROFANITY.

A few days ago, in England, a Parsee, being called as a witness, and refusing to be sworn either upon the Old or New Testament or the Koran, was permitted to bind his conscience by holding openly in his hand a sacred relic, which

he was accustomed to carry about his person, and thus taking the oath. The judge at the same time remarked that strictly speaking a Parsee should be sworn holding the tail of a cow. Tyler in his History of Oaths says that Sir James Macintosh told him that at Bombay he once had a cow brought into court for this purpose. This would seem a good way to swear a milkman, but a Parsee ought to be sworn upon a grammar. The twelve judges, in Morgan's case, 1 Leach. 24, held that a Mahometan might swear upon the Koran. In *Ormichund v. Barker*, 1 Atk. 21, it was held that a Gentoo might be sworn by touching the foot of one of his priests. In *Eutrehman's case*, Cur. & M. 248, it was settled that a broken china saucer is essential to a Chinaman's oath. The Israelite swears upon the Pentateuch or Old Testament, with covered head. The Bedouin grasps the middle tent pole and swears by the life of the tent and its owner. One form ofswearing among the Scythians was by the roal hearth. In an interesting paper by Mr.s James L. Angle, of Rochester, N. Y., on "the Supernatural in the Administration of Justice," he says: "In his treaty with the king of Sodom, Abraham swore by the uplifted hand (Gen. xiv, 22); in his treaty with Abimelech he swore by Elohim (Gen. xxi, 23); and the Hebrews were commanded to swear by the name of Elohim (Deut. vi, 13; x, 20). The angel in the Apocalypse is represented as combining the two—the uplifted hand and the name of God (Rev. x, 5-6); when standing on sea and land he swears that time shall be no longer. Jehovah is represented as swearing by Himself (Gen. xxii, 16; xxvi, 3; Ex. vi, 8; Heb. vi, 13-17); as swearing by His own life, (Num. xix, 28), and by the uplifted hand (Deut. xxxii, 40). * * * Jacob swore by the fear of his father, Isaac (Gen. xxix, 53), and Joseph by the life of Pharaoh (Gen. xi, 11-15)." Erskine once fell in with a witness who insisted on being sworn with the uplifted hand, because the angel in the Apocalypse was thus sworn. "But," said Erskine, "you are no angel; and then you don't know how he would have been sworn if he had stood on dry land, as you do." We heartily sympathize with Mr. Angle in his observations about "kissing the book." He says; "The custom of kissing the leather covering of a Bible prevails with us; usually the book has been in use for that purpose for many years; it has passed through thousands of dirty, perhaps filthy hands, and been pressed to 10,000 lips, many of them redolent with tobacco juice or reeking with other unsavory liquids, some of them bloated, sore and corrupted, by disease and debauchery. I have seen Bibles in use for this purpose whose stained and begrimed covers looked like fit mediums for contagion, and emblematic of any thing but purity and truth; and the osculatory part of our form, while it might make the gorge rise, would certainly have nothing sacred or solemn in its influence. We read that when 'Jacob kissed Rachel he lifted up his voice and wept' (Gen. xxix, 1); why he wept I recollect hearing discussed in my younger years, and the young

people of my time could never satisfactorily account for such an effect from such a cause, but I can understand why the kissing of some of our court-room Bibles should produce a feeling distorting the features as much as weeping." In *People v. Cook*, 4 Seld. 84, an oath on Watt's Psalms and Hymns, the affiants supposing it to be the Bible or New Testament, was held binding.—*Albany Law Journal*.

THE GENESIS OF PERJURY.

We shall probably never see, and perhaps we have no right to expect, the advent of time when Parliament will treat things just in exact proportion to their real place and importance. What is personal will claim and get in most popular assemblies, our own not accepted, precedence over what is more material, but not so salient and conspicuous; the vivid, obtrusive interest of the moment will push aside things of more permanent consequence. We have not far to look for examples of this tendency, which is so natural as scarcely to merit censure. If Parliament were guided solely by reference to the intrinsic importance of things, it would have found, sooner or later, a little time for considering a matter, the significance of which cannot be easily overrated. At Manchester, the other day, Lord Coleridge took occasion to tell the grand jury that the crime of perjury was greatly on the increase. He had not in view merely local circumstances; for another judge, Lord Justice Baggally, speaking to the grand jury of Carnarvonshire, made much the same remark, expressing his regret that this offence was now so prevalent. If these judgments be correct—and there is no reason to doubt that they contain an element of truth—they unveil a defect in the administration of justice to which all others are secondary. What is the good of Judicature Acts and amending measures, if the very fountains of law are being thus poisoned? It will be all in vain to seek to improve legal machinery if this internal deterioration, to which judges of experience testify, be really going on. Lawyers of the old school will probably say that they are not surprised at this declension. It is, they will argue, the natural, though mournful, outcome of the changes which enable parties on the record and persons interested generally to give evidence. It was predicted, when such a change was suggested, that perjury would become rife; and it will be said that we are now only reaping as we sowed in 1843, 1851, and 1853. This explanation is more plausible than satisfactory. It is not conspicuously witnesses who are "interested," in the legal sense of the term, and who once might have been objected to as incompetent, that are reckless in regard to what they say in the box. Oaths are not more respected in criminal cases, where a remnant of the old rule survives, than in civil cases, from which it is banished. It is not at all certain that if the stupid exclusive system which shuts the mouths of almost everyone who knew anything about the matter in dis-

pute were in full force, fewer perjuries would be committed than is now the case. At any rate, it would be paying dearly for a slight diminution, to forego what are usually the most valuable indications of truth. We shall, perhaps, be told also that the vice is more or less due to the careless, unimpressive, and barely decent way in which an oath is administered in the English courts of justice. Mumbled or gabbled over by some subordinate official, no one heeding what is going on, the oath loses its force over those whom it is intended to affect, and who, it is supposed, would speak under a less keen sense of responsibility if their evidence were prefaced by a bare affirmation. We cite this criticism for what it is worth. There is certainly a contrast, not wholly to our honor, between an oath as administered in foreign courts by the presiding judge, and the same ceremony as slurred over in an off-hand way in an English court. If evidence is to be taken under oath—if we are to abide by the maxim, *In judicio non creditur nisi juratis*—the accessories should not be such as to suggest to a witness the thought, "This is a mere form; everybody in court, from the judge to the usher, treats it as such." There is, however, no reason to suppose that things would be very different if taking an oath were made to look a little more important than shaking hands, bowing, or any secular act of politeness. It would be inventing a far-fetched, unsubstantial explanation, to suppose that the unseemly manner in which witnesses are sworn is at the bottom of much of the evil of which Lord Coleridge and Lord Justice Baggally complain. Make the ceremony as impressive as you can, it will fail to affect very deeply many minds. False witnesses who never studied casuistry under Sanchez or Escobar have always had their little devices by which they palliated to their own satisfaction the crime they committed. They kissed their thumbs instead of the Book. They made mental reservations while they repeated the formula prescribed by law. There is no reason to think that this sort of sophistry is at all more common than it was, or that any fresh appeals to men's consciences would put an end to it. What may be new, and what is perhaps responsible for much loose testimony, is the knowledge more or less precisely possessed by most people, that it is extremely difficult to convict a person who has committed perjury; that convictions for this offence are rare, and that the punishment is at worst not very severe. A man may go into the witness-box and utter there a series of falsehoods in his own interest or that of some other person. It may be plain to everybody who hears him that he lies. Yet in ninety-nine cases out of a hundred he stands down in perfect safety. His sole punishment, in all probability, will be a rebuke from the bench. As soon as the question of prosecuting him arises, difficulties present themselves. It must be shown that he has deposed to some statement which is material to the issue; and that qualification—said to have been due to a blunder as to the meaning of a passage in

"Bracton"—is an excellent safe-guard of rogues. It is not in practice so easy as it might, at first blush, seem, to prove that an averment is at once false and material. Probably, too, no accurate note of what the witness said exists. The enormous expenses incidental to trials for perjury also operate as an encouragement of the crime. Nothing can be taken for granted in a criminal proceeding. The circumstance that a jury in a civil case by implication gave it as their opinion that a witness swore falsely, does not conclude the matter at the Old Bailey or at the Assizes. Everything must be proved there; nothing can be taken for granted; and this rigorous principle necessitates, especially in proceedings for perjury, heavy outlay. The Tichborne trial, which cost the nation many thousands of pounds, has been an evil precedent, and has discouraged the instituting of proceedings for perjury in circumstances in which the crime has been obviously committed. What happens almost every week is not at all edifying. A witness steps into the box and makes statements about transactions said to have taken place in South America or Australia. The story is proved to be false; and the jury unmistakably show that is their view of it. No one, however, cares to go to the expense of making protracted inquiries into these distant countries, and of procuring and bringing over the necessary witnesses, and so the offender goes unpunished, to the scandal of public morals and the encouragement of the evil-disposed. When a perjurer is brought to justice, his fate is not calculated to operate as a striking warning. Though his offence may be as heinous in the eye of a moralist as murder, though it may be committed with a view to destroying the character of the innocent, or robbing a man of his property, the judge finds his hands tied, and is forced to pronounce a totally inadequate sentence. It is a significant fact, that of 13,130 prisoners committed for trial for indictable offences in England and Wales, in 1879, only ninety-one were committed for perjury or subornation of perjury; that only fifty of the ninety-one were convicted; and that only three of the fifty were sentenced to penal servitude. We need not assume that perjury is more prevalent than it ever before was. It is well known that, in spite of the national character for downright veracity, the commonness of this crime in English courts was always a subject of lamentation among our moralists. The pillory was specially reserved for it until recent times. The bishops actually met in 1754, to take counsel how to cope with this crying sin. The professional perjurer, with the straw in his shoe, is as prominent a figure as any in our legal history. In view of all this, we are not disposed to strain the remarks of Lord Coleridge and Lord Justice Baggally, and say that things are worse than they were at any previous time. There is nothing to show that the alterations, first largely introduced into the law of evidence in 1851, and extended, with misgivings in many minds, to the divorce court in 1869, have led to an increase

in perjury. After thirty years trial, of a liberal system of evidence, no clear reason for retracing our footsteps can be adduced. But no one can be acquainted with the inside of our courts without being aware of the enormous amount of petty perjury there, and which passes unpunished. Men perjure themselves because they wish to make good their claims or escape liability. They do so because they are friendly to one of the parties, or because they have once incautiously out of court told some one a certain story and resolved to stick to it when subpoenaed by an enterprising solicitor, or because they are vain and wish to figure in public proceedings. These motives will always operate, and cannot be effectually resisted. But men commit perjury also because they assume, with too much reason, that they will not be punished, and this is a temptation which might be diminished by means too obvious to require explanation.—*London Times*.

PROFESSIONAL ADVERTISING.

It is well for the old attorney, after years of struggle have given him fame, and a lucrative practice, to descant upon the professional degeneracy of the times if a young attorney resorts to printer's ink to inform the world that he is, where he is, and what he is; but the young attorney who is deterred by such antiquated professional ethics and ingenious sophistry from doing so straight forward and sensible a thing reflects discredit either upon his shrewdness in detecting sophistry or his moral courage in facing an old and absurd prejudice.

Is a young man to sit down Micawber-like in the seclusion of his office and whisper to himself amidst its silence, "Here I am, let the world come and employ me?" But, my dear young friend, did it never occur to you that it is a species of presumptuous egotism for you to suppose that the world even knows, much less cares anything about you; and that it is a species of moral cowardice in you to refrain from modestly announcing yourself to the world as an attorney at law? You thus simply do in one form what your ethical stickler does in another. He has reached a point where he can attain the same end by other methods; by his appearance before the public and in the public print in connection with celebrated cases, and in various other ways not yet open to you.

The profession of law in the times when, what we have termed antiquated ethics obtained, was strictly an honorable one and its followers being gentlemen of wealth, pursued it not as now for the purpose of earning a living; nay, it was even no less dishonorable to take pay for services than it was to seek an employment. Does the modern advocate of the old honored custom attest his sincerity by scorning to accept compensation for his own services? If not, is it noble in him, having discarded half the rule himself, to disclaim the young attorney's right to discard the other half?

SUPREME COURT RECORD.

[New cases filed since last report, up to May 17, 1882.]

1157. *George W. Moore v. The Greenville Building and Savings Association*. Error to the District Court of Darke County.

1158. *Joseph Fisher et al. v. Louisa Schlosser*. Error to the District Court of Lawrence County. W. H. Enochs and W. S. McCune for plaintiffs; O. F. Moore and E. F. Williams for defendant.

1159. *John Campbell v. Phoebe B. Johnson*. Error to the District Court of Lawrence County. O. F. Moore and Neal & Cherrington for plaintiff; John Hamilton for defendant.

1160. *Continental Life Ins. Co. v. Andrew Hamilton*. Error to the District Court of Delaware County. Sayler & Sayler and Jones & Lytle for plaintiff; E. T. Poppleton for defendant.

1161. *Mary J. Selman et al. v. J. H. Selman*. Error to the District Court of Brown County. White, McKnight & White for plaintiffs; C. B. Fee for defendant.

1162. *Wilber R. Smith et al. v. Hezekiah Bainum*. Error to the District Court of Brown County. White, McKnight & White for plaintiffs; W. W. Young for defendant.

1163. *Wilber R. Smith et al. v. Taylor Manchester*. Error to the District Court of Brown County. White, McKnight & White for plaintiffs; Thomas & Thomas for defendant.

1164. *Theophilus P. Brown v. The Merchants' National Bank of Toledo et al.* Error to the District Court of Lucas County. Lee, Brown & Lee for plaintiff; Dodge & Raymond for defendants.

1165. *William Bailey v. Jacob Stoneman*. Error to the District Court of Cuyahoga County. R. E. Knight and A. T. Brewer, for plaintiff; Pennewell & Lamson for defendants.

1166. *John Peters v. Isaac Peters*. Error to the District Court of Lawrence County. Ralph Leete, John Hamilton and O. F. Moore for plaintiff; W. A. Hutchins and W. H. Enochs for defendant.

1167. *Lewis Coster v. W. R. Hardman et al.* Error to the District Court of Greene County. T. E. Scroggy for plaintiff; Little & Shearer for defendants.

1168. *Jane E. Sanders v. Annie R. Smith*. Error to the District Court of Jefferson County. W. P. Hays and Walden & Elliott for plaintiff.

1169. *Charles E. Beardsley v. Jarvis Wing, Guardian, &c.* Error to the District Court of Putnam County. C. J. Swan, W. C. G. Krauss and E. N. Lamson for plaintiff.

1170. *Knickerbocker Casualty Insurance Co. v. N. E. Jordan, Administrator*. Error to the District Court of Hamilton County. C. D. Robertson for plaintiff; Jordan, Jordan & Williams for defendant.

1171. *Irving W. Pope v. John Bleasdale*. Error to the District Court of Cuyahoga County. Ranney & Ranney and J. M. Estep for plaintiff; A. J. Marvin for defendant.

SUPREME COURT ASSIGNMENT.

FOR ORAL ARGUMENT.

May 25th—No. 111. *Bundy v. Ophir Iron Co.* No. 112. *Simpson et al. v. Greenfield Building and Savings Association*.

May 26th—No. 114. *Coffin v. The Greenless and Ramsom Co.*

May 31st—No. 1117. *Charles Stoddard v. The State of Ohio*. No. 1118. *Jacob Ridenour v. The State of Ohio*.

June 14th.—No. 1138. *Nelson B. Stone et al. v. Henry C. Viele, Treasurer*.

THE Supreme Court adjourned Saturday last, until Monday next.

Ohio Law Journal.

COLUMBUS, OHIO, : : MAY 25, 1882.

WE published last week, a sensibly worded article, entitled "Professional Advertising," due credit for which should have been given to *The American Law Magazine*, of Chicago, one of our valued exchanges.

THE Supreme Court of the District of Columbia, on Monday last, rendered its decision, affirming the decision of the court below in the conviction of the assassin of President Garfield. Barring accidents, the execution will take place June 30th, next.

RAILROAD—CONSTRUCTION—PAY FOR.

SUPREME COURT OF OHIO.

SCIOTO VALLEY RAILWAY COMPANY

DENNIS CRONIN.

May 9th 1882.

1. Under the act of March 31st, 1874, entitled "an act to secure pay to persons performing labor and furnishing materials in constructing railroads," (71 O. L. 51), a substantial compliance with the conditions of the statute providing for the service of written notice upon the owner of the road is essential to create any obligation on the part of such owner toward the person performing labor or furnishing materials under a contractor or sub-contractor, or to give to such person any right of action against such owner.

2. Where from the nature of the action defendant has notice that the plaintiff intends to charge him with the possession of a written instrument, formal notice to produce the same at the trial is not essential as a foundation for the introduction of parol testimony touching its contents.

3. The limitation of time within which suits under this statute must be brought, applies to controversies arising between the contractor or sub-contractor and the person furnishing materials or work, and not to rights of action on the part of the latter against the owner of the road.

Error to the District Court of Ross County.

The defendant in error commenced an action against the plaintiff in error, before a justice of the peace, on the 24th day of July, 1876. In his bill of particulars he states his cause of action in the following language:

"The said plaintiff, Dennis Cronin, says, that the firm of Spotts, Frank & Co., contractors for building a part of the Scioto Valley Railway, was indebted to him, the said Dennis Cronin, in the sum of fifteen dollars and forty-three cents, for work and labor bestowed by said plaintiff in grade-making upon the line of said Railway. That said amount is yet due to said plaintiff, and is wholly unpaid. That on the 30th day of January, 1876, plaintiff filed with defendant, the Scioto Valley Railway Company, a notice of said claim, in writing, in all

respects complying with the requirements of the statute in such case made and provided: thereby making said claim a lien upon said Railway, and said indebtedness payable from defendant to plaintiff. That said Railway company has not paid such claim, or any part thereof to said plaintiff; wherefore plaintiff prays judgment against said Railway company for said amount of fifteen dollars and forty-three cents, and interest thereon, from said 30th day of January, 1876.

"By WM. E. GILMORE, *his Att'y.*"

On the day set for the trial of the cause, the plaintiff in error, by his attorney, filed a motion to dismiss the action for reasons therein assigned, among which is the following, viz:—

"Because there is no cause of action against the defendant alleged in the bill of particulars."

The motion was overruled by the justice, to which the plaintiff in error excepted.

At a subsequent day the cause was tried to a jury, and after the evidence for the defendant in error, all of which is embodied in the bill of exceptions, was closed, the plaintiff in error moved the justice "to withdraw said cause from the jury, and to dismiss said action, because there was no evidence offered on behalf of the plaintiff to make out a cause of action against the defendant, and because the testimony of the plaintiff showed that more than thirty days had elapsed between the alleged service of notice upon the company and the bringing of the action." This motion was also overruled and exception noted.

Plaintiff in error also asked the justice to charge the jury that they must find for defendant in case it should appear that the suit was not commenced within thirty days from the time the notice of the claim was served upon the company. This charge, the justice refused to give.

At the trial, after proof of service of the notice upon the company, parol evidence of its contents was given against defendant's objection, without showing that the written notice had been lost or destroyed, or that any demand had been made upon defendant for its production.

The verdict and judgment were for plaintiff, and upon error the judgment was affirmed in the court of common pleas, and the action of the latter court was in turn, affirmed by the district court.

LONGWORTH, J.

The cause of action upon which suit was originally brought, was created by the act of March 31st, 1874, (71 O. L. 51), entitled "an act to secure pay to persons performing labor and furnishing materials in constructing railroads," and the solution of the questions raised in this court, depends upon the proper construction of its terms. These questions we shall treat in the following order:

1st. Was the bill of particulars sufficient?

2nd. Was parol evidence of the contents of the notice properly received?

3rd. Was the written notice sufficient under the statute?

4th. Did the lapse of more than thirty days bar the right of action?

I. The rules which govern pleading in courts of record at common law and under the code of civil procedure have never been strictly applied in proceedings before justices of the peace. From the earliest days a very liberal practice, has obtained in this State in reviewing proceedings had before these officers, where the question of their jurisdiction is not involved. A different course would be unreasonable and impracticable, and, to use the language of this court in *Harding v. Trustees of New Haven Tp.*, 3 O. R. 232, "would not only destroy their usefulness, but render them in a great degree deceptive and mischievous."

In the case before us the bill clearly informed the defendant of the nature of the cause of action sued on and the amount for which a recovery was sought.

We are not disposed to quarrel with it because it is not as complete in its statement of facts as might be required of it, had it been filed as a petition in a court of record.

II. It is undoubtedly true that secondary evidence to prove a fact cannot be resorted to until all sources of original evidence have been exhausted, and in general where a written instrument is in the hands of an adverse party, its contents cannot be proved by parol until its production has been called for and refused. There are, however, as laid down by Mr. Greenleaf, three well established exceptions to this general rule, and in which notice to produce is not necessary. First, where the instrument to be produced and that to be proved are *duplicate originals*; secondly, when the instrument to be proved is *itself a notice*, such as a notice to quit, or notice of the dishonor of a bill of exchange; and thirdly, where *from the nature of the action, the defendant has notice that the plaintiff intends to charge him with possession of the instrument*. 1 Greenl. on Ev. § 561. See also 2 Phillips on Ev. 539, and cases therein referred to.

In the case before us the plaintiff's right of action is created by the statute and depends upon the fact of written notice served. Without proof of this no recovery could possibly be had. The bringing suit, therefore, apprised defendant that it would be necessary for plaintiff to introduce the written paper at the trial, which paper at the time was in defendant's possession.

We think the case clearly falls within the last exception to the rule quoted above, which seems to be founded in sound reason and common sense, in view of the fact that the law regards substance rather than mere form. The defendant being thus informed that plaintiff required this paper at the trial, no reason can exist for insisting that it should be a *second time* formally notified of this fact.

III. The statute provides that the notice shall be served upon the railroad company

"within thirty days from the date that said person ceased furnishing said materials or laboring on said road as aforesaid, stating in said notice the kind and amount of materials furnished and labor performed, the time when, the contractor or sub-contractor for whom, and the section or place where on the line of the road the labor was performed or materials were furnished by him as aforesaid, and the amount due him therefor."

A substantial compliance with these requirements is unquestionably necessary to create any liability on the part of the company, their object being to apprise the company of all facts necessary to a thorough understanding of its rights and obligations in respect to its contractor and the person furnishing the materials or labor under him, with the latter of whom it had, up to the time of notice, made no contract and assumed no obligation.

The notice served upon the company was as follows:—

"TO THE SCIOTO VALLEY RAILWAY COMPANY: You are hereby notified that there is due to me, and unpaid, from Spotts, Frank & Co., contractors, the sum of fifteen dollars and forty-three cents, for work and labor bestowed by me in grade-making upon the line of said railway, between the Scioto river bridge and Main street in the city of Chillicothe. I ceased to bestow said labor on the _____ day of _____ 1876, and less than thirty days from the time of filing this notice."

DENNIS CRONIN.

In this we find a substantial compliance with the conditions of the statute. The company is advised of the nature of the plaintiff's claim, the character and value of the work done, the contractors under whom it was performed, the place where done and that it was finished within thirty days next preceding the notice. More than this, it was not the intent of the legislature to require.

These notices are drawn up and served in most cases by unlettered men without the aid of counsel. To require a *literal* compliance with the terms of the statute, would not only be objectless, but would in many cases defeat the very end and aim of the law.

IV. In answer to the claim that suit was not brought within thirty days, we have only to say that the limitation contained in the proviso relates only to disputes between the contractor and the claimant, and not to controversies between the claimant and the railroad company.

It is further urged that the plaintiff failed to make out a case by omitting to prove that the aggregate indebtedness of the contractor for the labor let by the company did not exceed 90 per cent. of the contract price. This fact, if it existed, would have constituted a defense *pro tanto*, and might have been shown by the company. It was not a matter necessary to be proved to make out a right of action.

It is also insisted that there was no evidence tending to show that Spotts, Frank & Co. were

contractors upon the road, and that for this reason, the case should have been arrested from the jury. To warrant such action, there must be an absolute want of proof. In this case, the notice served upon the company, stated that Spotts, Frank & Co. were contractors, and the admission by silence of this fact on the part of the company, although evidence of the most meager and unsatisfactory character, was, nevertheless, proper to go the jury in the absence of any other testimony upon the subject.

Furthermore, it appears from the record that this objection, although covered by the general assignment of errors in the petition filed in the court of common pleas was not specifically alleged, or brought to the notice of that tribunal. Although clearly within its power to have taken cognizance of this subject, it was not bound to search for errors not specifically alleged and its failure so to do, will not necessarily be fatal upon review in the district court or here.

Judgment affirmed.

[This case will appear in 38 O. S.]

RAILROAD—RECEIVER—NOTICE MUST BE GIVEN OF APPLICATION FOR.

SUPREME COURT OF OHIO.

OHIO RAILWAY CO.

v.

HUGH J. JEWETT.

1. A railroad may be sued in any county through or into which its road passes, without regard to the nature of the cause of action.

2. The appointment of a receiver to take from the defendant the possession of his property, cannot be lawfully made without notice, unless the delay required to give such notice will result in irreparable loss.

3. In an action to prevent the consolidation of railroad companies, the election of directors for the new company at a meeting of the stockholders held under section 3383 of the Revised Statutes, will not justify such an appointment against either of the companies, on the ground that part of the stockholders participating in the meeting have been inhibited from doing so by injunction.

Error to the Court of Common Pleas of Franklin County.

The original petition was filed in the Court of Common Pleas of Franklin County, on October 19, 1881, by Hugh J. Jewett and R. Suydam Grant, who sue in their own behalf as stockholders in the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, and in behalf of other stockholders who might come in and contribute to the action. The defendants are the said railway company, the Cincinnati, Hamilton and Dayton Railroad Company, J. H. Devereux, George H. Russell, F. H. Short and Stevenson Burke.

The petition is founded upon the attempted consolidation of the two companies named, and sets out the steps taken to effect such consolidation. The material facts are found stated in the case of *State ex rel. Attorney-General v. Vanderbilt*, decided at this term, *ante*.

The case last named was instituted after the bringing of this action, and it was therein ad-

judged that the attempted consolidations of said corporations was unauthorized and invalid.

The object of the petition in this case was to prevent the election of a board of directors of the consolidated company, known as the Ohio Railway Company, at a meeting of the stockholders to be held at Cleveland on October 20th, 1881. The petition avers that Devereux is a stockholder, director and the president of both companies, and that said Burke is vice-president of the first named company, that said Russell is the secretary of the first named company, and that said Short is secretary of the last named company.

The petition also contains the following averment: "That not only is the said pretended consolidation illegal by reason of the matters and things hereinbefore set forth, but also the interests of these plaintiffs, as stockholders aforesaid in the said defendant, the Cleveland, Columbus Cincinnati and Indianapolis Railway Company, will be greatly prejudiced and irreparably injured by reason of the furthering and completing of said pretended consolidation. That under the said agreement of consolidation, it is intended to consolidate or unite the two corporations defendant into one pretended corporation, with a single management of the said corporations, to keep but one set of books of the earnings of the two lines of railway, and thereby to confuse the earnings and expenses, respectively, of the said corporations defendant, and to make the property and earnings of each of the said corporations liable for the debts and obligations of the other. That the debts and obligations of the defendant, the Cincinnati, Hamilton and Dayton Railroad Company, are actually much greater than those of the Cleveland, Columbus, Cincinnati and Indianapolis Railway company, and that it will be greatly to the damage of these plaintiffs to have the stock of the two corporations consolidated, and the earnings of the properties of the respective corporations amalgamated and confused." And asks that the said corporations defendant, and their respective directors, stockholders and officers, be forever enjoined and restrained from doing any act toward the completion of the said pretended consolidation, or any consolidation of the said corporations defendant, or for the election of any board of directors of the said pretended Ohio Railway Company, and from surrendering the possession of the railways and properties, books, papers and records of the said corporations; or either of them, to the said alleged Ohio Railway Company, or to any board of directors or officers pretending or claiming to represent the same.

And the defendants, J. H. Devereux, Stevenson Burke, George H. Russell, and F. H. Short be, and each of the same be forever enjoined and restrained from in any way furthering, aiding, promoting or participating in the said meetings, called as aforesaid. An *ex parte* temporary injunction was allowed, as prayed for, at the time of filing the petition. And on the same day service was made on the Cleveland, Columbus,

Cincinnati and Indianapolis Railway Company, at Franklin County, and on the other defendants on the morning of the 20th of October in Cuyahoga County, before the meeting for the election of directors.

On October 22, 1881, the plaintiffs, by leave of the court, filed a supplemental petition, in which it was stated in substance that notwithstanding the injunction and service thereof, the meeting for the election of directors of the Ohio Railway Company was held at the time and place appointed for that purpose in which the said Devereux, Burke, Russell and Short participated. That all the stockholders assembled at said meeting were notified of the filing of said petition and the allowance of said injunction before proceeding to such election. That directors were elected at such meeting for the Ohio Railway Company whose names are set forth and who are asked to be made defendants.

It is also averred: "That said pretended directors and officers of said pretended new corporation intend to, and unless stopped by the effective intervention of this court, will take control and management of the property, franchises, and assets of every kind, of the two railroad companies, defendants in this case, in the name of said pretended new corporation, and will abandon and cause to be dissolved the two railway companies, defendants in this case. Plaintiffs say that by reason of facts stated in the original petition, the said two railroad companies, defendants, have not been consolidated, nor can they be; that the meeting stated in the original petition, wherein their stockholders voted to ratify the agreement for consolidation, and the votes there given, as well as the votes cast at the meeting on October 20, 1881, at Cleveland, hereinbefore described, were without legal validity or effect, either to dissolve the old companies or to create a new one."

The appointment of a receiver was prayed for, to take possession and control of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company's road, and of all other roads leased or held by it, and of all of its property of every kind and nature whatsoever, and to hold and operate said roads under the direction of the court until further ordered; and for such orders of injunction as would enable the receiver to fulfill the duties of his appointment.

At the time of the filing of the supplemental petition an appointment *ex parte* of a receiver was made as prayed for, and such orders entered as would enable him to take control of all the property and rights of the said company, and to fully perform the duties of his appointment.

The receiver gave bond and was duly qualified as required by the court.

On application to this court, leave was granted to the plaintiffs in error to file the present petition in error to reverse the order appointing the receiver, and all orders founded upon and in execution of said appointment; and the execution of the duties of said appointment, and of

said orders, were stayed until the petition in error could be heard.

Harrison, Olds & Marsh for plaintiffs in error.

Converse, Booth and Keating for defendants in error.

WHITE, J.

The only question before us for determination relates to the order appointing the receiver, and the orders made in aid of such appointment.

Whether the service of process upon the original defendants, Devereux, Burke, Short and Russell, in Cuyahoga county, was effective to subject them to the jurisdiction of the court issuing the process, is not before us for consideration; that branch of the case is still in the court of common pleas. The only parties interested in the question of the appointment of the receiver, are the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, and the original plaintiffs Jewett and Grant. The company, for any cause of action against it, was brought into court under the last clause of section 5027 of the Revised Statutes, which provides, that "an action against a railroad company may be brought in any county through or into which such road or line passes."

The meeting held at Cleveland was a meeting of the stockholders only. The corporations had no corporate duty to perform at the meeting. The object of the meeting was to comply with section 3383 of the Revised Statutes. The section provides for a meeting of the *stockholders* of the original companies, at a time and place to be fixed by themselves, to elect directors and other officers of the new company formed by the consolidation; and it is declared that the "election shall be conducted in such a manner as may be prescribed by the *stockholders* at such meeting."

The ground of action stated in the petition was the invalidity of the consolidation. This invalidity arose from the incapacity of the corporations, under the statute, to effect such consolidation. There being no power to consolidate, the original corporations continued to exist in their integrity, with all their rights of property and franchises. As such corporations they were respectively enjoined, under the original petition, "from surrendering the possession of the railways and properties, books, papers and records of the said corporations, or either of them, to the said alleged Ohio Railway Company, or to any board of directors or officers pretending or claiming to represent the same."

The alleged violation at the meeting, of the injunction, by the defendants, Devereux, Burke, Short and Russell, did not constitute ground against the corporation of which they were stockholders, for the appointment of the receiver; and it was only in the capacity of stockholders that they acted or had any authority to act at the meeting.

It does not appear who constituted the other directors of the defendant company; nor is it averred that the company or any of the directors were intending, in violation of the injunction against the company, to surrender or transfer its property to the alleged Ohio Railway

Company, its directors or officers. No such transfer could be effected by operation of the statute; for the consolidation was not authorized by the statute.

There was no obstacle to giving notice to the company before acting on the appointment of a receiver. No fraud or insolvency was charged against any of the parties; nor that the property of the company was in danger of removal beyond the jurisdiction of the court, or of otherwise being lost. The controversy was solely as to the effect of the attempted consolidation.

Under the circumstances of the case, the appointment of the receiver was an unwarranted exercise of judicial power, which it is the duty of this court to reverse and set aside. *Railroad Co. v. Sloan*, 31 Ohio St. 15; *Verplank v. Insurance Co.*, 2 Paige, 438.

Judgment accordingly.

[This case will appear in 37 O. S.]

PASSENGERS IN PUBLIC CONVEYANCES.

SUPREME COURT OF MICHIGAN.

CUDDY v. HORN.

The rule by which one who rides in a private conveyance is presumed to control, or be identified with, the driver, and to have no right of action for any injury done him by a collision caused by the driver's negligence, cannot apply to passengers in public conveyances, such as railway cars or steamboats, even though they have chartered the conveyance.

The master of a vessel cannot relieve himself of responsibility for its safe management by surrendering its control to a charterer.

Where a passenger in a conveyance can have no control over those in charge of it, he cannot be held to be so identified with them as to be considered a party to their negligence.

Passengers on a steam yacht chartered for their use, but not under their control in matters of navigation, have a right of action against its owners for injuries caused them by the negligent management of those in charge of it.

An act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them without concert, renders them liable, either jointly or severally.

If a passenger upon one vessel is injured by its collision with another in consequence of the negligence of the officers of both, he has a right of action against them jointly and it is for the jury to fix the liability where it belongs.

Where evidence tends to make out a case for the plaintiff, its force and effect is for the jury, and the Supreme Court will not attempt to review or weigh it.

The Limited Liability Act of Congress exempting ship-owners from personal liability for injuries caused by the negligence of those in charge of their vessels, does not apply to boats navigating streams connecting the great lakes.

MARSTON, C. J.

The following statement of facts taken from the briefs of counsel for the defendants, is sufficiently full and accurate for a definite understanding and discussion of the legal questions raised. The action was commenced by the plaintiff, as administrator of the estate of John Kelley, deceased, to recover damages on account of his death caused by a collision between the steamer "Garland," of which the

defendant, Horn, was owner, and the steam yacht "Mamie" owned by other defendants on the Detroit river, July 22d, 1880. The declaration alleged, in substance, that the "Garland" was going down the river upon a pleasure excursion, and the "Mamie" was coming up, returning from a pleasure excursion, and that Kelley was a passenger on the "Mamie"; that by failure of the master of the "Garland" to keep a proper lookout, and by his failure to give proper signals at the proper time upon the approach of said "Mamie," as required by rule 3 for the government of pilots, and by reason of the failure of the master of the "Mamie" to give the proper signals to indicate upon which side she would pass until the vessels had approached so near that a collision was inevitable, and by reason of the failure of the owner and master of the "Mamie" to keep a proper lookout upon said "Mamie," said vessels collided, and said "Mamie" sank, causing the death by drowning of said Kelley.

The defendant, Horn, and the other defendants filed separate pleas of the general issue. The owners of the "Mamie" also filed a plea in abatement, alleging that proceedings had been commenced, and were then pending in the District Court of the United States by them as owners of the "Mamie" for the purpose of taking advantage of the statute of the United States limiting the liability of vessel owners in certain cases. And special notice of such proceeding was also given with the plea of the general issue.

A trial was had upon this plea, and a verdict, by direction of the court, rendered for the plaintiff thereon, and the trial thereupon proceeded upon the plea of the general issue, and a verdict was rendered in favor of the defendants. The case comes here on writ of error, and the points relied upon by the defendants will be considered in order.

The position taken by defendant, Horn, was that the plaintiff's intestate was a passenger on the "Mamie" at the time of the alleged collision, and the "Mamie" having contributed to the collision, plaintiff's intestate must, in law, be held to have been so far identified with those in charge of the yacht, that he could not have recovered, if he had survived, for an injury suffered by him occasioned by such collision, and that, under the terms of the chartering or hiring of the yacht, he could not have recovered for an injury so received.

It appeared that Rev. A. F. Blyenberg had chartered the steam yacht "Mamie" to carry a party of altar-boys and others, twenty-one in all, and fourteen of them from eleven to fifteen years of age, from Detroit to Monroe and back, for which he was to pay \$20; and

that the yacht was in charge of the master and engineer placed there by the owners. At the time of chartering the yacht it was stated that there would be about twenty persons to go on the trip, but no limit was placed upon the number or as to the route to be taken in going to and returning from Monroe.

It has not, and could not be claimed, that young Kelley had any authority or control whatever over the master or engineer of the yacht, or that he could have changed or directed the movements of the yacht in even the slightest degree. And while Father Blyenberg, we may assume, could and did have charge of the yacht, as to the time of starting, the number of passengers and such like, yet, as to the due and proper management of the vessel, the steam she should carry, the speed at which she should be run, the course she should take within certain limits, the rules she should observe in meeting and passing other vessels, the lights she should carry, in a word, the laws and rules applicable to such crafts while navigating the rivers and lakes, were matters over which he could not rightfully be permitted to have any control or direction whatever. These were matters which the master of the vessel could not legitimately turn over to the guidance of any person who may have chartered the boat for a trip to and from a certain point. Had directions been given the master to run the yacht ashore, or upon a rock, or to run down upon and destroy a rowboat, or to not give and answer the necessary signals when approaching another vessel, or to not carry proper lights, clearly the master would have been under no obligations to obey such orders, and neither he nor the owners of the vessel could have justified such a departure from duty by setting up the authority or directions of Father Blyenberg therefor. In this case it was the legal duty of the yacht to carry proper lights at night, and to give and answer certain signals in due and proper time when approaching another vessel, and what the law had thus directed to be done could not be varied, changed or controlled by any person who may have chartered the vessel for the occasion. And where a person can rightly have no voice or control, he cannot be held so identified with those in charge as to be considered a party to their negligence. It seems to me that any other rule could but point out the way to owners of vessels in which they could violate all rules and regulations adopted to insure the safety of passengers without incurring any liability therefor.

The reason for holding a person riding in a private conveyance identified with the driver thereof, and, therefore affected by the negligence of the latter, cannot fairly be held applicable in cases

like the present. In the case of a private conveyance the driver is under the direction and control of the passenger, and, if not, the latter may well decline to intrust his safety further in such conveyance. When, however, a person enters a public conveyance, and certainly a railroad train or a steamboat, he has no such control over the movements of either, and whether he may have chartered such conveyance for a special purpose or not, yet for a faithful observance of the rules of law enacted for the running or navigation thereof, he cannot be held responsible in a case like the present, where the master is not his servant and is not subject to his direction or authority.

The authorities cited by counsel for plaintiff in error, and which decline to follow *Throggood v. Bryan*, 8 C. B. 115, should be followed in the present case. The charterer in this case did not appoint the officers of the boat but was himself, and those who accompanied him, under and subject to their power in the navigation of the vessel; and if they, thus controlling the movements of the "Mamie" while running, and representing the owners thereof, were guilty of negligence in the performance of their duties, those aboard have a remedy for injuries suffered in consequence thereof. See also *Covington T. Co. v. Kelley*, 36 Ohio St. 86.

It was next insisted that there was no joint liability on the part of the defendants. The question is not free from embarrassment, and upon a trial the danger is that each defendant is interested in endeavoring to throw all the blame upon the other, and perhaps attempt to prove acts of negligence not set forth in the declaration. In opposition to this, it may be said that negligence caused a collision by which plaintiff's intestate was killed, and that a remedy is given by statute to recover damages therefor; that if separate actions are brought different juries may acquit all the defendants, and thus the plaintiff be defeated, although his right to recover be unquestioned. When, therefore, such embarrassments are likely to arise upon the trial, and bearing in mind that the plaintiff is without fault and is entitled to recover—at least we must so consider in the discussion of this question—is not the plaintiff who has thus suffered the wrong entitled to a remedy, and that the difficulties and dangers are to be thrown upon those presumably in the wrong, rather than upon him who was not in fault? If, in either view, injustice is likely to be done, should not the defendants assume, or be charged with, the risk? Is there, however, likely to be any injustice done in holding them jointly liable? I think not. The facts are likely to be brought out in such a trial; neither will be interested in keeping back any thing tending to show that it was the other alone that was in fault; and we cannot assume that any wilfully false evidence will be given in the case. The facts are quite likely, therefore, to be fully presented to the jury, who can place the responsibility where it rightfully belongs, either by holding both liable or by

holding one party liable and acquitting the other.

An act wrongfully done by the joint agency or co-operation of several persons will render them liable jointly or severally. The injury done in this case resulted from a collision caused by the contemporaneous act of two separate wrongdoers, who, though not acting in concert, yet by their simultaneous wrongful acts put in motion the agencies which together caused a single injury, and for this the injured party could receive but a single compensation. It is a fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed. That rendered them jointly liable to the person injured, whether the act was done by the procurement of one person or of many; and if by many, whether they acted with a common purpose or design in which they all shared, or from separate and distinct motives and without any knowledge of the intention of each other, the nature of the injury is not in any degree changed or the damages increased which the injured party has a right to receive: *Stone v Dickinson*, 5 Allen 30.

In *Colegrove v. N. Y. Cent. & Hud. River Railroad Co.*, 20 N. Y. 492, it was held that a passenger injured by a collision resulting from the concurrent negligence of two railroad corporations could maintain a joint action against both. *Cooper v. E. T. Co.*, 75 N. Y. 116, was a case where death had resulted from a collision by two vessels, and an action against both was maintained. In my opinion this action may be maintained against the owners of both vessels: *Hillman v. Newington*, 23 Albany Law Jour. 294.

It was next insisted that the case made by the plaintiff showed no fault or negligence on the part of the owners of the "Mamie" that would justify a verdict against them. The rule must now be considered as settled in this state, that where the evidence tends to make out a case for the plaintiff, the force and effect thereof must be submitted to the jury, and that this court will not attempt to review or weigh it.

In a case like the present it would be dangerous in the extreme for this court to attempt to find the facts or to draw inferences from the facts proven, or to attempt to say what might be considered an act of negligence or sufficient evidence thereof. In our opinion the case upon this point should have been submitted to the jury; and, in view of the fact that there must be a new trial, it is better that this court should not enter upon a discussion of the facts which lead us to this conclusion. It was also urged that this case came within the limited liability act of Congress, and that the defendants, owners of the "Mamie," were not personally liable. The learned judge before whom the case was tried held that the "Mamie" did not fall within the provision of the United States statutes, citing in support thereof *Am. Transp. Co. v. Moore*, 5 Mich. 368, *The Mamie* 5 Fed. Rep. 813. We are of opinion that these cases fully covered this question, and

that the view taken by the court below upon this point was correct.

As we have thus passed upon all the material questions raised, and are of opinion that the court erred upon the questions designated, the judgment will be reversed, with costs, and a new trial ordered.

LEASE—FRAUD—REPRESENTATIONS.

SUPREME COURT OF MINNESOTA.

WILKINSON

v.

CLAUSON.

April 5th, 1882.

In the course of negotiations between plaintiff and defendant for a lease of stores then in process of completion, whose situation required a sewer, plaintiff, who had constructed a sewer therefor with ordinary care, in good faith recommended the said stores as suitable for defendant's business, and stated to defendant "that there was an excellent sewer connected with them, which would make the premises clean." The written lease thereafter executed, contained no stipulations upon these matters, and no references to the sewer. Said sewer was sufficient in ordinary storms, but subsequently proved insufficient in a heavy rainstorm of exceptional severity, and said premises were flooded and defendant's goods greatly damaged. *Held*: (1) That said representations are to be taken as the expression of plaintiff's judgment and opinion merely, and fail to sustain the charge of fraud; and the same are not to be construed as a part of the terms of the contract. (2) There is no implied covenant in the lease that said stores were suitable for defendant's use, or supplied with proper drainage. (3) No wrongful act or omission on plaintiff's part being shown, and no stipulation in his contract violated, he is not liable for said damage, but is entitled to recover upon said lease.

Appeal from District Court, County of Ramsey.
VANDERBURGH, J.

The defendant entered into possession of the demised premises prior to November, 1878, and moved out in March, 1880. This action is to recover rent due for the last two months of his occupancy. The lease was for a term of three years and upwards, and before it was executed certain negotiations took place in reference to the stores to be occupied, then being built, during which, as the trial court finds, "the plaintiff recommended said stores to defendant as suitable for his business, which was that of merchandizing, and stated to him that there was an excellent sewer connected with the stores, which would make the premises clean." This appears to be the sum of the representations upon which defendant predicates his charge of fraud in connection with the leasing of said premises. The lease itself expresses no covenants on plaintiff's part which are claimed to have been broken. It contains no representations on the subject of the sewer or the suitability of the tenement for defendant's use; but aside from the usual covenants for letting, its provisions relate wholly to the matter of the finishing and fitting up of the rooms to be occupied by the defendant, including the basement in which the defendant proposed to store goods. At the time of said negotiations, said sewer had been constructed with

ordinary care and prudence by plaintiff, and both parties believed the same sufficient, though it was not examined by defendant; and the same was in fact sufficient in ordinary storms, but proved insufficient and inadequate in a heavy rain storm of exceptional severity, which occurred while defendant was occupying said premises, in July, 1879, and said sewer was broken, and the said basement flooded with water therefrom, in connection also with a large amount of surface water, and said defendant's goods therein were greatly damaged. No other damage is complained of in the case.

The findings of the court, embracing the foregoing facts, are fully supported by the evidence, and, we think, constitute no defence to plaintiff's claim for rent, or cause of action for damages by way of counter-claim. It is apparent that the lease was made in entire good faith, and the plaintiff having exercised the care of a man of ordinary prudence in the construction of said sewer, which is the only matter complained of, his general statement in reference to the condition and character of the premises must be considered as the expression of his opinion and judgment in the matter, and is insufficient to establish the fraud charged. It was not properly matter of false description, or erroneous statement of facts not known to be true, which might mislead the party to his injury; neither was it competent evidence of the agreement and understanding of the parties, being outside the writing. *Denton v. Serrish*, 9 Cush. 93-4.

Laying out of view the question of fraud in the case, the plaintiff's obligation and duty rest wholly in the written contract. The words "demise or let," or their equivalent, in a lease, imply a covenant for title and for quiet enjoyment, but no other covenants on the part of the lessor are implied therein. *Foster v. Peyser*, 9 Cush. 246. There is no implied covenant in this lease that said stores were provided with drainage facilities suitable for their location, or that said stores were suitable for defendant's business for that or any other reason. The lessee is the party most deeply interested in protecting himself against casualties of storm and fire, and he should see to it that proper stipulations are embraced in the contract for his own security. And as said in the case just cited, (page 247), "if he really mean a lease to be void by reason of any unfitness in the subject for the purpose intended he should express that meaning." See, also, *Wells v. Castles*, 3 Gray, 323; *McGlashan v. Talmage*, 37 Barc. 315; *Jeffe v. Hartean*, 56 N. Y. 398. There may be one or two exceptions to this rule, as in the case of houses or rooms rented ready-furnished, not, however, material to be considered here.

The case of *Whittle v. Webster*, 55 Ga. 180, relied on by appellant, turned upon the statute of the State. *Swift v. Hotel Co.*, 40 Iowa, 322, also cited, was an action by the tenant for damages for not furnishing a hotel as covenanted. *McAlpin v. Powell*, 1 Abb. (New Cases), 427, was an action for negligence under the statute,

for a defective fire escape. *Scott v. Simmons*, 54 N. H. 426, in which the court strongly support the doctrine of the cases above cited, was based on a charge of negligence. *Cesar v. Karntz*, 60 N. Y. 229: A landlord had knowingly leased premises infected with contagious disease.

Others cited, are cases where the course of conduct of the landlord in reference to the premises has been adjudged equivalent to eviction. The evidence objected to on the trial by defendant as to the size, and manner of construction of said sewer, also the advice and opinion of the city engineer, an expert, about the same, were proper, and went to the question of plaintiff's good faith and due care in its construction. The evidence as to the nature of the storm in question, was also proper, to show how the premises were affected by it, and to a full understanding of the real cause of the injury. But the evidence in chief sought to be introduced, of subsequent storms, which are not complained of, was immaterial. And the rejection of the same offer upon cross-examination could in no event have wrought any prejudice, as we view the case.

The order denying a new trial should be affirmed.

JUROR—COMPETENT EVIDENCE.

SUPREME COURT OF IOWA.

STATE OF IOWA

v.

NELSON.

April 21, 1882.

Where a juror, on his examination on trial of an indictment against the defendant for selling intoxicating liquors contrary to law, expressed himself as being opposed to the law, and a challenge for cause was overruled, *held*, proper.

When the reputation of a witness for general morality and truth is assailed, it is competent to sustain his character by showing that those having the best opportunity of knowing his reputation have heard nothing said respecting his character. Such negative evidence, while not the best evidence, is competent proof of good reputation, and should be accepted and weighed by the jury. A statement by the court during the trial that such evidence is the best evidence to prove a good reputation, is a mere abstraction, and can have no bearing upon the ultimate decision, where the court leaves to the jury the weight and effect of the evidence.

Where testimony was excluded by the court, if the ruling was erroneous, the error is cured by the testimony being subsequently admitted.

Where the witness called for the prosecution testified that he drank liquor in defendant's saloon, and defendant, as witness on his own behalf, testified that he did not remember selling whisky to the witness, the evidence was deemed sufficient to sustain the verdict, in a prosecution for the sale of liquor contrary to law.

The defendant was indicted for, tried, and convicted of the crime of nuisance, committed by using a building for the purpose of keeping and selling therein intoxicating liquors contrary to law. The defendant appeals.

DAY, J.

1. The jury being filled for the trial of the cause, with the exception of one man, and the defendant having exhausted his peremptory challenges, H. Monroe was called by the sheriff, and

upon examination answered as follows: "I have no opinion in this case; I would try my best to do justice to a man on trial for an offense of this kind. Almost every one knows that I am opposed to the business of saloon keeping. I am opposed to the law regulating the sale of intoxicating liquors, but as long as it stands as it is now, I am not prejudiced against a man for selling beer or wine. I am not a license man. I mean just what I say." The defendant thereupon challenged the juror for cause, because of his opposition to the law as it now exists. The challenge was overruled and the defendant excepted. It appears from the answers of the juror that his opposition to the law grows out of the fact that it does not prohibit the sale of wine and beer. Still the juror testifies that as the law stands he is not prejudiced against a man for selling beer or wine. In other words, that proof of the sale of beer or wine would not have any influence upon him in considering the case. From the juror's statement it appears that his opposition to the law would not affect him in the consideration of the case, and that, notwithstanding such opposition he could render an impartial verdict. The challenge to the juror was properly overruled.

2. The only witness introduced in chief on the part of the State was James Spencer. For the purpose of impeaching the witness, the defendant introduced a number of witnesses, who testified that the general moral character of James Spencer in the neighborhood where he lives is bad. To sustain the character of the witness, the State introduced one J. C. Painter, who testified that he had known the witness about five years, and had never heard anything worse of him than drinking. Upon cross-examination, Painter testified that Spencer had been in his employ for two or three years and had handled thousands of dollars for him. When called upon to name some person he had heard speak well of Spencer, the witness said, "I don't know that I ever heard any person speak good or bad of him." The court thereupon said: "Where a man has lived for five years in the neighborhood of a man, and been his employ for two or three years, and mixed with the same people, and the witness who is on the stand never heard that man's character or honor called in question, that is the best kind of evidence that he is a man of good moral character, for the reason that we have but few trumpeters for what good we do in this world, but we have many trumpeters for the evil we do. It is generally like rolling snow—the further it goes the larger it gets." The defendant objected to this statement, for the reason that the jury are the judges of the testimony.

The State also introduced one D. B. Gotshall, who testified that he was somewhat acquainted with James Spencer, and knew him for two years in Jasper County, but did not know his general moral character in that county before he came to Polk County. The court thereupon said: You can ask him whether during all

that time, he ever heard his character called in question. I do not decide that that is conclusive proof, but it is good proof tending to show a man's good character. If you have associated and done business with the same people, and never heard his character called in question, you may take it as good evidence tending to establish his character. It is the strongest kind of evidence in that direction." The defendant excepted to this statement of the court. The State then asked the following question: "You may state whether, while you knew Mr. Spencer in Jasper County, you ever heard anything against his reputation or character." To this the witness answered: "I do not." Respecting this evidence the court instructed the jury as follows:

"When there has been testimony introduced for the purpose of showing that a witness who has testified in a case has a bad moral character and a bad reputation for truth, and witnesses are introduced to rebut such testimony, and they testify that they have lived in the same neighborhood with the witness for four, five, or six years, and show that they have mixed, done business and associated with the same people that the witness has lived among for five or six years, and then testify in substance that they never heard anything against the witness' moral character, and that they have never heard his reputation for truth called in question, that is among the best of evidence tending to show that the witness has a good reputation in both of said respects, and such testimony is entitled to just such weight and credit, and just such weight and credit only, as you may think it entitled to."

To this instruction the defendant excepted.

The defendant assigns as error the several actions of the court above objected to. It must be competent for one, whose reputation for general morality and truth is assailed, to sustain his character by showing that those having the best opportunity of knowing his reputation have heard nothing said respecting his character. Otherwise, the person who has so far lived a blameless life as to provoke but little discussion respecting his character, would oftentimes be utterly unable to support his character when assailed. We are inclined to think, however, that the court was not strictly correct in characterizing this evidence the best evidence of reputation. It cannot fairly be said that proof that one's neighbors have never heard his character canvassed, is better proof of his good reputation than proof that his neighbors generally speak in terms of commendation of his character. All that can properly be said of the kind of negative proof under consideration is that it is competent proof of good reputation, and should be accepted and weighed by the jury. Still, taking the whole action of the court together, we are unable to see how the defendant could have been prejudiced by it. The statement during the trial that the evidence proposed was the best evidence, and the direction to the jury that it was among the best evidence,

was the statement of a mere abstraction, having no practical bearing upon the ultimate decision, so long as the court left to the jury the question of the weight and effect of the evidence, and directed them that it was entitled to such weight and credit, and such weight and credit only, as they might think it entitled to.

3. The witness, James Spencer, upon cross-examination, testified: "I make my headquarters on the east side, at Mr. Stolgren's. He furnished me all the money I wanted." He was then asked the following question: "Do you know of Stolgren and Nelson having had trouble a short time ago?" This was objected to as immaterial, and the objection was sustained. It is insisted that as Spencer made his headquarters at, and was furnished money by Stolgren, it was competent to show the relations existing between Stolgren and the defendant, as having some bearing upon the interest which the witness might feel in the prosecution. But the witness did subsequently, in the further progress of the cross-examination, state all that he knew about the difficulty between Stolgren and the defendant, and when he learned it. If, then, the ruling of the court was erroneous, which we do not determine, the error was cured by the testimony subsequently admitted.

4. The witness, Spencer, was asked, upon cross-examination, what was his condition as to being sober when he testified before the grand jury. The State objected to the question as not proper cross-examination, and the objection was sustained. The appellant insists that this examination was proper, because the witness admits that he had refreshed his recollection by reference to his testimony before the grand jury. Upon the contrary, the witness testified that he had not refreshed his memory by his testimony before the grand jury, and that he had not seen the minutes of that testimony since he gave it.

5. The defendant insists that the evidence is not sufficient to support the verdict. The witness Spencer testified that he bought whisky from the defendant, in his saloon. The defendant was a witness on his own behalf. In his testimony, he does not deny that he sold whisky to Spencer, but simply states that he does not remember doing so. In our opinion the evidence supports the verdict. The instructions given properly reflect the law of the case. Those asked and refused, so far as they embody the law, were embraced in the instructions given.

We discover no error in the case. Affirmed.

TRESPASS BY SHERIFF — RIGHTS OF MARRIED WOMEN.

SUPREME COURT OF PENNSYLVANIA.

FREEMAN AND WIFE v. APPLE ET AL.

January 2, 1882.

Certain property had been seized and taken in execution as the property of the defendant in the execution, which was afterwards sold by the sheriff, notwithstand-

ing notice from the wife of defendant that the said goods were her own by virtue of a parental gift.

Held, that the sheriff was liable in an action of trespass, although he may never have actually taken manual possession of the goods levied on. His return that he "had taken and sold" is conclusive.

The fact that after the sale the husband had rented the goods from the purchaser does not affect the wife's right or the sheriff's liability.

STERRETT, J.

In taking the case from the jury and directing a verdict for the defendants, the court below virtually ruled that the sheriff was not liable in trespass for advertising and selling the separate personal property of the beneficial plaintiff on an execution against her husband, after being duly notified in writing of her title thereto. It is contended there was error in this.

The uncontradicted testimony is that the property which was the subject of the alleged trespass, was given to Mrs. Freeman by her parents shortly after her marriage in 1870, and continued to be her separate property until it was advertised and sold by the defendant, Sheriff Apple, on the execution against her husband, in disregard of the notice that it was owned and claimed by her as a parental gift. If the case had been submitted to the jury, it would have been impossible for them to have found otherwise without disregarding the evidence. So clearly and conclusively were these facts proved that the learned judge in his charge assumed Mrs. Freeman's ownership of the property in question as an established fact; but, notwithstanding all this, he refused to affirm the plaintiff's first point, and thereby instruct the jury that the sheriff was liable in trespass, if they believed the property belonged to her at the time of the sale, and was purchased by Mr. Slocum on his own account, and is still owned by him. On the contrary, he withdrew the case from the jury by charging that "the right to the occupancy and enjoyment of the property has not been interfered with by the sheriff, nor was it so interfered with at the time of bringing this suit, and your verdict will be for the defendants." In this we think there was error. If the allegations of fact embodied in plaintiffs' point had been found in their favor they would clearly have been entitled to a verdict; and for present purposes, it must be assumed they would have so found. As has already been suggested, there was no testimony on which a contrary finding, as to the main facts, could have been based. The fact that the levy was made by his predecessor in office furnished no justification or excuse to the sheriff for enforcing the levy by advertising and selling the wife's property on the execution against her husband, especially after having received written notice of her title; nor was the trespass in any wise condoned by the arrangement made with the purchaser, by which he permitted the property to remain in the possession of the plaintiffs in consideration of a certain rental for the use thereof. While it is true the maxim, *caveat emptor*, was applicable to the purchaser, and he took such title only as the defendant in the execution had in the property, it may have been both prudent and economical to

recognize his title and make an amicable arrangement as to the retention and use of the property rather than embark in a controversy that might have involved both inconvenience and expense. But, it is claimed, that, inasmuch as there was no manual seizure or removal of the property by the sheriff, no trespass was committed. We cannot regard this position as tenable. There was at least a constructive seizure and delivery to the purchaser. By disregarding the notice of title that was given, and proceeding to advertise and sell the goods of a stranger to the execution, he unlawfully exercised an authority over them against the will of the owner, and so far invaded her right of property as to subject himself to an action of trespass: *Paxton v. Steckel*, 2 Barr, 93, and cases there cited. In that case the court say: "It is not necessary to constitute trespass by an officer, who executes a writ of attachment on chattels, to prove any manual handling of the property, or taking them into possession. The levying of the attachment may be done without these acts and the property be fully bound by it. * * * Trespass *de bonis asportatis* against a sheriff is maintained by proof that he unlawfully exercised an authority over the chattels against the will and to the exclusion of the owner, though there was no manual taking or removal when he took them under process of law and by virtue of his office." In the case before us, the sheriff returned that, after having given due and legal notice, he did, on the 16th day of January, 1879, sell the property, etc. According to the authorities the return is conclusive upon him, and neither manual taking, occupation or removal was essential to render him liable to the beneficial plaintiff. The first and fourth assignments of error are therefore sustained.

It follows also, from what has been said, that the plaintiff's second point should have been affirmed. The wife's right of action against the sheriff for illegally advertising and selling her property could not be defeated by the act of her husband in recognizing the right of the purchaser at sheriff's sale and agreeing to pay him a stipulated sum for the use of the property. It would be a novel doctrine, indeed, to hold that her right of action against the sheriff could be preserved only by permitting the purchaser to remove the property, and thus deprive her of household furniture, beds, bedding and other articles necessary to the comfort of herself and family. No such unreasonable technicality as that can be invoked for the protection of a wrong-doer.

Judgment reversed, and a *venire facias de novo* awarded.

THE IDEAL LAWYER.

Our highest ideal of a lawyer is not a man who simply works for success that he may gain large fees, become wealthy and have the luxuries of affluence, and enjoy the renown of a rich man; but rather, a man who lives and cherishes his profession for its high and ennobling employ-

ments and associations, for the opportunity it affords him to participate in the administration of justice, which he always loves for its commanding influence in politics and government, and for the part it performs in moulding the civilization of his country and age. He accepts the honors and emoluments of his profession as tokens of approbation from his clients, his fellows and his country; and not as the tradesman or speculator receives his gains, as the reward of his shrewdness. Again, our typical lawyer prepares himself to serve his clients, and patiently waits for them to come and employ him. Some very distinguished lawyers have waited long, but still, with commendable patience, they waited. In this mercenary age, when money-making is so much prized, when expensive habits of life prevail, we should guard against its demoralizing influence, and see to it that our ambition to be rich, or the pecuniary demands upon us, shall never become a factor in the determination of our compensation, which should always be regulated by the meritoriousness of the services rendered, the value of the matter in controversy, and the ability of the client to pay. Again, we should be careful that this mercenary spirit, this love of employment for gain, should not induce us to countenance the methods of the modern charlatan. A shyster hunts up an apparent cause of action, and obtains leave to bring a suit, upon condition of employing a reputable lawyer to aid him. The suit is brought, and though successful for a time, ends in the defeat and ruin of the client, who was lured into the suit by the association of the reputable lawyer with the shyster. Though the shyster was the party guilty of thus seeking practice and ruining a too credulous client, yet he received the countenance of the man of standing, upon the reputation of whom he obtained the employment and who thus gave sanction and encouragement to such practices, and is responsible, by such countenance, for the ruin of the client. Again, in this commercial age, when every man offers his wares in the market, and the seller solicits the buyer, and carries his goods to him and shows them to him, and when the charlatan, the quack, and the shyster imitate the peddler, it seems difficult for even reputable lawyers passively to wait for business; indeed, there are strong grounds to suspect that many of them not only countenance these charlatans above alluded to, by association with them, but indirectly resort to solicitation for business.—*Hon. Asa Iglehart, before Indiana State Bar Association.*

SCENE IN A CHICAGO COURT.

A and B were attorneys on opposite sides of a suit on a promissory note. The case was expected momentarily to be called for trial, and both were watching it attentively, when A was called away a few moments from the court room. Before going he went to B and asked as a professional courtesy, that should the case be called before his return he should be sent for, and no advan-

tage taken of his absence. B cordially assented and A retired. Scarcely was he outside of the court room when the case was called, and B sprang to his feet immediately. "We are ready for trial, your honor."

"How will you try it," said the court. "I see there is no regular panel of the jury present?" "Just fill up the jury from the bystanders," said B. "It is but a short case, will only take a few minutes."

It was done immediately and the case proceeded, and was well nigh completion when A came walking in.

He comprehended the situation at once and informed the court of the arrangement between himself and the opposite counsel, but was coolly told that it was his place to have been present, and the court could not recognize any such arrangements between counsel. Just then A happened to glance around at the jury and his countenance lighted up. "Well," said he, "I guess its all right. I don't think our interests are likely to suffer, for I see you have got my client on that jury." And sure enough they had placed the defendant in the case on the jury.

The above is an actual occurrence, and is not a whit more ridiculous than other incidents occurring almost daily under our present system of selection of jurors. For instance: A short time ago the keeper of one of the worst gambling hells in Chicago was indicted for keeping a gambling house. That he did keep such a house was as patent and well known a fact to every man, woman and child in the city as it is that the filthy water of the Chicago river washes out to the Crib, and yet a jury selected from the patrons of the house by a bailiff whom the gambler owned, only required three minutes to agree upon a verdict of "not guilty," although it took them fifteen minutes to sign their names to the verdict, so unaccustomed were they to the practice of so high an art as that of writing their names.—*The American Law Magazine.*

Digest of Decisions.

NEW YORK.

(Court of Appeals.)

DERRNBACHER v. LEEHIGH VALLEY R. R. Co. January 24, 1882.

Master and Servant—Negligence.—Plaintiff was injured by the breaking of the rope of a derrick, while assisting in discharging ore from his boat to defendant's cars. It did not appear that the derricks were used for defendant's benefit, that its officers had any control over them, or that it furnished the rope. It appeared that for a long time the derrick was under the control of M. & Co., who employed the men who discharged the cargo. *Held*, that defendant was not liable.

TRUSTEES OF COLUMBIA COLLEGE v. TRATCHER. Jan. 17, 1882.

Covenant—Specific Performance—Change of Circumstances.—An agreement was entered into between plaintiffs and defendant's grantor that the buildings to be erected

on their lots respectively should be used exclusively for dwelling-houses. In an action to restrain defendant from permitting the use of his building for business purposes, it appeared that the current of business had encroached on the neighborhood, and that since the action had commenced a railroad had been built, with a station in front of the premises. *Held*, that the premises being thereby rendered unsuitable for the use contemplated by the covenant, defendant was made incapable of carrying it out, and that the action, therefore, could not be maintained.

PHENIX INS. Co. v. CONTINENTAL INS. Co. Jan. 17, 1882.

Covenant—Specific Performance.—A deed to defendant's grantor contained a covenant by him that he would not erect or cause to be erected any building on a certain strip of the land conveyed, and that for a violation of such covenant he should pay a certain sum as liquidated damages. The strip in question adjoined the wall of a building, afterwards conveyed to plaintiff, in which were windows which were necessary to admit light and air to the building. In an action to restrain defendant from building on said strip of land, *Held*, that plaintiff was entitled to the relief demanded; that defendant did not have the option to leave the strip vacant or to build upon it on payment of the sum specified.

FARMERS' & MECHANICS' NATIONAL BANK v. LANG. Dec. 13, 1881.

Guaranty—Pledge—Evidence.—A written instrument executed and delivered to a bank, whereby defendant promises and guarantees to said bank all pledges of property, warehouse receipts, and other vouchers that may be given by W. as collateral security, and promises that the property so set over shall not be misapplied, and that if any default or misappropriation thereof shall be made, defendant will make good any deficiency and fully satisfy the stipulation in receipts, *renders defendant liable only to make good a deficiency caused by diversion of property actually pledged.*

In an action on such guaranty to recover the amount of loans to W., evidence showing that when they were made and the pledges given there was no such property on hand as they called for; that plaintiff allowed W. to ship away property covered by the receipts, and pledge the shipping receipt for a new discount, is material and competent.

WISCONSIN.

(Supreme Court)

TURNER, FRAZER & Co. v. KILLIAN. April 25, 1882.

Misconduct of Sheriff.—1. Where a sheriff, with a process against the property of one person, seizes, by virtue thereof, the property of another, he is guilty of official misconduct, for which he and his sureties are liable in an action on his official bond; nor does it matter, as to the liability of his sureties, whether he do this knowingly and wilfully, or through gross carelessness, or mere indifference to official duty.

2. Where, notwithstanding formal defects in a petition, enough is alleged to support a judgment in favor of the plaintiff, it is not subject to general demurrer.

3. As to attachment creditors of the mortgagor a pre-existing debt already due is a good consideration for a chattel mortgage, and protects the mortgagee to the same extent as would a new consideration given at the time of making the mortgage.

4. A chattel mortgage of a stock of goods, containing a clause by which the mortgagor is given possession with power of sale in the usual course of trade, the proceeds to go in satisfaction of the mortgage debt, although by our statute made presumptively fraudulent, is not conclusively so, and may, by satisfactory evidence, be shown to have been made in good faith.

5. The question whether there was fraudulent intent in the giving of a chattel mortgage is, in all cases, one of fact, and must be raised, if at all, by suitable pleading.

Ohio Law Journal.

COLUMBUS, OHIO, : : JUNE 1, 1882.

CHANGE OF BASE.

It becomes necessary to advertise the fact that we have again changed our location and may hereafter be found at 42 North High Street, (or 17 East Gay.)

We desire that it shall be understood that the OHIO LAW JOURNAL is not a tramp, although our frequent change in location would indicate as much—almost. The fact is we have been compelled three several times to hunt up quarters sufficiently commodious to meet the demands of our steadily growing business.

The OHIO LAW JOURNAL has become well established and recognized as the only paper of the kind worthy of the name, in Ohio, and is regarded as a necessity in the offices of all the best attorneys in the State. This assertion contains no covert egotism. It is meant, and will be received as a well deserved tribute of praise to the lawyers and judges who understand the necessity of keeping fully informed of all the proceedings of the Supreme Court of the State. We claim no merit for our paper, except that we publish *as soon as written* ALL THE DECISIONS of the Supreme Court of Ohio. We miss none. The judges of the Supreme Court appreciating the anxious desire of the profession to be placed *at once* in possession of the full text of all decided cases place it within our power to thus publish as soon as written, each and every case decided. The State Reporter, Mr. E. L. DeWitt, heartily seconds this praise-worthy action of the Supreme Court, and we, are simply the medium through which the good is accomplished. The generous support our project has received since the first number was issued, has given us a steady growth and thereby wrought good to us and our patrons, as well. Our large and commodious rooms where we are now permanently established are unexcelled in point of size and convenience, by any newspaper or printing house in the State.

We hope attorneys will remember that we make the printing of briefs and records for the Supreme Court a specialty.

All that is necessary in order to get your cases properly into the Supreme Court, is that you prepare your petition in error, and send that, with the original papers, in the case to the clerk of

the Supreme Court, with an order that the printing be done by us. We take the papers and select and arrange those, and *only those*, necessary to be printed, print the record, reading all proof ourselves, file ten copies with the clerk and send the rest (fifteen) to the attorney for the plaintiff in error.

We guarantee satisfaction both as to work and price. Of the former we say fearlessly that it cannot be excelled; and of the price, we say, that will also give satisfaction. From 70 to 90 cents per page of printed matter—standard and regulation size of page—is the price, which is from 25 to 50 per cent. less than prices charged by other houses. We shall be glad to hear from our friends upon this subject.

THE UNITED STATES SUPREME COURT REPORTER.

We acknowledge the receipt of No. 2 of this valuable publication which is to be issued monthly from the well known publishing house of Mills & Co., Des Moines, Iowa. The editorial work is performed by the Hon. Samuel F. Miller, one of the Justices of the Court.

The *Reporter*, in so far as it gives to the profession promptly and regularly all the decisions of the Supreme Court of the United States, is in fact, a necessity, and will be so received. But, if Mr. Justice Miller intends, as we are compelled to say seems apparent from the remarks contained in the number before us, to make use of his editorial pen to belabor his fellow judges, and give expression to his chagrin and ill humor when the court does not decide cases as in his opinion it should do; we fear the real merit of the enterprise will suffer fatal detracton.

The country just now, of all things desires that the great accumulation of business in the highest court of the nation should be disposed of and the cases now filed be certain of adjudication within the lives of the parties, at least. The time of each of the judges is, or ought to be, wholly occupied in an attempt to secure this laudable consummation.

In the course of his editorial comments upon the case of *Baxter v. Barbour*, wherein arises the question of the liability of a Receiver in Chancery to be sued in a Common Law Court, Justice Miller remarks, "the judgment just rendered here is without support in authority and unsound in principle." This is an *ex cathedra* opinion with a vengeance. We had supposed there was no man in the United States, except

Irving Brown of Albany, who knew more law and was a better judge than all the courts and judges of the country combined; but we see from this that Mr. Justice Miller has views and small hesitation to express them. We very much doubt the policy, however, of the expression.

We beg to suggest that the *Reporter* follow the plan of the OHIO LAW JOURNAL, and indicate the volume of the Reports in which these cases published will appear.

AN IMPORTANT LIFE INSURANCE CASE.

WE publish elsewhere in full an important life insurance case from the Court of Appeals of Kentucky, which rules very sensibly that representations made by the applicant although false, will not invalidate the policy unless the insurer was induced thereby to assume a risk he would not otherwise have done. We all know the extremely pertinacious manner in which life insurance agents press their requests for "applications," and how lenient they are in the matter of eliciting replies to the questions contained therein. In fact, these replies are not really accurate in one application in a hundred. The applicant is led to believe that they are simply formal and the answers are given in a hap-hazard way, which frequently, being taken advantage of, avoids payment of the claim in case of the death of the death of the insured. It really can make no difference whether the great-grandmother of the applicant died of mumps or measles; yet, if measles is the reply and mumps actually took away the good lady, the family of her great-grand-son may become beggars thereby. This is really believed to be good law by some courts, and we are glad to see the case we refer to, and publish it at length although it is very long.

CORRESPONDENCE.

LANCASTER, O., May 24, 1882.

EDITORS OHIO LAW JOURNAL:

I was surprised on reading the "JOURNAL" of the 18th, to find reported in full on page 509, the (to me) familiar case of *State v. Wm. Linkhaw*, 69 North Carolina, 214.

This case was decided by the Supreme Court of North Carolina in 1873; is reported in full in Green's Criminal Law Reports vol. 1, page 288, published in 1874, is digested in Waterman's Criminal Digest, page 540, par. 7, (published in 1877); is cited fully in 2d Archbold's Cr. P. P.

8th edition (1877) page 1806, and in vol. 2, Bishop's Criminal Law (7th ed), page 172, section 310; note 5.

Now, while I acknowledge your constitutional right to conduct your business and paper in your own way, yet I (and I think many other lawyers) take legal periodicals to be informed as to the *latest decisions*, and must, as one of your subscribers, mildly protest against taking up the space in your valuable journal in reporting "old cases" which should be on the shelves of every criminal lawyers library.

With best wishes for your success I remain
Very respectfully,

Your obt. svt.,

J. G. REEVES.

Under ordinary circumstances our esteemed correspondent would be justified in finding fault with our publication of cases decided so many years ago, as was the one to which he refers. We should have stated at the time we published it, that the case of *State v. Linkhaw*, was re-published by us at the request of a gentleman, who, like Mr. Linkhaw, has a voice which harmonizes only with a combination of steam-whistles and saw-filing, and he wants his neighbors to understand that the exercise of his musical powers is an inalienable right and that he means to sing. The case itself, aside from its importance as an authority, is of great interest as an example of ludicrous circumstances upon which are predicated both civil and criminal cases at law.

We have received the following communication, written on a postal card, from a gentleman in Cincinnati. We suppress the name of the writer for obvious reasons, although it would serve him right to publish it in full. A tender regard for the feelings of his family and friends secures him from the publicity he deserves, as no consideration is ever otherwise extended to such offenders.

Cincinnati, O., May 29, 1882.

ED'S OHIO LAW JOURNAL:

We have in this city nearly, or quite, five hundred members of the Bar. There are probably three hundred lawyers. I find upon investigation that there are only two hundred of these lawyers whose names are on the books of the OHIO LAW JOURNAL as subscribers. The inference is plain that one hundred of them draw their legal pabulum from somebody else's OHIO LAW JOURNAL. Now, for example, your correspondent is prepared to say that it is only with the aid of a club that ye is able to get the LAW JOURNAL at all. The hungry cranks who are too stingy to take a paper so indispensable as is your publication, come sneaking around on Thursdays about the time the mail from Columbus is distributed, as regularly as a

dog watches for a butcher's cart, and gobble up the LAW JOURNAL, leaving subscribers fasting. I want you hereafter to mail two copies to my address—one on Thursday and a second one on Friday. Of course I will not pay anything extra. I will read but one and propose to pay for what I read. In the interest of the common brotherhood of lawyers, and the dissemination of the good of the order, this proposal is made by

Yours Truly,
Milton Sater,
Att'y at law.

OF COURSE HE WAS AN OHIO MAN.

HAMILTON, OHIO, MAY 21, 1882.

Ed's OHIO LAW JOURNAL:

In your last issue under the head of "New Publications," you make mention of the "Texas Law Journal," remarking that the first number contained a portrait of Hon. Royall T. Wheeler, "*which you presume is a fair likeness of a worthy man.*"

Royall T. Wheeler died in 1864—eighteen years ago. He was not unknown to fame, having filled with distinction various judicial positions from that of Prosecuting Attorney to Chief Justice of the State of Texas. His chief characteristic, however, was great purity of character and business integrity. He was a temperance teetotaler and moral reformer.

He went to Texas in 1839, supported annexation, and despite his early Whig training, became an ardent secessionist.

He was an "Ohio man," having been brought up and educated, both in law and letters, in this State. The *Texas Law Journal* does well to preserve in the pages of historical jurisprudence the memory of so good man.

Very Truly,
J. M. Warwick.

THE POND LAW.

The Pond law was, on Tuesday, decided unconstitutional by the Supreme Court in the case of the State ex rel. v. Hipp, the syllabus in which case may be found in our court report. The opinion in the case has not yet been written, but will be in time for next week's issue. We also hope to publish the dissenting opinion of Judge Johnson in the same issue.

SUPREME COURT OF OHIO.

UNION CENTRAL LIFE INS. CO.,

v.

EMMA CHEEVER.

The application contained among others the following question and answer: "Have you had during the last seven years any sickness or disease? If so, state the particulars and the name of the physician or physicians, who prescribed or were consulted." Answer. "No." The application was a warranty.

Held, that the applicant could not be required to state what he did not know; the inquiry was directed to such sickness as would manifest its presence in some way,

but as to such he must state the facts as they were, and not undertake to judge for himself whether they came within the meaning of the terms sickness or disease. The existence of a disease so manifested would avoid the policy regardless of the judgment of the applicant.

Held, that the terms were not intended to include every bodily ailment, however slight, but in their ordinary sense to include such ailments as are calculated to impair the general health or to produce death, and such as indicate a vice in the constitution and are signs or warnings of danger.

The substantial truth only was required. Life Ins. Co. v. Francisco, 17 Wall, 672.

The charge is sustained by Cushman v. Ins. Co., 70 N.Y., 72.

The temporary ailment in this case was a swollen gland in the neck, which had been angered and cut into in the course of improper treatment, and the charge is, as if the court said, before such a temporary ailment can be called sickness or disease within the meaning of this application, it must be such as to indicate a vice in the constitution, or be so serious as to have some bearing on the general health or the continuance of life.

To say, as the plaintiff in error argued below, that this charge is wrong, because typhoid fever or small pox are temporary ailments, which, after recovery, neither indicates a vice in the constitution nor affect the general health or the continuance of life—*ergo*, typhoid fever and small pox are not sickness nor disease—this is illogical, and that is all we need say about it.

The charge of the court had reference only to the testimony in this case, and contemplates no C. D. ROBERTSON, defendant in error.

Other state of facts and under the facts and circumstances of this case, the charge was correct. *Watson v. Mainwaring*, 4 Taunt., 763; *Jones v. Ins. Co.*, 91 E. C. L., 65; *Ins. Co. v. Francisco*, 17 Wall., 672; *Holman v. Ins. Co.*, 1 Woods, 674; *Southern Life Ins. Co. v. Wilkinson*, 53 Ga., 535; *Higbee v. Guardian Ins. Co.*, 53 N. Y., 603.

Charge of the Court below at February Term, 1881, of the Superior Court of Cincinnati.

HARMON, J.

Gentlemen of the jury: It has been my duty during the trial to determine what evidence is and what is not proper to be considered by you in this case. Of this I am the sole judge, and you are to consider, in making up your verdict, only such evidence as I have permitted to be given. You are to pay no regard to what either side has offered but has not been permitted to prove, nor to what, after being heard, I have ordered to be withdrawn or stricken out.

My duty, now that both sides have concluded their evidence, is to explain to you just what it is you are to decide, and the principles of law which you must bear in mind in reaching a decision. A jury is not permitted in any case to give a verdict upon any general ideas they may have of what is right or proper. This would make the administration of justice too uncertain, depending as it would upon the varying

standards of judgment of those who compose juries.

The jury is sworn, therefore, in each case, not to render such verdict as they think just and proper, but "to well and truly try the issue joined between the parties and a true verdict render according to law" (which they must accept as expounded by the court) "and the evidence" (which the court has by admitting it, adjudged proper for them to consider.)

An issue joined is this: Before a case can be tried the parties are required to file pleadings, each stating the facts as he claims them to be. If they agree about the facts but only differ as to their effect, each claiming judgment in his favor, there can be no jury trial; it is for the court to determine the effect of such admitted facts. If, however, the one party asserts and the other denies the existence of facts upon which the right of the parties depend by the principles of law, they are said to join issue as to those facts, and a jury is called to decide that issue, it being still for the court to instruct them as to the legal effect of their decision of it one way or the other.

The parties in this case agree upon nearly all the facts so that the issue between them is a very simple and narrow one. It is admitted that on November 27th, 1872, the Union Central Life Insurance Company, defendant, entered into a contract with plaintiff's husband, Charles E. Cheever, whereby it insured his life for plaintiff's benefit in the sum of \$3,000; that is, it agreed (for an insurance policy is merely a contract governed by the same principles in general as other contracts) to pay plaintiff that sum should her husband die while it remained in force. The parties do not differ as to the terms or conditions of the policy, and therefore each must stand or fall thereby; for it is the duty of courts and juries to enforce the contracts which parties have made, not to contract for them.

It is admitted that Mr. Cheever paid the premiums stipulated in the policy, that he died, and that due notice and proof of his death have been given as provided, so that plaintiff would be entitled to recover the amount of the policy without any trial, but for the facts which defendant sets up in its answer as a defense. It avers that it issued the policy upon the faith of the statements in a written application made by Mr. Cheever to the Cincinnati Mutual Life Insurance Company and signed by him. This application, though made to another company, is expressly referred to in the policy issued by defendant in place of that issued originally by the former company, and therefore is the same, for the purposes of this case, as though it had been made by Mr. Cheever directly to the defendant. In that application he was required to answer and did answer various questions for the purpose of informing the Company concerning his health, physical history, etc., which information it desired to enable it to decide whether or no it would enter into a contract of insurance upon his life.

Defendant avers that in this written application said Cheever agreed that any untrue answers by him, or any suppression of facts in regard to his health, should render the proposed policy, if issued, null and void; and moreover it avers that the policy it did subsequently issue was issued upon the faith of such application, and that one of the conditions contained therein was that the statements and declarations made in such application were in all respects true, and without the suppression of any fact relating to the health or circumstances of said Cheever, affecting the interests of said company. The policy was, by its terms, to be null and void if this condition should prove to be broken by reason of such suppression or untrue statements.

Defendant avers that said application contained, among others, the following question and answer: "Have you had during the last seven years any sickness or disease? If so, state the particulars and the name of the physician or physicians who prescribed or were consulted." Answer, "No." Defendant says this answer was untrue because said Cheever had had sickness and disease in 1869 and 1870, less than two years before the date of the application, that it was either cancer, recurrent fibroid tumor, an enlarged and suppurating gland, or some other local disorder upon the side of his neck, whose nature it cannot state, and that he had consulted and been treated by various physicians.

These facts, if true, would entitle the company to a judgment in its favor, if such ailment were of so serious a character as to amount to sickness and disease, had not the plaintiff in reply, averred, first, that her husband never made an application containing such statement, second, that, if he did, such statement was true and not untrue because the ailment referred to was merely an enlargement of the gland of his neck, which was only temporary in its character, and did not amount to sickness or disease, and, third, that the company and its agents were well aware of the facts in regard thereto and waived all rights on account thereof.

Now there is no evidence whatever that defendant or its agents knew the facts with regard to this ailment, or waived any rights on account of Mr. Cheever's failure to disclose it. And the plaintiff has offered no evidence to contradict the testimony offered by defendant that the application containing this question and answer is signed by Mr. Cheever. You will therefore consider neither the first nor the third allegations of the reply above mentioned, but must assume that Mr. Cheever did answer that question "No," and that neither the company nor its agent knew the facts concerning the ailment referred to, or waived any rights his failure to disclose them may have given the defendant.

The issue between the parties therefore is this and only: Defendant says the ailment in question was a sickness or disease and that therefore the answer referred to was not a true

answer; plaintiff says it was not a sickness or disease and that therefore his answer was a true answer. This issue you are to decide, and as you decide it your verdict must be. If it was a sickness or a disease the answer was not a true one and the verdict must be for the defendant. If it was not a sickness or a disease the answer was a true one and the verdict must be for the plaintiff.

You will observe that the issue is not as to whether Mr. Cheever had or had not recovered from any sickness or disease he may have had during the seven years preceding. His recovery, however complete, would not excuse his negative answer, if you find he in fact had had any ailment so serious while it lasted as to amount to sickness or disease as I will hereafter define those terms, for the question related to its existence not to its cure. The condition of the ailment upon his neck, however, at the time of the application, as well as its entire history and the history of his health down to the time of his death, are all circumstances which the jury are to consider in reaching a conclusion as to the character of this ailment.

Nor is the issue as to whether Mr. Cheever thought or believed that this trouble upon his neck was sickness or disease. He may, in good faith, have believed that it was not, yet his negative answer will defeat plaintiff's right to recover if you find the fact to be otherwise. He may, on the contrary, have been alarmed without just or sufficient reason and have believed at the time that it was very serious, yet if it turned out that this fear was unfounded his former belief would not matter. This question, unlike others in the application, inquired for the fact, not for his belief. The question, it is true, could not require him to tell what he did not know. It only asked as to such disease or sickness as would manifest its presence to him in some way. But it was manifest to him that he had some ailment upon his neck, and if instead of stating the facts and referring to the physician who treated him, thereby casting upon the company the responsibility of judging of its character, he chose to judge of it himself by simply answering "no," the plaintiff, not the defendant, must suffer the consequence, if you find in fact his judgment was wrong.

But on the other hand, plaintiff may recover if you find such answer to have been substantially, though not literally true. Sickness and disease taken literally might be said to include almost every bodily ailment. In this case, however, those words were not used by the parties in that sense, but in their common ordinary sense. The manifest object of the question rejects light upon the sense in which these words were used by the company in the question, and understood by the applicant in his answer. That object was to elicit information which would be useful in determining whether it would be prudent to take the risk of insuring his life. He was therefore asked by the question to disclose, and was bound to disclose, whether he had had within the pre-

ceding seven years not such merely slight or temporary disorders or functional disturbances as had and ordinarily can have no effect upon his general health or the continuance of his life, but such as either may have had in fact, or ordinarily do have, such effect. The latter only would come within the meaning of the term sickness or disease as used in this case. This is the common acceptance of the words. This is the meaning which you must attach to them in deciding whether or not the applicant answered truly when he said he had had neither. That meaning, however, includes not only such ailments and disorders as are calculated or tend directly to impair the general health or constitution or produce death unless arrested, but also such as indicate by their presence, history, or development, a vice in the constitution—such in other words, as are signs or warnings of danger to life or health rather than direct causes of danger. That meaning does not include such slight temporary ailments as are calculated neither to affect nor threaten the general health or constitution, or such as do not ordinarily indicate the seeds in the system of serious disorder.

Now to enable you to decide the issue whether this question was answered truly, a wide latitude of evidence has been allowed. You have had detailed to you the history and description of the trouble, whatever it was, upon Mr. Cheever's neck, and an account of his health and condition before its appearance, and afterwards to his death. You have also had a description of the disease of which he died. You have heard the opinions of physicians who saw him or treated him for these ailments, based upon their own observations, and you have heard the opinions of other physicians given upon hypothetical statements put to them. These opinions have related to what the trouble on the neck in fact was, to what its nature and tendency to affect life and health were, to whether it probably had or had not connection with the subsequent disorder of which the insured died, which, of course, was a sickness or disease.

Now, having brought you face to face with the issue in the case, my duty ends and yours begins. You are to weigh and consider all the testimony, to exercise upon it your good sense and judgment, and to say whether the evidence that what Mr. Cheever had upon his neck amounted either in its beginning or its development to sickness or disease, as I have defined them, outweighs the testimony that it did amount to such sickness and disease, when it began or during its subsequent development. The burden being upon the defendant to make out this defense by a fair preponderance of the evidence, the testimony upon that side must in your judgment be entitled to more weight than that upon the side of plaintiff. Defendant need not satisfy your minds, however, beyond a reasonable doubt; a fair preponderance is sufficient.

The value of the opinions, which you have heard, depends, as to those of them given from actual observation, upon the opportunity which

those who gave them had to form correct judgments about the matter, and upon the skill and experience they possessed in such matters. The value of the opinions not based upon any actual observation depends, not only upon skill and experience of those who give them, but also upon the correctness of the facts assumed to be true in the hypothesis upon which their opinions are based. You are to say which opinions are entitled to the most weight.

It is not necessary that you should be able to determine the exact name or nature of the ailment in question, though you are to derive what aid you can from the testimony of the physicians upon that subject. But whatever its exact name or nature, if, while Mr. Cheever was afflicted with it, you are satisfied from the preponderance of the evidence that it amounted to a sickness or a disease within the fair meaning of those terms, as I have defined them, your verdict must be for the defendant. Otherwise it must be for the plaintiff for \$3,000 with interest at six per cent. from June 23d, 1874, to February 7th, 1881.

2. I charge you that the burden of proof to show that Charles E. Cheever had sickness or disease within seven years next prior to the application for insurance, is on the defendant, and it must satisfy the jury by a fair preponderance of the evidence that he had no such sickness or disease, and if it does not, your verdict must be for the plaintiff.

(To which defendant then and there excepted.)

3. If the jury find that Charles E. Cheever had had, within seven years preceding the date to the application, a local ailment or disorder, but which was temporary, not amounting in the ordinary acceptance of the words to sickness or disease, and had been cured, and it did not reappear, and that the disease of which he died was a distinct ailment, occurring after the insurance was effected, then their verdict should be for the plaintiff.

(To which the defendant excepted.)

4. If the alleged sore on the insured's neck in the year 1870 and 1871, for which he was treated by physicians, was of such a character and nature as not in the ordinary common acceptance of the word to amount to sickness or disease, and had been healed up and cured when he made this application and procured the insurance, then his answer to the question No. 14 was substantially true, and the fact that a cancerous ulcer afterwards made its appearance upon the insured and caused his death will not prevent a recovery by the plaintiff.

(To which the defendant excepted.)

5. I charge you that before any temporary ailment can be called sickness or disease within the meaning of this application and contract, it must be such as to indicate a vice in the constitution, or be so serious as to have some bearing on the general health or the continuance of life.

(To which the defendant excepted.)

6. I charge you that Charles E. Cheever was

not bound in answer to question No. 14 to state the name of the physicians who prescribed for him or were consulted by him in regard to the ailments on the neck, unless it amounted to sickness or disease within the meaning of those words as I have charged.

On February 7th, 1882, the Supreme Court of Ohio affirmed the judgment of the court below, making no report of the case and leaving the charge of the trial judge as the legal definition of a sickness or disease within the meaning of the policy.

LIFE INSURANCE—FALSE DECLARATIONS IN THE APPLICATION. CHANGE OF RESIDENCE WITHOUT PERMISSION.

KENTUCKY COURT OF APPEALS.

GERMANIA LIFE INS. CO. OF N. Y.

v.

RUDWIG, &c.

April 13th, 1882.

1. *False declarations in application for life insurance, when made part of the policy, as in this case, avoid the policy, when they are material or calculated to affect the risk.*

See in opinion examples of immaterial false representations, not affecting the validity of the policy.

2. *The act of Feb. 4, 1874, providing that all statements and descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy* was but declaratory of the law as it then existed in this State.

3. *Farmers' & Drovers' Insurance Company v. Curry*, 13 Bush, 312, is overruled to the extent indicated in the opinion herein.

4. *By removing from Louisville, Ky., to, and residing in, the State of Mississippi, in violation of the stipulations of the policy, and without the consent of the company, the assured forfeited the policy in this case.*

But the right of the company to insist upon the forfeiture of the policy was waived by the agent in Louisville continuing to receive the premiums after, and with full knowledge of the removal, and remitting such premiums to the office of the company in New York.

By receiving and remitting the premiums for six years after the removal, the agent is presumed to have acted with the knowledge and consent of the company.

5. *Denials in reply were sufficient to place burden on defendant in this case.*

Issue being formed by reply and rejoinder, the surrejoinder is regarded as out of the record.

6. *Foreign record of the death of the parents and birth of the assured were read as evidence in this case.*

This action was instituted in the Jefferson Court of Common Pleas by Rudwig & Banchart (the appellees) v. The Germania Life Insurance Company, of New York, on a policy of life insurance by which the life of Bernard H. Gottshel was insured for their benefit. At the time the policy was issued, Gottshel was a resident of the City of Louisville. He removed from that city to Vicksburg, Miss., and died near the latter city, of yellow fever, on the 7th of September, in the year 1878.

The petition contains the usual averments essential to a cause of action on such a policy. In the 2d paragraph of the answer, or that portion of it necessary to be considered, the company alleges

that the policy was issued on the faith of a written declaration by the plaintiffs and Gottshelf, dated in April, 1869, and made part of the contract of insurance by the terms of which it was provided that it should become void or inoperative if the declaration made, or any part of it, should be found in any respect untrue.

It is further alleged that the following statements found in the declaration made, and upon which the policy is based, were false. 1st. The plaintiff stated in the declaration that Gottshelf was then insured for \$5,000 in the *Ætna Life Insurance Company*, which was untrue.

2d. That Gottshelf was born Feb. 5, 1819, when in fact he was born the 5th of Feb., 1816. 3d. That Gottshelf's father died of old age (93 years old), when he died of nervous apoplexy, at the age of 82 years. 4th. That Gottshelf's mother died of old age (72 years old), when she died at the age of 65 years, of paralysis of the lungs.

It is alleged that all of these statements were untrue, and the defendants did not discover that they were false until after the death of the assured.

A reply was filed to this answer, and also a rejoinder by the defendant. It is insisted that the denials contained in the reply of the facts alleged by way of defense in the answer, are not sufficiently specific, and therefore the statements of the answer must be regarded as true. The reply denies that the declaration filed with the answer contains any untrue statement, and further alleges that all of the statements therein contained are fair and true answers to the questions asked, and then proceeds to deny specially each averment of the answer, with reference to the particular statement said to be false. We think the reply made an issue and placed the burden on the defendant of sustaining his answer by proof.

The third paragraph of the answer avers that the policy provided that if Gottshelf should visit between the first day of July and November, without the consent of the defendant, those parts of the United States which lie south of North Carolina, Tennessee, Arkansas, and Kansas, the policy should cease, and that without its knowledge or consent, the said Gottshelf visited between the first day of July and the first day of September, 1878, the town of Beachland, in Warren county, Miss., which place is south of the prohibited line, and there died of yellow fever, on the 7th of September, 1878.

The appellees, for reply to this paragraph of the answer, admit that the assured Gottshelf removed to Mississippi in the year 1870; that this was done with the knowledge and consent of the company, and in consideration of said removal, the defendant required the appellees to pay, and they did pay an extra premium of thirty dollars for two years and until they were notified by the defendant that no further extra premium would be required, and the regular premiums were accepted afterwards by the defendant in full of all claims upon said policy.

To this the appellant rejoins and admits that on the 19th of August, 1870, for an extra premium of thirty dollars, it gave the plaintiff a written permit that Gottshelf might reside or travel in Mississippi until, but not after, July 1, 1871, and that on the 17th of August, 1871, for another extra premium of thirty dollars it gave the plaintiff another written permit that Gottshelf might reside or travel in Mississippi until, but not after, July 1, 1872, denies that it ever consented to any visit or change of residence after the limitation of the second permit, or that it accepted any premiums after July 1st, 1872, with any knowledge that Gottshelf resided or was or had been at any time since 1st of July, 1872, in the prohibited territory.

There was a surrejoinder filed to this rejoinder in which the appellees deny that the defendant never accepted any premium after the 1st of July, 1872, with any knowledge that the said Gottshelf resided in Mississippi after July 1, 1872, and denies that defendant did not know until after the death of Gottshelf, that he had resided or traveled in Mississippi after the 1st, of July, 1872, and the pleader then proceeds with other denials in the same manner. This certainly is bad pleading, and would be so held but for the reply which sets up specifically the consent of the company to the removal, and its acceptance of the premium with a knowledge of that fact. The rejoinder, in fact, made the issue except as to the terms of the consent alleged to have been specially given. The condition upon which the consent was given for the years 1871 and 1872, as alleged by the appellant, are admitted as true.

While the denial that the company had no knowledge raises no issue, an averment that the company knew, and consented to the removal, is sufficient, and this averment is found in the reply traversed by the rejoinder. The surrejoinder may be regarded as out of the record, and the issue is formed, the appellees admitting the conditional consent alleged to have been given by the company, in the years 1871 and 1872.

In determining the questions involved in this case, we will proceed to consider, first, the effect of the declaration by the assured of the existence of certain facts that, by the agreement of the parties, constitute the basis of the contract evidenced by the policy.

There is proof conducing to show that Gottshelf was not insured in the *Ætna Life Insurance Company* at the date of the policy, the insurance in that company having expired some time previous to the date of the insurance with the appellant. It is also questionable whether the insured was born on the 5th of February, 1816, or the 5th of February, 1819.

There is proof also tending to show that Gottshelf's father died at the age of 82 years instead of 93 years old, and his mother died at the age of 65 and not 72 years old as stated, and that his father died of nervous apoplexy, and his mother of paralysis of the lungs, instead of old age as stated in the declaration made. The policy of insurance provides that the insurance

is made in consideration of the representations made to them in the application for this policy; and further provides "if the declaration made by or for the assured or any part thereof forming part of this contract, and upon the faith of which this contract is made, shall be found in any respect untrue, the policy shall cease, and be null, void, and of no effect, and the company shall not be liable for the sum assured, or any part thereof." There is no denial made by the appellees as to the character of the statements made in the application for the policy, and the principal question on this branch of the case made by counsel for the appellant is, that the court erred in failing to instruct the jury or to adjudge, as a matter of law, that the statements contained in the application were made material by the contract of insurance, and if not substantially true, although immaterial to the risk, the policy is avoided. In other words if any of the statements made however immaterial to the risk, were untrue, whether made with a fraudulent purpose, or from ignorance as to the truth or falsity of the statement, the appellees cannot recover. Several cases have been cited by counsel, having a close analogy to the case before us and a careful consideration of those, as well as other cases to which our attention has been called, go far in support of the position assumed by counsel. *Miles v. Connecticut Mutual Life Insurance Company*, 3 Gray; *Campbell v. New England Life Insurance Company*, 98 Mass.; *Conover v. Massachusetts Life Insurance Company*, 3 Dillon, 321; *Anderson v. Fitzgerald*, 4 Home on Trust Cases.

These cases all proceed upon the idea that the parties themselves have determined that all the minute questions and answers contained in such declarations should become a part of the contract, and the only inquiry to be made by a court or jury is, whether the statements made are true or false. As to the statement made in regard to the age of the insured, and the respective ages of his father and mother, and the cause of their death, the jury has, by a special finding, said they were true, and this obviates the necessity of passing upon the errors assigned as to these findings, unless, as is asserted by counsel, the special findings are not sustained by the evidence. The deposition of one Eldod is taken in the Kingdom of Bavaria, who states that he is the keeper of the register of births and deaths of a Jewish congregation in Aleinerdinger, kept and furnished by law, and from the register it appears that the father of the insured died at the age of 82, and his mother at the age of 65; one dying of nervous apoplexy, and the other with paralysis of the lungs, and further that Gottshelf, the assured, was born in February, 1816, instead of February, 1819.

The son of Gottshelf states that it was the custom of the family to always celebrate the day of the birth of each member, and of this fact and the statement there made by the father, he was 60 years of age at his death, and in this he is corroborated by another witness. The Bavarian register, without any evidence as to who made

the record in regard to Gottshelf's family, or how the party making it derived the information it purports to give, either as to the ages of the different members of the family or the diseases of which they died, might well be held by the court or jury as insufficient to overthrow the statements made by Gottshelf in order to convict him of falsehood, when he had no motive to act otherwise than in the best of faith between his creditors, who were having his life insured, and the company issuing this policy. These special findings were, in our opinion sustained by the evidence.

It is urged, however, that the assured Gottshelf was not insured at the time of his application in the Aetna Life Insurance Company, in the sum of \$5,000, and the jury having returned a special finding to that effect it avoided the policy. It seems that Gottshelf had been insured in the Aetna Life Insurance Company for \$10,000, and that this insurance ceased by reason of his failing to pay the premium in January, 1868. It is shown by an agent of an insurance company that such a statement, if untrue, is not material to the risk, and it is not contended that it would have controlled the action of this company in making the contract if the fact had been known.

We can well see how a concealment, fraudulently made, or a knowledge of like contracts with other companies, innocently withheld, should avoid the policy. The greater the amount of insurance, either for the benefit of the family of the assured, or his creditors, the less would be the anxiety of the assured with reference to their protection, and with this feeling of security on his part, it might in some instances, at least, cause the assured to be less careful of his own health; or more liable to indulge in habits calculated to shorten life; but here there was nothing withheld from the company calculated to increase the risk. If trusting in the fact that the Aetna Insurance Company was vigilant through its medical examiners in selecting the subject for insurance, it had the benefit of such an examination of Gottshelf, so we find at least, from the evidence in this case, that no injury could have resulted from this oversight, on the part of the assured at the time of making the application. In the construction of insurance contracts it is difficult to distinguish between a representation made upon the truth of which the contract was entered into, and an express warranty as to the truth of the representation made. It is very properly said that the contract of insurance is entered into by the company upon the faith of the representations made, but it is further insisted that if made part of the contract, the representations then become express warranties.

If incidental to the contract, but upon the faith of which it is entered into, the representation, if false or untrue, must be material in order to avoid the policy, but when made a part of the contract, the representation made, whether material to the risk or not, if untrue avoids the contract. So in this case, if Gottshelf had made the

statement that his father died at the age of eighty-two years, when in fact he died at the age of ninety-nine, this false or untrue statement would have rendered the contract null and void. There is no doubt that an insurance company relies upon the truth of the representation made, in either case and equally certain that if untrue and material to the risk, no inquiry will be directed for the purpose of determining whether the statement was fraudulently or innocently made. The injury to the insurer is the same, but where no injury can possibly result to the company, where is the breach and what is the penalty? It would certainly be no breach of warranty in a chattel if the quality was better than that warranted, unless the inferior article alone would conform to the wants of the purchaser, and if a breach, the damages would be merely nominal, but in regard to insurance contracts, that which neither increases or diminishes the risk and which could not have influenced the action of either party in making the contract, is seized upon as a ground for forfeiting the entire policy and depriving the assured, not only of all the benefits of the contract, but permits the insurer to retain all the premiums paid.

While the contract of insurance may be peculiar to itself, "it must be liberally construed in favor of the insured so as not to defeat, without a plain necessity, his claim to indemnity, which in making the insurance it was his object to secure. 'There is nothing about an agreement for insurance intrinsically more sacred or inviolable than in an agreement about any other subject matter.'" May on Insurance, pages 111-112. Such contracts are to be interpreted like other agreements and must be governed by the same rules, good faith (says the same author) being especially required, as one of the parties is necessarily less acquainted with the details of the subject of the contract than the other. In the declaration made in the present case it is said: "That all the answers and declarations made are true, and that we have not omitted to communicate, nor concealed any material circumstance, and we agree that this declaration shall be the basis of the contract for insurance of the said life." Following the ordinary rule in regard to the interpretation of contracts, and giving to this declaration its full legal effect when inserted in the contract, and it is evident the parties were looking to facts that were material to the risk and not to the minute statement as to the precise age of the ancestors of the assured, their nationality or any other statement not calculated to affect the risk in the slightest degree, and that could not have possibly induced the company to enter into the contract.

The application in this case constitutes a part of the policy, and that means simply, that the assured has not withheld any material fact from the company, and when construed with the entire contract, means nothing else. This court, in the case of *Galbraith's adm'r v. The Arlington Mutual Life Insurance Company*, reported,

in 12 Bush, in discussing a similar question, said: "Whether the representations alleged to have been untrue are warranties is not necessary in this case to decide. The first instruction quoted made the liability of the appellee to depend upon the truth of every statement made by the assured, which was enumerated in that instruction, whether the risk was thereby increased or not, and in this respect was erroneous. The language is not to be taken literally, but is to be construed with reference to the subject matter and the business to which it relates. In the case of the *Continental Insurance Company v. Wall*, decided at the present term, the assured, in her application, which was made the basis of, and formed a part of the contract, undertook and warranted that the building was of the value of \$3,000, when in fact, as appeared from the proof, it was worth a less sum.

This constitutes one of the grounds of defense by the company, and this court held that such a representation, although made part of the contract, ought not, when made in good faith, to amount to a warranty or affect the rights of the parties in any way, and further, if a difference in the opinion of the insured with others as to the value of the property insured will defeat the recovery, it is creating a test difficult for a court or jury to determine, and must render valueless nearly every policy similar in its character in the hands of those who have insured. Before such a defense can prevail it must appear that the party falsely, and with the purpose of deceiving the company or its agent, placed an over valuation on the property insured. The case cited was where the contract of insurance had been executed since the passage of the act of February 4, 1874, providing "that all statements and descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy." This act, in our opinion, was but declaratory of the law as it then existed in this State, and we find no opinion to the contrary, unless in the case of the *Farmers and Drovers Insurance Co. v. Curry*, reported in 13 Bush, 312.

In that case the building was not occupied, as stated in the application and policy. It was also encumbered by a vendor's lien and had become vacant without notice to the company. These constitute the grounds of defense. This court, in that case, said: "The evidence conduced to establish the fact upon which each of the propositions rest, and such being the case the judgment below was reversed. That the statements were material to the risk could not have been successfully questioned, but the court proceeds in that case to discuss the effect of the act of 1874, now a part of the General Statutes, and says that statute should control when the policy is silent as to the effect of the statements made, but when the parties undertake in the policy to declare the meaning and effect of its stipulations, they have the right to do so and

cannot be controlled by the statute." The court was evidently considering the importance of the statement made in the policy to the party giving the indemnity at the time this utterance was made. The very purpose of the statute was to bring such representations or warranties within its provisions, and to prevent the insured from losing his indemnity upon either a representation or warranty that was not fraudulent or material to the risk, and when parties have entered into an insurance contract, since the adoption of the statute, they must be held as contracting with reference to the statutory provision, and we might add subject to a like rule recognized by this court, regardless of the statute, and therefore that portion of the opinion in the case of the Farmers and Drovers Insurance Company v. Curry, expressing a contrary view, is overruled.

The Supreme Court held, in the case of the National Bank v. Insurance Company, on a policy like this, that a representation as to value was not to be construed as a warranty. 5 Otto, 673.

Forfeitures are regarded by courts with but little favor, and while the non-payment of premiums or a representation of facts fraudulently or innocently made, if untrue and material to the risk, or such as would induce the insurer to enter into the contract, must prove fatal to the policy when minute and trivial questions are propounded and answered having no bearing or influence on the minds of those about entering into the contract, and not material to the risk, the parties cannot be affected by them. An honest belief in the truth of the statement made, when not material to the risk, should not avoid a policy, if the statement should prove to be untrue and to adjudge that it works a forfeiture is contrary to the intent and good meaning of the parties, and subversive of that rule of good faith and fair dealing that should enter into and form a part of every insurance contract.

The principal question we think in this case arises out of the declaration and agreement made by the assured, that Gottshelf would not reside or visit certain parts of the United States lying South of North Carolina, Tennessee, Arkansas and Kansas, between the first days of July and November, without the consent of defendant.

Gottshelf removed from Louisville to the city of Vicksburg, and his creditors, the appellees, upon the payment of an extra premium of thirty dollars, obtained the consent of the company (the appellant) that he might reside or travel in Mississippi up to July 1, 1871, and by the payment of a like extra premium obtained the appellant's consent that he might reside or travel in the same State up to July, 1872. After this time, viz: July 1872, no permit was asked or consent obtained from the company, and Gottshelf still continued to reside in or near Vicksburg until his death in September, 1878. The regular premium was paid each year from the date of the insurance until his death.

It is apparent from the proof that the appellees

knew, and if not, they must be presumed to have known the terms of the policy, and that by Gottshelf's removal to Vicksburg without the consent of the appellant, the policy became void. It appears from the testimony that the appellees, after obtaining the written permits from the company, proposed to the agent of the company at Louisville to continue the payment of the extra premiums and were informed by the agent that he would notify the company and see that the policy was not forfeited. These suggestions were made time and again to the agent, the latter continuing to inform them that it was not necessary to make any additional payments, and with this understanding and the continued offer by the appellees to pay the extra premium, the agent continued to receive the regular premiums and to forward the same to the appellant, at its office in New York, from July, 1872, till Gottshelf's death in 1878.

Knoefel, the agent of the company, says that he has no recollection of any such interviews or conversations had with the appellees as they detail, but he even fails to recollect that any written permits were obtained, and it is evident from the entire proof that the appellees offer to pay the extra premiums and were informed by the agent that the company would not require any additional payment. It must be admitted that the appellees knew that it was necessary to obtain the consent of the company to the removal and continued residence of Gottshelf at Vicksburg, and that the agent had no power to modify or change the contract, but this case does not present the question as to the power of the agent to alter the legal rights of the parties, or to change the limitation placed upon the rights of the assured by the terms of the contract. This the agent had no power to do. The policy informed them the agent had no such power, and therefore the appellees continued to pay the premiums when they knew the policy, by its terms, was forfeited, on the assurance by the agent that the company would not require a greater sum. They concealed no fact from the agent, and having effected the insurance with him, confided in his statements and paid the premiums as he required, and doubtless would have continued to do so but for Gottshelf's death. In this case the agent received the premiums, with the understanding and agreement between himself and the assured that this policy was to be binding on the company. They paid it upon no other conditions, and Knoefel being the agent of the company to receive premiums, it was the duty of this general agent to have informed the company of what had transpired between the assured and himself. The power to receive the premiums is expressly given the agent by the terms of the policy, and if he received them after the act of removal had worked the forfeiture, what right had the company to receive the money? They did receive it from July, 1872, until September, 1878, a period of six years, and now insist upon the forfeiture, with the right to retain the premiums paid by the appellees. The

company must either disclaim the act of the agent by returning the money thus improperly paid, or comply with the terms of its policy.

It has failed to do either, after a full knowledge of all the facts, and in our opinion the judgment below was proper. The case of *Wing v. Harvey*, reported in *De Gex and Gordon's Reports*, English Chancery, vol. 5, page 265, is very much like this. There the policy was void if the assured went beyond the limits of Europe without license from the company. Bennett, the assured went to Canada and was informed by Lockwood, the agent, that the policy would be good if the premiums were regularly paid. They were paid for several years and transmitted to the home office. On the death of the assured, the company refusing to pay, it was held in the court of chancery that it was liable, even after the company had offered to repay the premiums, with interest, that had been paid after the assured left Europe. On the policy in that case was this indorsement: "If the party upon whose life the insurance is granted shall go beyond the limits of Europe, without the license of the directors, this policy shall become void, the insurance effected shall cease and the money paid to the society become forfeited to its use."

In the case of *Insurance Company v. Wolff*, reported in 5 Otto, the proof conduced to show that the agent was not even apprised of the fact that the assured had gone into forbidden territory and as soon as the company ascertained that fact it directed a return of the premiums paid after the forfeiture, and while it is held in that case that the knowledge of the agent did not waive the forfeiture it is evident in the absence of convincing proof to the contrary, the court would have held where the company had received the premium for years, the presumption must necessarily be indulged that it knew of the removal, and in accepting the premiums waived the forfeiture. We are not prepared to say that the proof in this case would not authorize such a conclusion, but it is sufficient to say that the appellant is in court insisting on its right to retain the premiums paid from 1872 to 1878, and by so doing it has ratified the acts of its agent. Considering, therefore, the facts on this branch of the case in the light presented by counsel for the appellant, the appellees are entitled to recover.

Judgment affirmed.

HUSBAND AND WIFE—MORTGAGE.

SUPREME COURT OF MICHIGAN.

FAY
v.
SANDERSON AND ANOTHER.

April 25th, 1882.

A married woman having a mortgage upon which there was due principal and interest, gave to her husband the interest which was due and put the mortgage into his hands. The mortgagor exchanged the mortgaged lands for others under an agreement whereby he

was to pay off the interest. He deeded the lands, and at the same time paid the grantees the interest on their promise to hand it over to the husband. The grantees having failed to pay it, held, that the husband might maintain an action against them for money received to his use.

The wife subsequently purchased the lands subject to the mortgage except as to this interest, and then discharged the mortgage of record. Held, that this did not affect the husband's right of action.

COOLEY, J.

The plaintiff in this case recovered judgment on evidence tending to establish the following state of facts:

In September, 1878, one Reimer owned certain real estate in the city of Detroit, which was encumbered by a mortgage to Catherine Fay, the plaintiff's wife for \$600, on which interest had accrued to the amount of \$126. Sanderson and Johnson were then in business together as dealers in real estate, and they, or one of them owned a parcel of real estate in Nankin. Between them and Reimer an exchange was made, by the terms of which it was agreed that Reimer should pay \$400 on Catherine Fay's mortgage, besides the interest due, and that defendants should take the place subject to the remainder. Previous to this, Catherine Fay had given to her husband this unpaid interest money, and he held the mortgages, and it was understood in the trade that the sum should be paid to him. When the papers were exchanged between Reimer and the defendants, Reimer told them he would pay the interest money to plaintiff, but defendants insisted it should be paid to them and they would pay it over. Accordingly, he paid it to them, both being present; and he also paid them \$400 on the principal. For the payment of the principal, Catherine Fay had agreed to wait, and it was not expected that what Reimer paid to defendants towards the principal was to be then paid over.

From other evidence in the case, it appeared that plaintiff had no assignment of the mortgage, or of any sum due, or to become due upon it, and as between himself and his wife there was merely a verbal gift of the interest. Reimer's deed named defendant Sanderson as grantee, who a few days later conveyed the land to Johnson, subject to the mortgage, "and the interest due on this sum to this date." Johnson the next May conveyed to Sarah M. Armstrong, and she in December following conveyed to Catherine Fay, "subject to a mortgage made by Frederick Reimer and wife to Catherine Fay for \$600, with the interest from the third day of October, 1878." These constitute the material facts in the case. The conveyance to Catherine Fay of course operated as a merger of the mortgage, and she afterwards entered a formal discharge of record.

The question whether defendants were partners in the transaction was fairly submitted to the jury, and no comment upon it is required here. The point of contention is, whether plaintiff, by the verbal gift to his wife and the promise of the defendants when they received the money from Reimer, became entitled to de-

mand and receive from them the moneys so paid. We think he did.

This is not a suit upon a promise made to one party for the benefit of another, and the questions which were passed upon in *Pipp v. Reynolds*, 20 Mich. 92, do not therefore arise. It is a suit by one to recover money which has been paid expressly for his use, and which the party recovering it undertook to pay over to him. No question under the statute of frauds arises, as in the case of *Halsted v. Francis*, 31 Mich. 113. Nor is there any question of the substitution of one contract for another. It was not contemplated that any new contract should exist; money was merely paid to the defendants to be paid to the plaintiff; and if plaintiff had a right to receive it, the fact that there was a contract in the case in which another party was concerned, and upon which the money when received would operate as a payment, does not appear to be of importance.

We may concede that the promise of defendants, in case they had taken the land subject to both principal and interest, that they would pay the interest to a party not holding the legal title to the mortgage, would be ineffectual, but that would be another case from this case, for in this case the plaintiff has not entered or proposed to enter into contract relations with the defendants, and he merely demands that they shall pay over to him moneys confided to them for him. The case is ruled by *Burchard v. Catlin*, 13 Mich. 110. It is urged that the payment would not have protected the defendants against a suit by Mrs. Fay to recover the sum; but this is a mistake. Her parol gift, whether effectual in law or not, was at least sufficient authority for plaintiff to receive the payment; and not only did defendants subsequently deal with plaintiff on the supposition of his being the owner, but Catherine Fay in purchasing the land treated the interest moneys of which she had made a gift to her husband as being no longer secured by the mortgage.

No error appears in the record, and the judgment is affirmed with costs.

VIRGINIA MILITARY LANDS IN OHIO. IMPORTANT DECISION BY THE COMMISSIONER OF THE GENERAL LAND OFFICE. THE EFFORT TO DISTURB TITLES IN A CLASS OF CASES UNSUCCESSFUL. ONE THOUSAND HOMES AND ONE HUNDRED THOUSAND ACRES OF LAND SAVED FROM LITIGATION.

NORVILL'S CASE.

1. A paper certified by the principal surveyor of the Virginia Military District in Ohio, as a duplicate of a survey of lands, with no evidence that it had been recorded, or is a duplicate original, is not sufficient to authorize the issue of a patent, no matter when filed.

2. When a statute requires the performance of conditions precedent to the issue of a patent, none can issue without the performance of such conditions.

3. No patent can lawfully issue for any survey of lands in the Virginia Military District in Ohio, unless on a proper survey made and returned to the General Land Office within the time prescribed by the act of Congress of May 27, 1890, (21 Stat. 274) or the acts giving further time for that purpose.

4. No patent can lawfully issue on a survey returned to the General Land Office after March 3, 1857.

5. Patents unlawfully issued on surveys and warrants returned to the General Land Office after March 3, 1857, are void.

6. The act of Congress of May 27, 1890, (21 Stat. 105) does not authorize the issue of patents on surveys made prior to March 3, 1857, but returned to the General Land Office after that date.

7. Under this act no patent can lawfully issue for any land surveyed prior to March 3, 1857.

Virginia Military Survey No. 12096 for 150 acres of land in Hardin County, Ohio, in the name of Aquilla Norvill, on warrant No. 584, for 200 acres was made as alleged December 28, 1822, and recorded in the office of the Principal Surveyor of the Virginia Military District at Chillicothe, January 27, 1823. A paper purporting to be a duplicate copy of the original warrant certified by proper officers of the warrant office at Richmond, Virginia, and a paper purporting to be a duplicate copy of the original survey certified as such by the Principal Surveyor at Chillicothe, but not in the hand writing of the Deputy Surveyor who purports to have made the survey, were filed in the General Land Office by Jeremiah Hall, Attorney, May 12, 1890. No warrant, survey, or copy of either was ever previously filed.

There is no certificate or other evidence showing that the survey was recorded at Chillicothe. Mr. Hall asked for the issue of a patent for the land to Norvill or his heirs. The application was heard before the Commissioner of the General Land Office April 29, 1892.

Jeremiah Hall, for Norvill's heirs.

Hon. Samuel Shellabarger, attorney, for parties who have been in possession of the land under claim of title for over fifty years, argued in opposition to the issue of a patent.

Hon. Wm. Lawrence when in Congress, having procured the passage of a bill through the House, to quiet the title of occupants of lands in the Virginia Military District, and having defeated a bill introduced by Mr. Clarke of Ohio, to extend the time for making surveys, volunteered to argue in opposition to the issue of a patent. He made the following points:

The only statutes under which a patent can be claimed are those of March 23, 1804 (21 Stat. 274) and May 27, 1890, (21 Stat. 142).

I. No patent can issue under the act of 1804 for several reasons:

1. This act requires that the claimant "shall make return of his, or their (original) surveys." A copy does not meet the statutory requirement. The act of March 3, 1803 (2 Stat. 237) as to surveys made prior to its date authorized copies "from the office of the surveyor in which the same is recorded." There is no such law as to surveys made since March 3, 1803.

2. No patent can issue because there is no evidence that this alleged survey was ever recorded.

3. There is no law authorizing the surveyor at Chillicothe to certify a duplicate, and in fact the paper in this case is not a duplicate.

II. As it is possible that the original survey may be found, it is desirable that this application be decided as if it were here; and if it were here, no patent could issue under the act of 1804, because:

1. This exact question was decided by the Commissioner of the General Land Office April 3, 1890, in Hendrick's case (Copp's Land Owner, Vols 6 and 7, August number 1890, p. 69.)

2. It was so decided by Justice Matthews of the Supreme Court of the United States, and Judge Martin Welker in the Circuit Court of the United States, at Toledo, Ohio, August 1881, in the case of *Marshall v. Chamberlain* reported in *Copp's Land Owner*, Vol. 8, page 145, No. 9, December 1881; in the *OHIO LAW JOURNAL*, in 1881, and in Vol. 8, page 398 of the *St. Paul, Minn. Federal Reporter*, September 1881; also in the case of *Fussell v. Hughes* reported in the same number of the *Federal Reporter* pp. 384, 398. The reasoning in these cases is conclusive.

III. The act of May 27, 1890, does not authorize the issue of a patent. The only provision for the issue is in section three. No patent can issue for several reasons:

1. It only authorizes patents on entries made as it expressly says "on, or before January 1, 1852." The claimant's entry was so made; but the statute is prospective in its operation by a well known rule of construction. (*Broom Legal Max.* 34.)

It does not authorize a patent for surveys made before

the law was passed. It does not apply to lands surveyed prior to the date of the act.

As to those surveys made prior thereto, Congress did not intend that patents should issue to disturb occupants. The Commissioner of the General Land Office advised against such patents in his letter of April 21, 1880, sent to Congress, when the act of 1880 was under discussion, printed in Cong. Rec. of May 18, 1880, Vol. 10, part 4, p. 3454, 2d Sess. 45th Congress.

2. A full argument will be found on this subject in my letter to the Commissioner of the General Land Office, published in 8 Copp's Land Owner, January, 1882, p. 189; and in the OHIO LAW JOURNAL Vol. 2, No. 4, p. 49, September 1881.

3. From March 3, 1857 to May 27, 1880, a period of over twenty three years, no surveys were allowed. The Commissioner in his letter referred to said; "a period of seventy-six years" previously given, was long enough.

The reason is plain: When lands were entered they were taxable, 3 Howard 441; 4 Wallace 210; 20 Ohio 556; 24 Ohio St. 439; 14 Indiana 442; Lewis Leading Cases 702. The lands might be sold by the owner of the entry by imperfect evidence of title, which might be lost; and might be sold for debt, and at judicial and tax sales, and be occupied for fifty years under such title, and then a patent issue, against which as the Courts hold the statute of limitation, would not protect an occupancy as in other cases. For the purpose of protecting occupants, Congress refused to permit patents to issue to disturb occupants.

IV. Section 2 of the act of 1880, does not authorize the issue of a patent for several reasons:

1. There is not one word in it about patents. The time for issuing patents under the act of 1804, expired March 3, 1857. It was not revived by the act of 1880.

2. This section had a different purpose. It confirms as it says "legal surveys," which would not seem to require it. But the expression "legal surveys" was designed to exclude surveys made in conflict with prior ones under the act of 1807. This section confirmed irregular surveys, or surveys with imperfect descriptions for reasons:

1. One was, so that patents previously issued on them might not be held void.

2. Another was this: The act of February 18, 1871 (16 Stat. 416) ceded the "unsurveyed and unsold lands" to the State of Ohio, and the Legislature granted them to the Ohio Agricultural College. That institution at one time attempted to claim, (1.) All lands covered by defective entries or surveys now lost.

(2.) Also lands in this condition:—Surveys were often made with lines, calling for a fixed distance, but in fact running to a marked tree or other monument at a greater distance. In this way the surveys actually contained more land than the warrant called for. But the Courts held the surveys good to the full extent. When the marked corner trees were gone, and the survey lines were run by distance there was an apparent surplus. This land was claimed under the grant to the College against settlers.

Congress intended to validate these surveys. This is shown by the fact that in one of the annual reports of the Commissioner of the General Land Office, without full knowledge on the subject, there was an apparent sanction of the claim that patents should be void, for the excess. Congress intended to protect settlers under patents, from disturbance on such claim.

3. So surveys had been made and not returned to the General Land Office within the time required in some of the several acts prior to 1857, but were returned thereafter, and before March 3, 1857. This was validated.

V. Another question is made under section 2, of the act of 1880. It is claimed that it validates "all legal surveys returned to the land office, on or before March 3, 1857," and that this means the office of the Principal Surveyor of the Virginia Military District at Chillicothe. To this, there are several answers:

1. If so, this does not authorize the issue of patents.

2. It is shown in the letter in 8th Copp's Land Owner January 1882, No. 10, p. 168, and in 2, OHIO LAW JOURNAL, Sept. 8, 1881, p. 49, that the office referred to is the General Land Office at Washington.

3. The only pretext for claiming that it is the office at Chillicothe is that in this section "land office" is not printed with a capital initial letter to each word. This criticism disappears when it is known that this section was inserted in the Senate with capital initial letters, "Land Office," and the mode of spelling in the statute is the work of the enrolling clerk, (Cong. Rec. Vol. 10, 2 Sess. 46 Cong. May 20, 1882, p. 3572.)

ute is the work of the enrolling clerk, (Cong. Rec. Vol. 10, 2 Sess. 46 Cong. May 20, 1882, p. 3572.)

The Land Office at Washington is referred to because the date of March 3, 1857, in section 2, corresponds to the date fixed in the act of March 3, 1855, (10 Stat. 701) and refers to the returns of surveys, and the place of returns required by that and prior acts.

VI. The rule to be wrought if patents are to issue, shows that Congress did not intend to authorize it.

In the Virginia Military District there are 130,000 acres of land unpatented, (Dickey's speech Cong. Rec. Vol. 7, Part 5, p. 338, 2d Sess. 45th Cong.)

1. Of this probably 100,000 acres have been entered and surveyed prior to 1857, but surveys not returned to the General Land Office. These lands have been sold often by the original holders of the entries by imperfect evidences of title, many of them never recorded, or lost also at judicial and tax sales, and have been occupied as homes for from 25 to 75 years, with no suspicion of danger to the title. If patents issue, the occupants cannot protect their rights under the statute of limitation of 21 years, because the Supreme Court has decided that the statute does not run until the patent issues. But upon every principle of justice and policy a possession under color of title should be protected as fully, as if held under an entry and survey, or under a patent. The entry and survey give a perfect, full, equitable title, and the issue of a patent when authorized was a mere formality.

2. Patents have been improvidently issued on surveys returned since March 3, 1857, for large amounts of land. If these are held valid, against the decision of Justice Matthews, probably 40,000 acres of land will be taken from honest occupants by speculators who buy in "for a song" stale claims from real or imaginary heirs, on which to prosecute ejectments against the rightful owners and occupants.

3. There are probably 30,000 acres resting on entries alone. The owners of these lands may be disturbed under the act of 1880.

Congress should speedily quiet these by passing the bill recently introduced in Congress by Hon. J. S. Robinson of Ohio, or by providing for patents directly to the occupants under color of title for twenty one years.

The Commissioner of the General Land Office rendered his decision as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

WASHINGTON D. C., May 9, 1882.

JEREMIAH HALL Esq.
CINCINNATI, OHIO.

SIR:—On May 12, 1880 you filed in this office an application for the issue of a patent on survey No. 12006 for 150 acres of land in the Virginia Military District in Ohio; you also transmitted a certified copy of Virginia military warrant No. 584 for 200 acres issued in the name of Aquilla Norvill, a sergeant in the Continental line, and also, an uncertified paper purporting to be a duplicate of survey No. 12006, made in part satisfaction of said warrant.

On October 1, 1880, you filed proof of publication of notice of the loss of the original warrant and of the original survey.

The copy of survey is defective, and is not conclusive evidence that any survey was made as alleged. But the defect is one that may be cured by the production of the proper evidence of the existence of the survey. As it is desirable to reach the ultimate merits of the application made, it is deemed unnecessary to decide what is such proper evidence. From the papers before me it would appear that the survey was made of the tract described therein on Dec. 28, 1822, and recorded in the Surveyor's office January 27, 1823.

I assume for the purposes of this decision that the survey was made and recorded as alleged.

Attached to the copy of survey is a certificate from E. P. Hendrick, Surveyor of the military district, dated Dec. 27, 1875, stating that warrant No. 584 on which survey No. 12006, for 150 acres was made, had not been satisfied at that date.

The act of Congress of May 23, 1804 (1 Stat. 274) provided that parties entitled to bounty lands in the reserved territory should complete their locations within three years from the date of the act and return their surveys and file the original warrants or certified copies thereof in the Department of War within five years from the

date of the act. The parties should then be entitled to receive patents for the lands so located. If the surveys were not returned to the Secretary of War within the time and times prescribed by the act, the land should be released from any claims for bounty lands and should thereafter be disposed of as public lands of the United States.

The effect of this act was to require a completed location to be made within three years and a survey and return thereof; together with the original or certified copy of the warrant on which they were founded to the Department of War, within five years from the passage of the act. The acts were conditions precedent to the acquirement of the right to receive patents. It is unnecessary to cite authorities to show that conditions precedent must be strictly performed. By a positive provision of this act, all lands not effectually appropriated within the prescribed times were thereafter to become released from all claims for bounty lands by virtue of any location and survey not thus completed and returned and were to become the property of the United States, to be disposed of as other public lands; free from any trust in favor of the soldiers of Virginia on continental establishment. (*Fussell v. Hughes*, U. S. Circuit Court N. D. Ohio, Sept. 1881.)

The survey required "was not the mere circumstance that a chain had followed a compass around a particular piece of land," (*Jackson v. Clark* 1 Pet. 739.) It must have been returned together with the warrant, in the manner within the times, and to the officer designated. At the date of the act, the Secretary of War was charged with executive duties appertaining to grants of land for military services.

These duties were subsequently transferred to, and devolved upon the Commissioner of the General Land Office.

The returns that by the act of 1804 were to be made to the Secretary of War, then became returnable to the Commissioner of the General Land Office.

The provisions of the act of 1804, were continued by subsequent enactments until finally by the act of March 3, 1855 (10 Stat. 701) a further time of two years was allowed to make the return of surveys and warrants to the General Land Office. The effect of this act was to extend to March 3, 1857, the limitation of the time in which surveys and warrants could be returned to the proper office and patents be issued thereon. All lands not then and thus effectively appropriated reverted to the public domain from and after said March 3, 1857, and no patents could issue on surveys based on military warrants and returned to the General Land Office after that date.

The provisions of the act of 1804, were therefore, extended to March 3, 1857; when all rights thereunto finally ceased and terminated and the unappropriated lands became public lands of the United States.

On February 18, 1871 (16 Stat. 416) the lands remaining unsurveyed and unsold in the Virginia Military District in Ohio, were ceded to the State of Ohio, reserving certain pre-emption rights to actual settlers.

On May 27, 1880 (31 Stat. 105) Congress passed an act construing the act of 1871, as ceding to the State of Ohio, only such lands as were unappropriated and not included in any survey or entry founded on military warrants upon continental establishment.

The 2nd section of this act declared valid all legal surveys returned to the land office on or before March 3, 1857, on entries made on or before January 1, 1852, founded on unsatisfied Virginia Continental warrants.

The 3rd section provided that parties entitled to bounty lands which had been entered within the Virginia Military District in Ohio on or before January 1, 1853, for satisfying legal bounties to Virginia soldiers on continental establishment should be allowed three years to make and return their surveys for record to the office of the principal surveyor of said district and might file their plats and certificates, warrants, or certified copies of warrants at the General Land Office and receive patent for the same. The 1st section of this act limited the cession of the State of Ohio, of the reverted lands to such as had not been surveyed or entered. The effect of this section was to leave the lands that had been surveyed or entered in the same position in which they remained after March 3, 1857, and prior to Feb. 18, 1871, in other words not to disturb titles that had grown up under surveys and entries made many years before but which had never been consummated into patent. The reason for this is obvious. The method of acquiring the legal title

to bounty lands under the act of 1804, and the several extensions thereof was for the party in interest to make an entry by virtue of the warrant, in the proper book of entries in the office of the principal surveyor of the military district.

Then the party procured a survey to be made of the land so selected in satisfaction of the warrant, which survey was recorded in the surveyor's office. This original survey, and the original or a certified copy of the warrant was to be then filed in the General Land Office whereupon patent would issue. As soon as the lands were entered in the Surveyor's office they became taxable under State laws without regard to the issue of patent, and the equitable titles created by entries were subject to assignment and inheritance. Many years frequently passed before the further proceedings essential to the procurement of patent were had, and in many instances such proceedings were not had within the statutory period.

(Concluded next week.)

Digest of Decisions.

MASSACHUSETTS.

(Supreme Judicial Court.)

SWAN v. MANCHESTER & LAWRENCE R. R. March 22, 1882.

Carrier—Rights of Passenger on Railroad who has not purchased a Ticket.—The defendant railroad advertised to make a discount of fifteen cents for the journey from Derry, N. H., to Lawrence, Mass., to those procuring tickets, the fare otherwise being sixty-five cents. The plaintiff, intending to make the journey, arrived at the station before the arrival of the train, but after the advertised time of its arrival and departure. The ticket seller had been in his office until the regular time for the departure of the train, but had then left it to assist in handling the baggage. Being unable to procure a ticket, the plaintiff offered to pay fifty cents on the train, but refused to pay more, and was ejected from the train at Windham. At Windham, before the departure of the train, plaintiff asked at the ticket-office for a ticket to Lawrence, and had paid the money therefor; but, upon the conductor's stating the facts to the ticket agent, and requesting him not to sell plaintiff a ticket to go on that train, the agent refused to let plaintiff have a ticket, and offered him back his money, which, however, the latter declined to take. In an action of tort against the railroad,—*Held*, that the exclusion of the plaintiff from the train was justified, as a reasonable opportunity had been afforded him to procure a ticket, and he could not claim that the ticket office should be open after the time for the arrival of the train. *Held*, also, that the refusal to sell him a ticket at Windham to go on that train was justified, as the journey for which he desired to purchase a ticket, viz: from Windham to Lawrence, was part of the original journey which he impliedly contracted for, which contract he had violated, and was persisting in the violation of.

WISCONSIN.

(Supreme Court)

MILES v. OGDEN AND ANOTHER. April 5, 1882.

Partnership—Principal and Agent—1. R. held for collection a book account and also a note and mortgage against O. individually, and claims against O. and another as partners; and O. paid R. a sum in excess of said book account, to be applied on his individual indebtedness, without further direction. *Held*, that R. was bound to apply the whole of said payment to O.'s individual debts then existing, and could not divert any part thereof to the payment of the firm debts, or of an indebtedness to be thereafter contracted by O.

2. Where an agent, without authority, accepts a deed of land to his principal as a payment on a debt due the principal, a retention by the latter of the title is a ratification of the act.

3. Even where a creditor, who holds his debtor's note and mortgage, has become bound to pay for legal services rendered by the debtor, the value of such services cannot be set up as a *payment*, in an action upon the securities, without proof of an express agreement, made by the creditor or with his authority, that the services should be treated as a payment.

JEWELL v. CHICAGO, ST. P. & M. Ry. Co. April 5, 1882.

Railroad accident—Negligence—1. One who passed out of a railway car and got upon the platform thereof, and attempted to step or jump from the car while it was in motion, cannot recover for injuries suffered in consequence thereof, even though he had reached his place of destination, and the train, which had previously stopped to permit passengers to alight, had not so stopped for a reasonable length of time.

2. Upon the admitted facts, and those shown by undisputed evidence in this case, this court holds that the court below erred in not setting aside special findings of the jury to the effect that the plaintiff was not guilty of contributory negligence, and granting a new trial, though there was also a general verdict in plaintiff's favor.

YOUNG & Co. v. COOPER. April 25, 1882.

Fraud—Contract—One C., a member of the firm of C. & Co., went to Chicago, and arranged with Y. & Co. to purchase stock for them, and draw on them for the necessary advances. C. then returned to this state, drew a draft on Y. & Co. for \$2,000, and wrote to them that he had purchased 125 hogs, and would have 200 by Saturday night. Upon these representations the draft was paid. C. & Co. then sold the hogs to other parties. *Held*, that an attachment against the property of C. & Co., upon the ground that the debt was fraudulently contracted, would be sustained.

SUPREME COURT RECORD.

[New cases filed since last report, up to May 30, 1882.]

1172. **John A. Long, executor v. Thomas White.** Error to the District Court of Geauga County. Durfee & Stephenson for plaintiff; D. W. Canfield and N. H. Bostwick for defendant.

1173. **John Spitler v. Adam Heeter et al.** Error to the District Court of Montgomery County. J. A. McMahon and Pfoutz & Hartranft for plaintiff; George W. Houk for defendants.

1174. **Pittsburgh, Cincinnati & St. Louis Railway Co. v. George Leathley.** Error to the District Court of Clarke County. Charles Darlington for plaintiff.

1175. **Pittsburgh, Cincinnati & St. Louis Railway Co. v. John W. Hedges.** Error to the District Court of Greene County. Charles Darlington for plaintiff.

1176. **Pittsburgh, Cincinnati & St. Louis Railway Co. v. J. W. Hayner et al.** Error to the District Court of Warren County. Charles Darlington for plaintiff.

1177. **United States Home and Dower Association v. Jacob W. Reams et al.** Error to the District Court of Hamilton County. Samuel T. Crawford for plaintiff.

1178. **Herman Eckel, administrator, v. Joseph Renner, administrator.** Error to the District Court of Hamilton County. Goss & Peck for plaintiff.

1179. **Thomas W. Sanderson v. Laura Gilmore et al.** Error to the District Court of Mahoning County. Sanderson & Evans for plaintiff;

iff; Jones & Murray and S. W. Dana for defendants.

1180. **John H. Longbrake et al v. Anna R. Longbrake et al.** Error to the District Court of Logan County. Kernan & Kernan for plaintiffs.

1181. **Daniel Catoir v. M. G. Waterson, Treasurer.** Error—Reserved in the District Court of Cuyahoga County. L. A. Russell and Foran & Dawley for plaintiff; C. M. Stone for defendant.

1182. **Samuel Pritz v. John B. Drake et al.** Error to the District Court of Hamilton County. Long, Kramer & Kramer for plaintiff; Champion & Williams for defendants.

1183. **H. C. Rutter, Sup't, et al v. Ohio ex rel James Gatrel.** Error to the District Court of Franklin County. J. T. Holmes and Attorney General Nash for plaintiffs; Bolin & Grigsby for defendant.

1184. **Adam P. Vance et al v. A. R. Baker et al.** Error to the District Court of Champaign County. John S. Leedom for plaintiffs.

1185. **Day, Williams & Co. v. New York, Pennsylvania & Ohio Railway Company.** Error to the District Court of Portage County. Norris & Howdon and W. W. Boynton for plaintiffs; Adams & Russell and M. Stuart for defendant.

1186. **Francis L. Stone v. Wesley A. Strong, administrator, et al.** Error to the District Court of Hardin County. Stillings & Allen for plaintiff; Strong & Strong for defendants.

1187. **Conrad Bridenbaugh et al v. William E. King.** Error to the District Court of Hardin County. Stillings & Allen and W. H. West for plaintiffs; F. C. & J. W. Daugherty for defendant.

1188. **I. W. Martin et al v. Isaac Bolenbaugh et al.** Error to the District Court of Hardin County. Stillings & Allen and James Watt for plaintiffs; F. C. & J. W. Daugherty for defendants.

1189. **George W. Plumb et al v. James Dee.** Error to the District Court of Hamilton County. C. H. Blackburn for plaintiff.

1190. **Anderson J. Young v. T. J. Brown, Eager & Co.** Error to the District Court of Putnam County. Long & Long and Swan & Barton and H. S. McClure for plaintiffs.

1191. **Ohio ex rel Attorney General v. The Pioneer Live Stock Co.** Quo warranto. General Nash for plaintiff; Geo. M. Eichelberger and R. C. Fulton for defendant.

1192. **Harvey & Ulrey v. Nathaniel Webb.** Error to the District Court of Darke County. Anderson & Chenoweth and H. M. Cole for plaintiffs; Knox & Sater for defendants.

1193. **Wm. Hanselman v. Mary A. Ozias.** Error to the District Court of Darke County. Anderson & Chenoweth and Reffel, Otwell & Clark for plaintiff.

1194. **The Pennsylvania Co. v. Theodore B. Hine.** Error reserved in the District Court of Lucas County. Rush Taggart for plaintiff; Lee, Brown & Lee for defendant.

1195. *Jefferson National Bank of Steubenville v. John B. Purcell*. Error to the District Court of Hamilton County. King, Thompson & Maxwell for plaintiff; Mannix & Cosgrove for defendant.

1196. *Isadore M. Loeser et al v. Edward Humphrey*. Error to the District Court of Cuyahoga County. Peter Zucker, J. E. Ingersoll and J. W. Heisley for plaintiffs; E. J. Blandin for defendant.

1197. *Sarah H. Gilbert v. Almon B. Carlton*, administrator. Error to the District Court of Geauga County. Durfee & Stepenson for plaintiff.

1198. *Peter P. Lowe v. Samuel J. Redgate et al*. Error to the District Court of Montgomery County. Young & Young for plaintiff; Iddings & Iddings for defendants.

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH Judges.

Tuesday, May 30, 1882.

1067. *McHugh v. State*. Error to the Court of Common Pleas of Hamilton County.

LONGWORTH, J. Held:

1. Sections 7267 to 7275 inclusive, of the Revised Statutes, are not repealed by the act of March 29th, 1881, (78 O. L. 96), in respect to empanelling juries in capital cases, or affected otherwise than in substituting the wheel, therein provided for, in place of the box from which the names of electors shall be drawn for jury service.

2. A person summoned as a juror who states upon his *voir dire* that he has formed or expressed an opinion, touching the guilt or innocence of the accused in *prima facie* incompetent, and such *prima facie* incompetency is not removed until it has been made to appear that such opinion was formed from reading mere newspaper statements, communications, comments or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony, or bearing them testify, and that, notwithstanding such previously formed or expressed opinion, the juror is able to render an impartial verdict upon the law and the evidence.

(*Frazier v. State*, 23 O. S., 551, followed and approved.)

Judgment reversed.

17. *John A. Cowan v. William J. Flag*. Error to the District Court of Scioto County.

McILVAINE, J. Held:

1. A survey, embracing sixteen hundred and eighty-two acres, on an entry of lands in the Virginia Military District made on a warrant for five hundred acres, is, by reason of such excess, fraudulent as against the Government of the United States, and vests in the owner of the warrant no estate or interest in the land, which the government of the United States, on principles of equity, is bound to protect by issuing a patent for the whole or any part of the survey.

2. Whether the act of Congress of February 18, 1871, granting to the State of Ohio, lands in the Virginia Military District "remaining unsurveyed," passed title to lands covered by a previous survey voidable on account of excess in the quantity of land embraced, *quære*? But, if it did not, the title to such land sold by the Ohio Agricultural and Mechanical College, grantees of the State of Ohio, to a purchaser for a valuable consideration, was ratified and confirmed to such purchaser, by the 4th section of the act of May 27, 1880.

Judgment affirmed.

WHITE, J., not concurring in the second proposition, being of opinion

that the right of such purchaser depends on the construction of the act of 1871 unaffected by the act of 1880.

LONGWORTH, J., did not sit in this case.

103. *The Merchants' National Bank of Louisville v. John McLeod*, Receiver. Error to the District Court of Hamilton County.

JOHNSON, J.

In a suit in chancery pending in a Kentucky Court, wherein the trustees of an insolvent railroad corporation sought to enforce their rights under certain mortgages of the road and its equipment, the conditions of which had been broken, an application was made for the appointment of a receiver to take charge of and operate the road.

Pending this application, certain rolling stock covered by the mortgage was temporarily in Ohio, and while here was seized in attachment by an unsecured Kentucky creditor. The entire property was insufficient to pay the debts secured by the mortgage, or to earn income to pay the interest. The order of the court appointing the receiver, made subsequent to the seizure in attachment, ordered him to take possession of all the property, including that seized, and authorized him to sue in his own name as such receiver, whenever necessary to perform his duties. Held: That the mortgage covered the rolling stock, though temporarily in this state, and the receiver might, under the comity between states, by an action brought in this state in his own name, assert his right to the possession thereof, where such right is not in conflict with the rights of our own citizens, nor against the policy of our laws.

Judgment affirmed.

15. *Kilbreth v. Bates*. Error to the Superior Court of Cincinnati. WHITE, J. Held:

1. Under the charter of the Ohio Life Insurance and Trust Company, the discounting of a bill of exchange at a higher rate of interest than was allowed by the charter, rendered such bill void in the hands of the company. Bank of Chillicothe v. Swaney, (8 Ohio, 257) followed.

2. The effect of the clause in the charter declaring its forfeiture, was not to validate, in whole or in part, an instrument that would, in the absence of such clause, have been invalid; but to enforce upon the company additional motives for observing in the management of its business the requirements of its charter.

Judgment affirmed.

77. *Alfred H. Lukens, et al., v. Catharine Lukens*. Error to the District Court of Franklin County. Judgment modified so as to adjudge that the conveyance to Welling and from him to Mary E. Lukens is invalid as respects the judgment of Catharine Lukens. There will be no further report.

MOTION DOCKET.

80. *The State of Ohio, on relation of Daniel Roth v. Frederick Hipp*, Probate Judge of Crawford County. Mandamus. OKEY, C. J.

1. The constitutionality of a statute depends upon its operation and effect and not upon the form it may be made to assume.

2. A license is permission granted by some competent authority to do an act which, without such permission, would be illegal.

3. The act of April 5, 1882, entitled "An act more effectually to provide against the evils resulting from the traffic in intoxicating liquors," (79 Ohio Laws, 66), which requires every person engaged or engaging in such traffic to pay a specified sum of money annually and execute a bond as therein required, and also provides that "every person who shall engage or continue in such traffic, without having executed the bond * * * or after his bond shall have been adjudged forfeited * * * shall be deemed guilty of a misdemeanor," is in its operation and effect a license, within the inhibition of the section of the constitution which provides that "no license to traffic in intoxicating liquors shall hereafter be granted in this state," and is, therefore, void.

Writ refused.

JOHNSON, J., dissents from the 3d point of the syllabus.

No. 79. *The State of Ohio on relation of Daniel Roth v. William Ribbet*, Treasurer of Crawford County. Mandamus. Writ refused on the ground stated in *The State, on relation, v. Hipp*.

85. *Grafton Iron Co. v. Patrick Martin*. Motion for conditional order of revivor in No. 508 of the General Docket.

Motion granted.

Ohio Law Journal.

COLUMBUS, OHIO, : : JUNE 8, 1882.

CONSTITUTIONAL LAW—WHAT IS LICENSE?—"THE POND LAW."

SUPREME COURT OF OHIO.

THE STATE v. HIPPI.

1. The constitutionality of a statute depends upon its operation and effect and not upon the form: It may be made to assume.

2. A license is permission granted by some competent authority to do an act which, without such permission, would be illegal.

3. The act of April 5, 1882, entitled "An act more effectually to provide against the evils resulting from the traffic in intoxicating liquors," (79 Ohio Laws, 66), which requires every person engaged or engaging in such traffic to pay a specified sum of money annually and execute a bond as therein required, and also provides that "every person who shall engage or continue in such traffic, without having executed the bond * * * or after his bond shall have been adjudged forfeited * * * shall be deemed guilty of a misdemeanor," is in its operation and effect, as to the traffic not already prohibited, a license, within the inhibition of the section of the constitution which provides that "no license to traffic in intoxicating liquors shall hereafter be granted in this state," and is, therefore, void.

Mandamus.

Daniel Roth filed in this court a petition setting forth that he is engaged in the traffic in intoxicating liquors in Galion, Crawford County, Ohio, Galion being a city with a population of less than ten thousand inhabitants; and that for the purpose of complying with the act of April 5, 1882, "more effectually to provide against the evils resulting from the traffic in intoxicating liquors" (79 Ohio Laws 66), he presented for acceptance to Hon. Frederick Hipp, Probate Judge of Crawford county, his, said Roth's bond as a dealer in intoxicating liquors, the same being in all respects such a bond as is contemplated in said act; but that said Hipp, as such probate judge, refused to accept or approve such bond, on the sole ground that the statute is unconstitutional. Roth also filed a petition setting forth that, having procured from the Auditor of Crawford county, the certificate specified in the act, he tendered to William Riblet, Esq., Treasurer of that county, the sum of two hundred dollars, as required by the act; but that said Riblet, Treasurer as aforesaid, refused to receive the same on the sole ground that the act is unconstitutional. In each case a writ of mandamus is prayed to compel the officer to perform the duty required of him. The facts are admitted, and if the act is valid, a peremptory writ of mandamus should issue; but if the act is void, the writ should be refused.

The act is as follows:

"SECTION 1. That every person engaged in the traffic in intoxicating liquors shall, within thirty days after the taking effect of this act, and in the first week of May in each succeeding

year thereafter, and every person hereafter engaging in such traffic shall, before engaging therein, and in the first week of May in each succeeding year thereafter, during his continuance in such traffic, pay into the treasury of the proper county, upon the certificate of the county auditor, as follows, to wit: When his place of business is located not within any village or city, nor within one mile thereof, \$100; when within a village having a population of less than two thousand by the next preceding federal census, or within one mile thereof, \$150; when within any other village or city having a population of less than ten thousand inhabitants, or within one mile thereof, \$200; when within any city of the second class having a population of ten thousand inhabitants, or more, or within two miles thereof, \$250; and when within any city of the first class, or within two miles thereof, \$300.

"SEC. 2. Every person engaged in such traffic, and every person hereafter engaging therein, shall, at the time fixed by the preceding section for making said first payment into the county treasury, execute to the state of Ohio his penal bond in the sum of one thousand dollars, with at least two sureties, resident of the county, and each owning therein freehold estate, not exempt from execution, worth at least double the amount of the bond above incumbrances, which bond shall have indorsed thereon a pertinent description of the lot or premises wherein said traffic is or shall be carried on, together with the name of its owner; and the sureties thereon shall be to the acceptance of the probate judge of the county, who shall keep and record the same, together with the indorsement thereon, in a book to be by him kept for that purpose, which bond shall be conditioned for the faithful performance of all and singular the requirements of this act, and the probate judge shall receive in each case for his services under this act, to be paid by the person giving such bond, the sum of two dollars.

"SEC. 3. Every person who shall engage or continue in the traffic of intoxicating liquors after default made in any payment in the first section of this act required, shall be deemed to have broken the condition of his bond, and an action shall lie thereon against him and his sureties in the court of common pleas for double the amount of such default, with costs.

"SEC. 4. Every person who shall engage or continue in such traffic without having executed the bond in the second section of this act required, or after his bond shall have been adjudged to be forfeited, as in the preceding section provided, shall be deemed guilty of a misdemeanor, upon conviction of which, he shall be fined in any sum not exceeding \$1,000 nor less than \$500, or be imprisoned in the county jail not exceeding one year nor less than thirty days, or both, in the discretion of the court.

"SEC. 5. Every person who shall sell or furnish intoxicating liquors, by wholesale or otherwise, to one engaged, or who shall hereafter engage in such traffic, in violation of this act,

shall be deemed guilty of a misdemeanor cognizable in the proper court of the county in which said illegal traffic is carried on, and, upon conviction thereof, shall be fined in any sum not exceeding \$2,000 nor less than \$200, or imprisoned in the county jail not exceeding one year nor less than thirty days, and all indebtedness and evidences thereof, founded upon the consideration of such sale, or furnishing in whole or in part, shall be absolutely void.

"SEC. 6. Any person, company, or corporation, who, as agent, or otherwise, shall sell, or receive orders for, in this state, any intoxicating liquors, owned by any person, company, or corporation out of this state, shall be considered as engaged in the traffic in intoxicating liquors, within the meaning of this act.

"SEC. 7. Every assessor of personal property in this state shall, when he lists said property for taxation, carefully inquire and ascertain what persons, if any, are at the time of his so listing said property, or for the year preceding that time, have been engaged in the traffic in intoxicating liquors in his district, and report the same to the auditor of his county, indicating clearly the locality where such traffic is or has been so carried on, and the auditor of state, in preparing his forms for such assessors, shall include therein such forms as will enable such assessor to make such return with accuracy.

"SEC. 8. The auditor of each county shall, as soon as the report of the several assessors (mentioned in the preceding section) in his county in each year shall have been returned to him, make an accurate list of all the persons in his county engaged in the traffic in intoxicating liquors within his knowledge thereof, be derived from the report of said assessors, or from information from any other source satisfactory to him, record said list in a book, to be by the commissioners of his county provided for that purpose, and deliver a certified copy of said list to the treasurer, and one to the prosecuting attorney of his county; and the county auditor shall receive for his services, under this section, twenty-five cents for each name contained in said list.

"SEC. 9. All prosecutions for offenses under this act, in all counties in this state wherein the probate court has, by law, jurisdiction of misdemeanors concurrent with the court of common pleas, shall be conducted in all respects in said probate court, as provided in chapter nine of title two of part three of the revised statutes of Ohio.

"SEC. 10. In no prosecutions for crimes and offenses under this act, in the court of common pleas, in any county in this state, shall an indictment by the grand jury be required; but in all such cases brought before said court, the prosecuting attorney shall immediately file with said court of common pleas an information setting forth, briefly and distinctly, in plain and ordinary language, the charges against the accused person, and on such charges such persons shall be tried in the same manner as provided by law

for the trial of persons charged with other crimes and offenses on indictment in said court of common pleas; but such informations may be amended at any time before or during trial, on such terms as to continuance and otherwise, as said court may direct.

"SEC. 11. The prosecuting attorney of any county shall file his information originally in said court of common pleas, without a preliminary hearing before an examining court, upon the proper affidavits being filed therein, and in like manner shall file his information upon the transcript of a criminal cause brought for any offense under the provisions of this act of any justice of the peace or mayor of any village or city, which shall be filed in said court of common pleas within ten days after the filing thereof, by such justice or mayor.

"SEC. 12. The prosecuting attorney shall institute civil actions on all such bonds given under this act as shall have become forfeited, for which, as well as for all fines and costs, he shall be entitled to receive as fees ten per cent. of all sums by him collected thereon after process commenced.

"SEC. 13. All funds paid into the county treasury under the provisions of this act shall be credited two-thirds thereof to the townships, villages, and cities from which said funds were received, and shall be paid to such townships, villages, and cities by said treasurer for general expenses of such corporations and townships, and the remaining one-third to the general county fund, except the assessment placed upon the business of persons who have no fixed place of business in the state, which sum shall be paid into the state treasury, upon the certificate of the auditor of state, to the credit of the general revenue fund.

"SEC. 14. For the purpose of paying the assessment fixed and giving the bond required by this act, and for no other purpose thereunder, a firm or corporation may be treated and considered as one person, and the use and sale of intoxicating liquors, in good faith, for purely medicinal purposes, by lawfully authorized physicians in their regular practices, or of pure alcohol for mechanical purposes, or of other intoxicating liquors by druggists, upon a written order or prescription of such physician for such purposes, shall not be deemed traffic within the meaning of this act.

"SEC. 15. Nothing in this act shall operate to repeal, supercede, or impair any existing statute or any provision thereof; nor shall anything in this act be construed or held to authorize or license in any way the sale of intoxicating liquors.

"SEC. 16. This act shall take effect and be in force from and after the first day of May, 1882."

OKEY, C. J.

The question in this case is whether the act of April 5, 1882, (79 Ohio Laws, 66), "more effectually to provide against the evils resulting from the traffic in intoxicating liquors," is in conflict or in harmony with Art. 15, § 9, of the

constitution (schedule, § 18), which is as follows: "No license to traffic in intoxicating liquors shall hereafter be granted in this state, but the general assembly may, by law, provide against evils resulting therefrom." In the decision of causes in this court, the most important and delicate duty of a judge is the determination of such a question. While it is now universally conceded that this court is clothed with power and imperatively required to determine that an act is void, if it is in conflict with the constitution, it is equally well settled that the presumption is in favor of the validity of every act, and that no judge is warranted in holding a statute to be in conflict with the constitution, until he has given to the question of its validity most careful consideration, and is able to show in what respect there is such conflict, and that it is irreconcilable. To hold a legislative enactment to be void, where it is not plainly in conflict with the organic law, is as clearly unwarranted as to circumvent or nullify a plain constitutional inhibition by holding that the identical thing inhibited may be done under another name. Guided by these principles, we have bestowed upon the question before us that care which its acknowledged importance demanded.

At common law the traffic in intoxicating liquors was a lawful business. See remarks of Boynton, J., in *Baker v. Beckwith*, 29 Ohio St., 314, 319; Yaple, J., in *Granger v. Knipper*, 2 Superior Court Rep. 480. And there is nothing in the federal or state constitution which changes the rule. But the right to provide against evils resulting from the traffic in intoxicating liquors is asserted in our constitution in the words already quoted. The origin of statutes licensing the sale of liquors is found, it is said, in 5 and 6 Edward VI. c. 25, which statute was enacted more than three centuries ago. 5 Reeves' Hist. Eng. L. 36. The history of the legislation, English and American, upon this subject, is very instructive, but I have not time or space to enter fully upon it here. It is sufficient for the present purpose to show the condition of the law upon this subject at the time the constitution of 1851 was adopted by the convention which framed it. The act of 1831 (2 Swan & Cr. 1426), "granting licenses and regulating taverns," was then in force, and the license therein provided for was a license to retail intoxicating liquors as well as to keep a tavern. *Hirn v. The State*, 1 Ohio St., 15. That act provided how application should be made to the court of common pleas for such license, what notice of the application should be given, and what evidence might be offered on the hearing of the application. When satisfied that the proper notice had been given, that the applicant was a person of good moral character, that he was provided with suitable accommodations, that such tavern was needed, and that the applicant was a suitable person to keep the same, the court was authorized to grant such license for one year. In 1847, it was provided that the word "authorized" should be construed to mean *required*, and

that act was subsequently repealed. 2 Curwen, 1341, § 10. The act of 1831 further provided, "that the court granting the license shall fix the price thereof, which shall not be more than fifty dollars nor less than five dollars per annum, having proper regard to the applicant's situation for business." On payment into the treasury of the sum fixed, and payment of a fee of fifty cents to the clerk of the court granting the license, he issued to the applicant a paper, under the seal of the court, called a license. The act further provided, "that if any person shall keep a tavern or retail spirituous liquor, or shall vend or sell any spirituous liquors of any kind to be drank at the place where sold, or shall vend or sell such spirituous liquors by less quantity than one quart without being duly licensed as keeper of such tavern," he shall be fined not exceeding one hundred dollars nor less than five dollars, on conviction upon indictment. And it was further provided, (2 S. & C. 1430), that if such tavern keeper permitted any kind of rioting, reveling, intoxication or drunkenness on his premises, he should be indicted and fined, and his license should be revoked. The act of 1831 was repealed, so far as it authorized a license to traffic in liquors, by the act of March 12, 1851, (*Hirn v. The State*, supra), and in the absence of such repeal it would have been, in that particular, abrogated by the constitutional provision under consideration.

From the fact that the framers of the constitution must have had in their minds the license law then in force, it is argued that the constitutional inhibition under consideration is directed against licenses so granted and issued, and none other. But we think such a construction of the organic law wholly inadmissible. "Particular cases or instances," said Gholson, J., in *Goshorn v. Purcell*, 11 Ohio St. 641, 649, "lead to the adoption of general rules or principles. Many of the general rules of law are thus deduced from the decision of particular cases. But when particular instances lead to the adoption of a general rule in the shape of a legislative or constitutional provision, the authority for the rule has no such limit. The rule is to be interpreted from the language employed in its enunciation, and that language, when clear and comprehensive, is not to be limited in view of the particular instances which may be supposed to have led to the adoption of the rule." Clearly, this inhibition of the constitution applies to all departments of the government, and restrains the legislature from granting licenses for such purpose, whatever form of legislation may be adopted. If more direct authority for such construction could be thought necessary, it may be found in *The People v. Thurber*, 13 Ill., 554. It was said in that case, "the law itself is the license." Moreover, if there had been any force in such objection, it would have been suggested in *Youngblood v. Sexton*, 32 Mich., 406, s. c. 12, Albany L. Jour. 265; 2 Central L. Jour., 700, where the whole subject was elaborately considered.

We come, then, to consider as to the condition of the law on April 5, 1882, when the act under consideration was passed. At that time it was an offense, punishable by fine or imprisonment, to sell to any person alcoholic liquors to be drunk at the place where sold, or to sell intoxicating liquors of any kind to a person intoxicated or in the habit of getting intoxicated, or to a minor without the written order of his parent, guardian or family physician (77 Ohio L. 58), or to sell spirituous liquors on Sunday, except upon the written prescription of a practicing physician (78 Ohio Laws, 126); and there were some other restraints upon sales at particular places (Rev. Stat., § 6945), or at particular times. (Rev. Stat. § 6948.) But, except as restrained by the statutes above referred to, and valid ordinances of municipal corporations, the traffic was, as we have seen, entirely lawful. Hence, at the time the act in question was passed, it was clearly lawful to sell to an adult who was sober, and not in the habit of becoming intoxicated, wine manufactured from the pure juice of the grape cultivated in this state, or beer, ale or cider, to be drunk at the place where sold or elsewhere; it was lawful to sell to such person any sort of intoxicating liquor, in any quantity, where such liquor was not to be drunk at the place where sold; and it was lawful to sell liquor of any sort, in any quantity, even to a minor, if he produced the written order of his parent, guardian or family physician. Undoubtedly, one who conducted such business in a lawful manner was entitled, under the law as it then existed, to the same protection which was accorded to dealers in other articles of personal property; the state law required that he should be taxed, in addition to the sum exacted by the general government, in the same way as a grocer or like dealer, and not otherwise; and he was not required to give bond or pay money as a condition upon which he might deal in liquors. Whether this condition of the law was just or unjust, wise or the reverse, is not a matter submitted for our consideration; nor is any such question submitted to us in determining as to the validity of the statute under consideration. I am simply stating what was the condition of the law of this state on April 5, 1882, and in what condition it would have remained, if the statute enacted on that day, being the act under consideration, had not been passed.

The act of April 5, 1882, which took effect from and after May 1, 1882, provides, among other things, that each person engaged in the traffic in intoxicating liquors shall, within thirty days after the act takes effect, and each person engaging in such traffic after May 1, 1882, shall, before engaging in such traffic, execute a bond to the state, to be approved by the probate judge, in the sum of one thousand dollars, "with at least two sureties, resident of the county, and each owning therein freehold estate, not exempt from execution, worth at least double the amount of the bond above incumbrances," "which bond shall be conditioned for the faithful performance

of all and singular the requirements of this act." And at the time the bond is given, and annually thereafter in the first week in May, such dealer shall, "during his continuance in such traffic, pay into the treasury of the proper county, upon the certificate of the county auditor," not less than one hundred dollars nor more than three hundred dollars, the amount being determined, according to the provisions of the act, by the place of business of the dealer. If the dealer giving such bond fail to make any such payment, he shall be deemed to have broken the condition of his bond, in an action to be brought thereon in the court of common pleas. If a person engage or continue in such traffic after his bond shall thus have been adjudged to be forfeited, or without having executed such bond, he "shall be deemed guilty of a misdemeanor, upon conviction of which, he shall be fined in any sum not exceeding one thousand dollars nor less than five hundred dollars, or be imprisoned in the county jail not exceeding one year nor less than thirty days, or both, at the discretion of the court." Moreover, in such case of failure to comply with the act, the traffic is in terms referred to as an "illegal traffic." A sale of liquors to one illegally engaged in the traffic, is made punishable by fine not exceeding two thousand dollars, nor less than two hundred dollars, or imprisonment not exceeding one year nor less than thirty days. Besides, a person giving such bond, who engages or continues in such traffic after default in making any such payment into the county treasury, is, with his sureties, made liable on such bond for double the amount of such default.

The act under consideration provides, that "the use and sale of intoxicating liquors, in good faith, for purely medicinal purposes, by lawfully authorized physicians in their regular practices, or of pure alcohol for mechanical purposes, or of other intoxicating liquors by druggists, upon a written order or prescription of such physician for such purposes, shall not be deemed traffic within the meaning of this act." But with this exception, the act is as to all persons then engaged or hereafter engaging in the traffic in liquors, who fail to comply with its terms, a stringent prohibitory liquor law. If such person fail to give the bond, as required by the act, he becomes a criminal by continuing in the traffic. So if, having given the bond, he continue in the traffic without paying money into the treasury as required by the act, his bond is declared forfeited and he becomes equally a criminal. It is, in other words, where the person engaged or engaging in the traffic fails to comply with the statute in the way stated, impossible for him to carry on such traffic, or sell intoxicating liquors of any sort, without committing a crime. But dealers in liquors who execute bonds and pay into the treasury, in advance, annual sums of money, as stipulated in the act, acquire a privilege of freely trafficking in intoxicating liquors, with the restrictions and exceptions mentioned, to the exclusion of all other dealers.

It is conceded that the privilege granted by the act under consideration is not in the ordinary form of a license. It is also true that the provisions of the statute are so arranged, and of such peculiar form, that their real meaning is not readily perceived. But it is our duty to look through the collocation of words, whatever the form, to the operation and effect of the statute, and determine from that whether it is within the constitutional inhibition. Remarks bearing upon this subject will be found in cases already referred to, but the observations of White, C. J., in the District Court Case, 34 Ohio St. 431, 440, are more pertinent. "The constitution," said he, "must be interpreted and effect given to it as the paramount law of the land, equally obligatory upon the legislature as upon other departments of the government and individual citizens, according to the spirit and intent of its framers, as indicated by its terms. An act violating the true intent and meaning of the instrument, although it may not be within the letter, is as much within the purview and effect of a prohibition as if within the strict letter; and an act in evasion of the terms of the constitution, as properly interpreted and understood, and frustrating its general and clearly expressed or necessarily implied purpose, is as clearly void as if in terms forbidden." And see *Monroe v. Collins*, 17 Ohio St., 665; *Walker v. Cincinnati*, 21 Ohio St., 14, 53; *Eichenlaub v. The State*, 36 Ohio St., 140. The doctrine so enunciated, we take this occasion to reaffirm, in applying it to the statute under consideration.

The power to license certain classes of business, impose a charge therefor in the form of a tax, and enforce the payment of the tax as a condition precedent to the lawful prosecution of the business, is well settled. *Mays v. Cincinnati*, 1 Ohio St., 268; *Baker v. Cincinnati*, 11 Ohio St., 534; *Cincinnati Gas Co. v. The State*, 18 Ohio St., 237; *Telegraph Co. v. Mayer*, 28 Ohio St., 521. This relates only to employments which, in one form or another, impose burdens upon the public. Such tax cannot be imposed merely for general revenue, for the only mode of raising such revenue, whether for state, county, township, or municipal corporation purposes, is found in the twelfth article of the constitution, (*Raney, C. J., in Hill v. Higdon, Zanesville v. Richards*, 5 Ohio St., 243, 589; 18 Ohio St., 237; 31 Ohio St., 329); and as *Gholson, J.,* remarked in *Baker v. Cincinnati*, supra, "it could not be employed as a mode of taxing property, without reference to the uniformity and equality required in section two, of article twelve, of the constitution." That eminent judge also made this remark with reference to the license under consideration in that case, indicating the nature of and limit to such taxation: "The burden thus devolved on public officials, requiring, perhaps, an increase in their number and compensation, for the benefit of exhibitors of shows or performances, may justly authorize a charge beyond the mere expense of filling up a blank license." With respect to the traffic in liquors, however,

the power to license is, as we have seen in terms denied; but in relation to such traffic, express power is granted to "provide against evils resulting therefrom." See remarks of Thurman, C. J., in relation thereto, in *Miller v. The State*, 3 Ohio St., 475.

What, then, is a license? In a general sense, a license is permission granted by some competent authority to do an act which, without such permission, would be illegal. In *Home Ins. Co. v. Augusta*, 50 Ga., 530, the judge delivering the opinion, in speaking of the distinction between a license and a tax, said: "There is a clear distinction recognized between a license granted or required as a condition precedent before a certain thing can be done, and a tax assessed on the business which that license may authorize one to engage in. (42 Ga. 596.) A license is a right granted by some competent authority to do an act which, without such license, would be illegal. A tax is a rate or sum of money assessed on the person, property, etc., of the citizen. (*Bouv. L. D.*, 36 Ga., 460.) A license is issued under the police power of the authority which grants it. If the fee required for the license is intended for revenue, its exaction is an exercise of the power of taxation. *Cooley's Const. Lim.* 201." In the decision of that case on error (93 U. S., 116, 123), *Swayne, J.*, refers to the power to tax and to license, but he does not intimate, as has been supposed, that there is no distinction between a tax and a license, based on a difference in their effect on a business. It is quite sufficient to say of the case there under review and the case to which the judge refers, that the ordinance and legislation under consideration were different from the legislation involved here, and that the power of the legislative body and the court was not restrained in any of those cases by a constitutional provision like that which controls this case. And we find that the revenue acts of Congress and the decisions of the Supreme Court of the United States, referred to by the counsel for the relator, shed no light on the question before us.

In *Youngblood v. Sexton*, supra, the question was whether a sum imposed, by a statute of Michigan, on a dealer in intoxicating liquors, was a tax on the business, or an exaction for a license, and hence within a constitutional provision prohibiting the granting of a license for such purpose. The court held it to be a tax and not a license, and in delivering the opinion, *Cooley, J.* said: "The popular understanding of the word license undoubtedly is a permission to do something which without the license would not be allowable. This we are to suppose was the sense in which it was made use of in the constitution; but this is also the legal meaning. The object of a license, says Mr. Justice Manning, is to confer a right that does not exist without a license. *Chilvers v. People*, 11 Mich., 43, 49. Within this definition a mere tax upon the traffic cannot be a license of the traffic, unless the tax confers some right to carry on the traffic which otherwise would not have existed.

We do not understand that such is the case here. The very act which imposed this tax repealed the previous law, which forbade the traffic and declared it illegal. The trade then became lawful whether taxed or not; and this law in imposing the tax did not declare the trade illegal in case the tax was not paid. So far as we can perceive, a failure to pay the tax no more renders the trade illegal than would a like failure of a farmer to pay the tax on his land render its cultivation illegal. The state has imposed the tax in each case, and made such provision as has been deemed needful to insure its payment; but it has not seen fit to make the failure to pay, a forfeiture of the right to pursue the calling. If the tax is paid, the traffic is lawful; but if not paid, the traffic is equally lawful. There is consequently nothing in the case that appears to be in the nature of a license. The state has provided for the taxation of a business which was found in existence, and the carrying on of which it no longer prohibits, and that is all." And in *Pleuler v. The State*, 11 Nebraska, 547, where a similar question arose, under a statute of Nebraska, and the exaction was held to be a license, *Youngblood v. Sexton* was cited, the definition of a license which it contains was stated, and the court added: "Within this definition, a mere tax upon the traffic, unless its payment confers some right that otherwise would not have existed, can in no sense be properly called a license." Hence, the distinction between the act under consideration in the case before us, and the Michigan Statute, is very plain. Non-compliance with the Michigan statute did not render the traffic illegal, and compliance with it gave a dealer no privilege over another dealer who failed in such compliance; but one who carries on the traffic under the Ohio statute, without complying with its provisions, commits a criminal offense, while a dealer who complies with the Ohio act obtains privileges denied to dealers who fail to comply with it.

An effort has been made to show that the penal provisions of the statute simply provide a mode of collecting a tax, and, moreover, that giving the bond and paying the money is simply the performance of a condition upon which business may be done, the conditions, it is said, not being different in principle from regulations as to the days and times of closing the place of business, putting in or removing screens, or the like. But we think the provisions of this statute are of a very different character. They impose, as we have seen, conditions precedent to the lawful prosecution of such business. Non-compliance with the statute renders its prosecution, to any extent wholly illegal; and hence, the act falls within the definition of a license law stated in the cases to which I have referred. No unrestricted license to traffic in intoxicating liquors has ever been granted in this state; and the restrictions and conditions imposed by this statute and the acts in connection with which it must be con-

strued, in no way affect the character of the privilege granted, or render it anything else than a license. So, it is objected that there is no provision that a dealer shall be a person of good character; but character is not a necessary element in a license. Whether it is in effect the grant of a license, and therefore inhibited, must be determined from the whole act. The constitutionality of a statute depends upon its operation and effect and not upon the form it may be made to assume. This statute, in its title, is an act to provide against evils resulting from the traffic. In form, it requires the payment of money and the execution of a bond, and provides that certain consequences shall follow in case a dealer in liquors fails to comply with the act. In substance, it is, as to all dealers who fail to comply with its provisions, a stringent prohibitory liquor law; and as to all dealers who do so comply, it grants the privilege in the future to deal in such liquors, to the extent not prohibited by previously existing laws. In legal effect, it is an act granting to those who comply with its provisions, licenses to traffic in intoxicating liquors, to the exclusion of all other dealers, and hence it is in conflict with the constitutional provision under consideration. Though not called a license law, it authorizes the granting of that which in effect is as clearly a license as the privilege granted under the act of 1831. The quality of thing is not altered by changing its name; and the special privilege to traffic in liquors which is granted under this act, is as clearly a license as if it had been in terms so called. What would constitute a license law within the constitutional inhibition, and in what respect would such a law differ, in its operation and effect, from the act under consideration, construed, as that act must be, in connection with the statutes in force relating to intoxicating liquors? This pertinent inquiry was made during the argument of the cause, but no satisfactory answer has been given to the question, for the obvious reason that it is impossible to frame a statute which, in its operation and effect, would be more clearly a license law than the act under consideration. And it is proper to say on the question of constitutional power, the giving or not giving the bond is not an essential matter. The bond is to secure the payment of the specified sums of money. The question of the constitutionality of the act would have been the same had the legislature not required the bond to be given, but had required the payment of the same sums for the privilege of engaging in the traffic.

Attention has been directed to the fact that the statute in question provides, that nothing in this act shall "be construed or held to authorize or license in any way the sale of intoxicating liquors." No doubt the construction placed upon a statute by the legislature will in many cases have controlling weight. *Schooner Aurora Borealis v. Dobbie*, 17 Ohio, 125. But finding that the statute in its operation and effect is simply and only a license law, in violation of the constitutional inhibition, the provision as to the man-

ner in which the act shall be construed is wholly nugatory.

Finally, it is urged that even if the section providing punishment for non-compliance with the requirements of the statute, should be held to be unconstitutional, still that other parts of the act may stand. But as Blackstone observes, "the main strength and force of a law consists in the penalty annexed to it." 1 Com., 57. It is not to be supposed that the legislature would have enacted this statute without such clause; and hence, the whole act fails. *The State v. Perry Co.*, 5 Ohio St., 497.

Counsel for the defendants insist, furthermore, that the law is in conflict with various other provisions of the constitution. But the view adopted in this case renders it unnecessary to enter upon the examination of the questions so presented. On the other hand, counsel for the relator contend that, notwithstanding the inhibition against licensing such traffic, the *business* of a dealer in liquors may be taxed, and they rely on *Youngblood v. Sexton*, supra. But the question involved in that proposition is not before us for decision in this case. We have not considered that question with reference to any determination of it, and therefore we express no opinion upon it.

In reaching the conclusion that the act in question is a license law, and therefore void, the decision is not in conflict with any case or authority to which our attention has been directed.

Writs refused.

JOHNSON, J. dissented from the 3rd point of the syllabus.

JOHNSON, J., dissenting:

After the most pains-taking examination which I am able to bestow, I cannot assent to the legal proposition, that the act under consideration is a plain and palpable violation of the Constitution.

I dissent from the third point of the syllabus, which announces that inasmuch as the act requires that every person engaging or continuing in the traffic in intoxicating liquors without having given the bond provided for in the 2nd section, or after such bond has been adjudged forfeited, shall be guilty of a misdemeanor, therefore the act is in conflict with section 18 of the schedule.

To the canons of construction recited by the Chief Justice, the following may be added as equally pertinent. While it is the duty of the Court to refuse to enforce a statute that is unconstitutional, yet the repugnance must be clear, necessary and irreconcilable. It ought not to be done because of a difference of opinion between the judicial and the legislative department, as to questions of public policy or expediency, nor unless the statute, when properly construed is a plain and palpable violation of the Constitution. It should be both against the letter and spirit of the instrument. So long as there is a doubt the decision of the Court should be in favor

of the law. Whenever Courts, in doubtful cases, undertake to declare laws unconstitutional, they weaken their just power and may with propriety be accused of usurpation. They lose sight of the scope and province of the Judicial department of the government, and trench upon the rights of the people, vested in the Legislative department. It is the duty of the court, in construing a statute, to give it such construction as will comport with the intention of the enacting power. When that intention is manifest, but is in part defeated by the use of some particular word or phrase, the court should look to the intention rather than the word. Per *Hitchcock, J.* in *Alexander v. McCormick*, 2 Ohio, 74-5, C, W. and Z. R. R. Co. v. *Clinton Co.* 1 O. St. 77-82. Again, a statute must not be construed so as to nullify or reverse the evident policy of the law, or to render impossible that which it was the obvious intent to render possible. *Beaver & Butt v. Trustees*, 16 O. St. 97, 108; and whenever words and phrases have been acquired, when used in a constitution or a statute, a definite fixed legal signification and are thus used, the presumption is, that it was meant to use them in that sense. *Turner v. Yeoman*, 14 Ohio, 207.

Thus the word "Jury" in the Constitution had its fixed legal sense at common law, and was so used in the Constitution. *Sovereign v. The State*, 4 O. St. 489.

Further, the mischief to be guarded against by constitutional provision is to be considered, in determining the extent of the provision. Per *Welch, J.*, in *Cleveland v. Frick*, 18 O. St. 801-3; and such a construction should be given to a constitutional provision, as will make it consistent with other provisions, and harmonize and give effect to all as a whole. To do this, we have only to suppose the convention used language with reference to its received signification; and as it had been practically applied for a long series of years. *Hill v. Higdon*, 5 O. St. 243-7.

Guided by the foregoing rules it is the just province of the judiciary to annul statutes in contravention of the Constitution, otherwise the exercise of this power, is not warranted by our theory of government, and is dangerous to the liberty of the people.

With these principles in view, let us inquire; what is the legal signification of the word license as used in the Constitution? What limitation was thereby placed upon the legislative power? Is the act in controversy, as fairly interpreted, so clearly and palpably a license, within the meaning of that word, as used in the Constitution, as to make it the duty of the Court to declare the act void, and thus nullify the expressed intention of the Legislature?

The no license clause of the constitution is a limitation upon the general legislative power, to provide against the evils resulting from the traffic of intoxicating liquors. Under the Constitution of 1802, there was no such limitation, and under that instrument, it was the settled policy of the State, as evinced by enactment, during a period of more than fifty years, to

regulate, and within certain limits, to prohibit the traffic, except to licensed venders.

The general features of the statutes are stated in the opinion of the Chief Justice.

Under that system of legislation, which was known as the "License System," of regulating the traffic, the distinguishing features were, that it was a special privilege to a selected few, to traffic in the article, while others were prohibited. The traffic which was prohibited as a general rule, was legalized by the license. It was a grant of an immunity from the penalties of the traffic. It gave the sanction and protection of law to a privileged class. It was in short, a dispensation, granted to some to retail liquors and denied to all others.

It was the purpose of this clause to abrogate this system and to place all on a common level, to give no protection or sanction to any, not given alike to all, and to leave the law-making power to provide against the evils of the traffic in any method it might see fit; provided always the protection and sanction of law should not be granted to any one to commit what was a crime in others. The Constitution recognizes the fact that there are evils growing out of the traffic and the legislature had authority to provide against them. The only limitation on this power was, that no license to engage in the traffic should ever be granted. Under the no license, no man can protect himself from unlawful acts by the shield and panoply of a license, while under the license system, he could.

The first exercise of the legislative power under the no license system was the act of 1854; to provide against the evils resulting from the traffic in intoxicating liquors; the last was the act of 1882, "To more effectually provide" against these evils.

Under the act of 1854, certain forms of the traffic were prohibited; all other forms were under the act of 1882, and by its 15th section, the act of 1854 is expressly recognized as part of the system. Under both acts, the privileges and immunities, as well as the penalties of the law, have a uniform operation on all, and in every part of the State. Neither act authorizes a violation of law. By comparing these two systems as defined in the statutes of the State, we can ascertain what is meant by this no license clause in the schedule.

An examination of the series of statutes, beginning in 1792, when this State was under a territorial government, and extending down to the adoption of the present constitution, and a comparison of their provisions with those of the statutes since the adoption of the constitution of 1857, a clear and definite idea of the change intended by the adoption of this clause. The one was on the principle of regulating the traffic by a restricted license to a few to do acts which were crimes in the many, while the other granted immunities to more, not allowed to all, and punished all alike for the prohibited traffic. The one sought to provide against the evils of a

license regulation which placed the prohibited traffic in the hands of licensed venders, who were exempted from the penalties of the law, while the other, so far as it goes, punishes all alike, for like acts.

The mode of regulating the traffic by the system of licenses, as known and understood by the members of the convention that framed the constitution was abrogated by Sec. 18 of the Schedule. The object was to change the former policy and in this respect, and to limit the legislative power over the subject, so that thereafter the protection of positive add express law should never be granted to engage in the traffic. The moral sense of the friends of this clause was shocked at the idea of licensing crime as they termed the old system. Whether this change of policy was wise or unwise, it is not the province of a court to discuss.

This brings us to the direct question, is the act of 1882 in practical and legal effect, a license within the meaning of the term as used in Sec. 18 of the Schedule? The evil to be remedied is an important element in ascertaining this meaning. This supposed evil was, *the sanctioning by law of this traffic in any form.*

The word license in its common, or as is said in the opinion, in its "general sense, is well defined in the second point of the syllabus to be, "permission granted by some competent authority to do an act, which without such permission would be illegal."

It has other shades of meaning. In its popular sense it is a permission or authority to do an act which would be otherwise unauthorized.

The problem is, not what the popular, common or general sense is, but what is its legal meaning. In what sense is it used in the constitution? Placing ourselves where the framers of this clause, and the people who adopted it stood, I think it obvious that it meant to authorize the legislature to provide against the evils of the traffic by any method within the province of the law making power, *except by confiding the authorized power to particular persons.* In a constitutional sense a license therefore means a permission or privilege granted to a person to traffic, that is, to *buy and sell* intoxicating liquors, under the protection of the law, while others to whom the privilege is not granted are punished for like acts. If this is the legal meaning of the word, and it will hardly be controverted, then it follows necessarily, that the act of 1882 is neither in form or legal effect a license. The person who complies with the act by giving bond and paying the tax, has no special privilege to traffic in liquor. The acts which are criminal if no such law existed, or if he had not complied with it are equally so if he complies with the law. It grants no dispensation, special privilege, exemption or immunity. It confers no authority to sell except according to law. The traffic is legal or illegal as defined by the act of 1854 and other statutes independant of this act. In fact the great objection to the law, urged by its opponents was, that it was taxation without protec-

tion A clear admission that the act did not license the traffic.

The act of 1854 makes certain kinds of the traffic illegal. The act of 1882 leaves that act in force, and exempts no one from its penalties, by giving the bond and paying the tax. The expressed intent of this act is, that it shall not be construed to be a license, or "to authorize the sale of intoxicating liquors." (Sec. 15.)

While this legislative declaration of its meaning cannot control the judiciary, where there is no doubt, yet it should have great weight in determining its legal effect, for the rule is, from the words used, must ascertain the legislative intent, the pole-star of all judicial interpretation. *Schooner Borealis v. Dobbie*, 17 Ohio 125; *Sedgewick v. State*, Con't Const. 214; *Pike v. McGown*, 44 Mo. 491. The keynote of the opinion is, that the provisions of the 4th section, in its connection with the 1st, 2nd and 5th, make this in legal effect a license.

The 1st section requires every person engaged in the traffic, or who shall hereafter engage therein, to pay the amount specified during the first week in May, annually. The 2nd requires every such person to give a bond as therein conditioned. The 3d section gives an action on the bond, if payment of the tax is not made, and the 4th section makes it a misdemeanor to engage or continue in the traffic without giving the bond, or after it has been adjudged forfeited. Nothing is prohibited by the act except to engage or continue in the traffic *without giving the bond*, or after it has been forfeited. The penalty imposed is for not giving security to pay the tax. It is only a mode of enforcing the payment of the tax. By complying with the law *no authority is granted to engage in the traffic*. (Section 15.) It is only a precedent to engaging in the *lawful* traffic. This traffic is open to all on the same conditions.

But it is said the 5th section speaks of the traffic where no bond is given as "illegal," but as has been said, as to the 15th section, the legislative designation does not vary the legal effect. If the 4th section had read, referring to the 1st and 2nd, "every such person," instead of the words used, the meaning would have been the same. It is conceded, that if there had been a penalty merely for the non-payment of the tax the act would not be a license in legal effect, but that as the bond is required, it is a privilege granted to engage or continue in the business, otherwise illegal. It is competent for the Legislature to say *when* the tax shall be paid, and what, if any security shall be given, or penalties imposed to insure its payment when due.

Such security, or such penalties, are only modes of enforcing the payment of the tax. Such a law does not purport to grant author-

ity to engage in the business. It merely says to all engaging in the business taxed, you must pay or secure your tax or you will be punished.

Such is the uniform construction of similar laws by the very highest authority.

The *License Tax Cases*, 5 Wallace 462, are directly in point. The defendants were indicted under the 73d sec. of the act of 1864 to provide ways and means etc. 13 W. S. at large 248.

Sec. 71 provides, that no person, firm or corporation shall engage in or carry on certain specified business, including the traffic in liquors, until they have paid the tax and obtained a "license therefor." Sec. 72 provides, how the application shall be made, and section 73 makes it a misdemeanor to engage in or carry on such business without such license. By section 78, the licensee is not exempted from the penalties of any State law for engaging in such business.

The parallel between this statute, and the act of 1882 is perfect. Sec. 73 of this statute and sec. 4 of the act of 1882 are identical in legal effect. They each make it a misdemeanor to engage in and carry on the lawful business without performance of the conditions prescribed. In the one it is a misdemeanor to engage in the business without a license, so called, which can only be had by payment of the tax *in advance*, in the other, it is misdemeanor if the bond is not given *in advance* to secure the tax.

In the one, the license does not exempt the person from the penalties imposed on the business in any of the States, that is, it grants no immunity from these laws, while on the other the giving of the bond does not exempt the person from the act of 1854, or other penal statutes relating to the traffic. The United States Statute calls this tax a "license," while the act of 1882 gives it no name, but declares it is not a license upon the indictments of sundry persons. Under this act of Congress the court unanimously held: That "the requirement of payment for such licenses, is only a mode of imposing taxes on the licensed business, and that the prohibition under penalties against carrying on the business without license, is only a mode of enforcing the payment of such taxes."

In the opinion of that high tribunal, it is said, "no claim was ever made that these licenses thus required, gave authority to exercise any trade or business within a state. They are regarded merely as a convenient mode of imposing taxes." Again: "But as we have already said, these licenses give no authority. They are mere receipts for taxes." Hence, though they are called licenses, and though it is a misdemeanor to engage in or carry on the traffic in liquors with-

out first having obtained them, they are taxes, and though it is a license in form, it is a mere tax receipt.

It was such a misnomer, in the judgment of the supreme court, to call such law "a license law," that congress, in 1866, amended it in that respect by striking out the word "license" and inserting "special tax." Thus, by the change of one word, the act became in name what it was declared to be in legal effect, a tax law, because the so-called license conferred no authority to engage in the traffic, and therefore was not a license law.

This court, in direct conflict with this high authority, holds, that although the act of 1882 confers no authority to traffic (Sec. 15), yet it is in legal effect a license, because a bond is required to secure the tax.

This decision, in 5th Wallace, is affirmed in strong terms in *Home Ins. Co. v. City Council*, 93 W. S., 116. It was the case of ordinance of the city of Augusta, in Georgia, providing for an "annual license tax on insurance companies." prior to the passage of this ordinance the insurance company had complied with the state law, and held a certificate of authority to do business in the state, then this ordinance was passed imposing a "license tax," and the company sought to enjoin the collection of the license tax on the ground, among others, that the city could not require a *second license*, as it would impair the obligation of the contract with the state, evidenced by the certificate of authority from the state.

The Supreme Court of Georgia, in the same case, 50 Ga., 360, has held, that this license was not such, but a *special tax* and conferred no authority to do business.

The case was carried to the Supreme Court of the United States on this question, and that court again unanimously held that such a tax was not a license, but a valid tax imposed by the city; and after repeating what was said in 5 Wallace, adds: "In the ordinance in question the tax is designated 'a license tax,' but its payment is not made a condition precedent to the right to do business. No special penalty is prescribed for its non-payment, and no second license is taken out. *Had the ordinance been otherwise in these particulars, we have seen, viewing the subject in the light of the License Tax Cases, that the result would have been the same.*"

In view of the foregoing cases, it can hardly be said of them that they "shed no light on the question before us." I think they shed a flood of light directly on the question. Neither can it be said of them, "that the ordinance and legislation under consideration (in those cases), was different from the legislation involved here." The fact that there was no anti-license clause, is wholly immaterial, as the question there was, as it is here, what is the meaning of the word license, and does a prohibition under penalties against carrying on business until a tax is paid impart a license? Such pre-eminent authority as these cases are ought not to be ignored.

Numerous statutes might be cited to show that

regulations prescribed as conditions precedent or subsequent to engaging in a business and enforcing them by penalties are not licenses.

Thus see 2778 of Revised Statutes, requires foreign express and telegraph companies to return and pay a per centage tax on receipts in addition to the tax on property. By Sec. 2843, if these taxes are not paid the companies in default were forbidden to do business in the state.

No one would call this a license statute, but a mode of enforcing the payment of the taxes due. The case of *Youngblood v. Sexton*, 32 Michigan, is important, as coming from a state having a constitutional provision similar to ours. It is directly in point and cannot be explained away. The statute was a graduated specific tax on the traffic, with the usual provisions for its collection, and it was made a misdemeanor to neglect to pay the tax, and a penalty was imposed for each offense.

The statute was held, *Cooley, J.*, announcing the opinion, to be a *tax* and not a *license*. It is sought to avoid the force of this case by drawing a distinction between the Michigan statutes and our own by claiming that under the Michigan the business is not prohibited if the tax not paid, while in ours it is. This is untenable. In the one, non-payment of the tax when due is a misdemeanor, and no bond is required; while in the other, failure to give the bond, which is merely security to pay the tax, is made the misdemeanor, and failure to pay the tax only subjects the person to an action on the bond.

In the one case a person is punished for not paying the tax, while in the other he is punished for not giving the bond to pay the tax when due. Legal accumen would be exhausted in making a distinction. The power, by discriminating taxes, as well as by fines, penalties and forfeitures, to provide against vicious and criminal practices, including the evils resulting from the traffic in intoxicating liquors, such as the vice, pauperism and crime it causes, is, as I believe, a part of the legislative power of the state that ought not to be frittered away or crippled. Free trade in this traffic has never been adopted as the policy of this state. On this point I adopt with hearty approval the language of this court, in *Miller v. Gibson*, 3 Ohio St., 486, 487, per Thurman, Judge, who says: "The idea apparently contended for, that the constitution recognizes an uncontrollable, illimitable right to sell intoxicating liquors, is manifestly erroneous. There is no such right in respect to any commodity, however harmless, for if there were, how could the various inspection laws, the laws relating to markets, the license laws, the Sunday law, &c., be sustained? A power of regulation, a power to provide against evils incident to traffic, a power to protect community against the frauds or dangerous practices of trade, is, in a greater or less degree, vested in every government, and certainly the people of Ohio are not wholly without this protection. *If, to guard against these evils, some restraint upon the traffic itself is necessary, it may be lawfully imposed, the fact*

being always borne in mind, and always acted upon, that the power is a power to regulate, and not to destroy. To this power, intoxicating liquors are expressly subjected by the constitutional provision I have quoted: *but were that provision stricken out of the constitution, the power would yet subsist*: and for the same reason that it might be declared unlawful to sell poison to a child, or a dagger to a madman, it might be made an offense to sell intoxicating drinks to a minor or a drunkard; and for the same reason that any other common nuisance might, by law, be abated, the business of a common tippling house might be subjected to that fate."

RECEIVER IN CHANCERY—ATTACHMENT—COMITY BETWEEN STATES.

SUPREME COURT OF OHIO.

THE MERCHANTS' NATIONAL BANK OF LOUISVILLE

v.

JOHN McLEOD, RECEIVER.

May 30, 1882.

In a suit in chancery pending in a Kentucky Court, wherein the trustees of an insolvent railroad corporation sought to enforce their rights under certain mortgages of the road and its equipment, the conditions of which had been broken, an application was made for the appointment of a receiver to take charge of and operate the road.

Pending this application, certain rolling stock covered by the mortgages was temporarily in Ohio, and while here was seized in attachment by an unsecured Kentucky creditor. The entire property was insufficient to pay the debts secured by the mortgages, or to earn income to pay the interest. The order of the court appointing the receiver, made subsequent to the seizure in attachment, ordered him to take possession of all the property, including that seized, and authorized him to sue in his own name as such receiver, whenever necessary to perform his duties. Held: That the mortgages covered the rolling stock, though temporarily in this state, and the receiver might, under the comity between states, by an action brought in this state in his own name, assert his right to the possession thereof, where such right is not in conflict with the rights of our own citizens, nor against the policy of our laws.

Error to the District Court of Hamilton County.

The original action was brought by Samuel Gill, Receiver of the Louisville, Cincinnati & Lexington Railroad Company, against the plaintiff in error and Geo. W. Zeigler, Sheriff of Hamilton County. Gill having died, the action was revived in the name of John McLeod, the successor of Gill, as such receiver.

The object of the action was to enjoin the defendant from detaining or holding two passenger cars and one baggage car, and to compel a restoration of them to plaintiff, and for other relief.

On the 1st day of April, 1870, the Louisville, Cincinnati & Lexington Railroad Company, which was the owner of a line of railroad from Louisville to Lexington, and from Lexington Junction on said main line to the Cincinnati and Newport bridge in Newport, and from Anchorage Station on said main line to Shelbyville, all in the State of Kentucky, mortgaged the same with all its rolling stock, equipments and franchises by a deed of trust to George L.

Douglas, Trustee, duly executed, acknowledged and recorded, to secure \$1,000,000 in bonds of the company, with interest coupons attached at 8 per cent., payable semi-annually. By virtue of a contract, the company had the right to cross the Newport bridge and make connection with like roads in Ohio.

One of the conditions of this mortgage was, that if default was made and continued for more than ninety days in the payment of any semi-annual instalment of interest, then the principal evidenced by the bonds should become due.

On the 25th of July, 1874, said Douglas as Trustee commenced a suit in the Louisville Chancery Court, making the proper parties, alleging the foregoing facts, insolvency of the company and insufficiency of the assets to pay the mortgage debts, and praying for the appointment of a receiver, on the ground that the entire property including that in controversy was insufficient to earn a net income sufficient to pay the interest on the bonded debt of the company which was insolvent.

By a cross-petition in that suit, filed by one Norvin Green, Trustee, it appears he was a trustee under a prior deed of trust in the nature of a mortgage on the same property to secure \$3,000, 000 in bonds.

The condition of this mortgage was, that if default be made for more than sixty days in the payment of interest, then it should be lawful for said trustee to enter and take possession of all the property embraced in the deed of trust.

In his cross-petition Green also seeks the appointment of a receiver and for the protection of his rights.

Pending these applications for the appointment of such receiver, the plaintiff in error, a corporation of the State of Kentucky, doing business in Louisville and within the jurisdiction of the court where said suit was pending, commenced an action in the Court of Common Pleas of Hamilton County, Ohio, against said railroad company as a foreign corporation, and caused an attachment to be issued and levied on certain cars, part of the equipments of said road included in said mortgages which was temporarily in Cincinnati, having crossed the Newport bridge to deliver passengers and freight and return.

This action and attachment was commenced September 15, 1874.

On the 21st of September, 1874, upon the motion of Douglas, trustee, under the second mortgage, and Green, trustee under the first, the breaches of the conditions of said mortgages being admitted, the court appointed said Gill receiver of all the property of the company, including the cars seized by attachment, and directed him to take charge of the same. This receiver was duly qualified, and the railroad company was ordered to surrender to him its road and all its equipments and property, and he was ordered to take possession of the same and use and operate the road until the further order of the court. The order invested him with the

"same powers as are conferred on the president and directors of the company under its charter."

He was authorized to bring and defend all actions *in his own name*, as receiver, as he may be advised by counsel to be necessary or proper in the discharge of the duties of his office. He was further authorized to take possession of all rights of the company across the Newport and Cincinnati bridge, to and from the depot in Cincinnati under a contract for that purpose.

On appeal to the district court the injunction prayed for was made perpetual, to reverse which judgment these proceedings in error are prosecuted.

JOHNSON, J.

There is no bill of exceptions, hence if the fact stated in petition, which are put in issue, entitled the receiver to the relief prayed and granted we must presume those facts were proved sufficient to warrant the judgment.

These facts are, in brief, that there were two mortgages on the railroad and its equipments including the cars in controversy, the conditions of which had been broken, the company was insolvent, the property was insufficient to pay the mortgage debts or to earn enough to pay the interest thereon.

In this condition of things, the trustees applied to a court of chancery in Kentucky, having jurisdiction of the subject matter for the appointment of a receiver. Pending this application, the plaintiff in error, a citizen of Kentucky and within the jurisdiction of the court before whom the application was made, came to Ohio, and by attachment founded on an unsecured claim against the railroad company seized cars covered by the deeds of trust, and now claims priority over the right of the receiver.

After this, the court in Kentucky made the appointment of a receiver, and clothed him with the powers stated. He was to take possession of the road, its equipments, franchises, &c., and to operate the same. He was vested with power to sue in his own name as receiver in all actions advised by counsel, necessary or proper in the discharge of his duties. This power to possess himself of the property of the road, and to operate the same, extended across the Ohio river over the Newport bridge to a connection with the Ohio roads at that point, and for that purpose invested him with the same powers as the president and directors of the company had under its charter to make connections with roads in this State.

The conditions of both mortgages having been broken, the right to the possession of the mortgaged property as by the laws of Kentucky vested in the trustees under the terms of the deeds of trust.

The right which the company had, to run its cars over the Newport bridge into this State, also vested in the trustees, and on their motion was conferred on the receiver. Instead of asserting in person, this right, the trustees secured the appointment of a receiver and had him clothed

with all the powers they, as well as the corporation possessed in the premises.

The temporary removal of the cars into Ohio by the company pending the application for a receiver did not divest the mortgages of any rights to possession of the property, nor impair the power of the court over it.

The rights of the mortgagees under this mortgage will be determined by the *lex loci contractus*, when such contract is not contrary to the policy of our laws, nor in conflict with the rights of our own citizens. In such a case our courts will by the law of comity enforce the contract and give it an extra territorial operation. Thus the mortgagee of chattel property under the laws of New York may assert his rights against the mortgaged property found in Ohio. *Kanaga v. Taylor*, 7 O. St. 134.

This property at the time it was seized in attachment was in possession of the mortgagor, and was temporarily in Ohio under a contract with the Cincinnati & Newport Bridge Co., but the right to the possession was in the trustees under these mortgages. If instead of procuring the appointment of a receiver they had in person asserted their right to the possession under the conditions of the mortgage, no one doubts that their right was paramount to the seizure under the attachment.

The right of the trustees under these mortgages, which are valid by the laws of both states, can be asserted in Ohio as fully as in Kentucky. The only limitation being that the courts of Ohio, while allowing the comity of suit on a contract not in contravention of our laws or public policy, will protect the rights of our own citizens, and will not allow the principles of comity to defeat or impair these rights. *Fuller v. Steiglitz*, assignee, 27 O. St. 355; *Bank of Augusta v. Earle*, 13 Peters, 591; *Shortwell v. Jewett*, 9 Ohio, 180; *Oliver v. Townes*, 14 Martin (La.) 93; *Gaulundet v. Hall*, 35 N.Y., 657; *Wharton Conflict of Laws*; *Story on Conflict of Laws*, Sec. 244, 259.

The validity of these mortgages and of the appointment of the receiver of this corporation is clearly stated in *Newport & Cin. Bridge Co. v. Douglas*, receiver, 12 Bush. 673. The extent of the powers of the receiver to operate and control the road and its earnings under this appointment are then fully settled.

Counsel for plaintiff in error concede the extra territorial rights of the owner of property, or of the mortgagee thereof, to maintain an action in the courts of a sister state, when the case comes within the exception stated, but deny that a receiver has any such power. The claim is, that the receiver acquired no title to the property in controversy, and had no power to bring an action in the State of Ohio, the order of the Louisville Chancery Court having no effect outside of the State of Kentucky. Let it be assumed as settled by all the authorities that the order of the Kentucky court sitting in chancery did not operate to confer or divest any title to property outside of that state. That is probably

also true as to the title of property within that state. The receiver, when appointed by the court of chancery, did not acquire the title to the property, but only the right under orders of the court to possess and operate the same, as the trustees under the mortgages might have done, or as the court might direct..

Stripped of all collateral matters, the question is: has the receiver in such a case the legal capacity to possess himself of the property embraced in these mortgages?

The general principle is: "that the possession of the receiver is that of all parties to the suit, according to their titles. As between the owner and incumbrancers it is for some purposes the possession of the incumbrancers, who have obtained or extended the receiver; as between the owner whose possession has been displaced and a third party it is the possession of the former." High on Receivers, Sec. 134, Note 1.

Thus in *Horlock v. Smith*, Law Jour. N. S. vol. 2 p. 157, where a receiver was appointed of property mortgaged to A, and continued to hold over after his discharge it was held, that the possession of the receiver after such discharge was the possession of A.

The general proposition is well established that the receiver is the officer or agent of the court appointing him, for the benefit of whoever may be ultimately determined to be entitled to the property. In the case at bar, the fact was established, that the right of property was in the receiver, for the benefit of the incumbrancers, on whose motion he was appointed, and therefore, as between them and the owner, or the unsecured creditors, the possession is that of the incumbrancers. Thus it was held in *Angel v. Smith*, 9 Vesey 337, that when the rights of the parties are ultimately determined, the possession of the receiver for the whole period, by relation dates back to the time of the appointment, though pending such determination, it be deemed the possession of the court for all parties interested.

Again, the possession of the receiver and his right to possession are exclusive. No one, not even the trustees under these mortgages, could interfere with this right. Having procured his appointment and placed the property in the custody of the court, they would be estopped from asserting in person the right to enter upon and use the property reserved to them in the conditions of their mortgages.

Without authority of the court, no one has the right by execution, or otherwise, to interfere with the receiver's possession. High on Receivers, Sec. 135 to 156, and cases cited.

Again, the authority to bring action is derived from the court appointing him, which may be conferred either by a general order or by special orders in particular cases. 2 Daniels Ch. Prac. 1751, Note 7. *Davis v. Gray*, 16 Wall 216-219.

This is according to the weight of authority, though there are many well considered cases holding that a receiver had the right to sue by virtue of his appointment and the general pow-

ers thereby conferred, without express authority for that purpose. 2 Daniels Ch. 1751. Note 7, in brackets. *Wray v. Jamison*, 10 Humph. 186. *Baker v. Cooper*, 57 Maine 388. High v. Receivers sec. 210.

In the case before us the order of appointment authorizes the receiver to bring all necessary proper actions in his own name as such, under advice of counsel.

So far as the court had power to do so it has by a general order clothed the receiver with the right to bring this action. If the allegations of the petition are true, and in this proceeding we must assume that they are, the action was a necessary and proper one, and was advised by counsel who represents the receiver. This right to sue in his own name is not controverted when applied to an action in Kentucky, but the claim is that the authority to do so is confined to actions brought in Kentucky. In other words, that this right cannot, by the comity between states, be exercised in a sister state.

As the mortgage was valid in Ohio, and the property was insufficient to pay the debt, the equity of redemption on which the attachment was levied was valueless. The attaching creditor acquired no right or interest by the seizure, paramount to the mortgagee's.

Had it appeared that an interest in the property was acquired by the seizure, a different and somewhat difficult question would have been presented, namely: would the Ohio court retain the property until this interest was ascertained and protected? If the attaching creditor was a citizen of Ohio, the principle that our courts would protect its own citizens would seem to apply, but treating the mortgages as valid, no such interest existed, or could be acquired by the levy of the attachment, as the property was insufficient to pay the debts secured by the mortgages.

Independent of the rights of any citizen of Ohio, will comity allow the receiver to maintain an action in Ohio, which he could bring in Kentucky?

We think that upon both principle and authority such an action may be maintained. The nature of the union between the states, as members of a common government, the vital interests which bind them together, should lead us to presume a greater degree of comity in commercial, as well as political affairs, than we should be authorized to presume between states, wholly foreign to each other.

In *Hurd, Receiver, v. The City of Elizabeth*, 41 N. J. L., 1, it was held, that a receiver appointed by a court of New York, clothed with authority to take the designated property wherever situate, may sustain a suit for such property in the courts of New Jersey.

That was an action in that state to recover moneys due a New York bank, of which the plaintiff was appointed receiver by a New York court. There, as here, the right to sue outside of New York was denied.

It is said there are *dicta* that go to the extent of this claim, but the correct rule is stated to be:

"That a receiver cannot sue or otherwise exercise his functions in a foreign jurisdiction, whenever such acts, if sanctioned, would interfere with the policy established by law in such foreign jurisdiction. * * * * *

"It could not be exercised in such foreign jurisdiction to the disadvantage of creditors resident there, because it is the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied."

The distinction is drawn between the case of a receiver acting under the inherent force of his appointment alone, and a case where, by the terms of his appointment, he is directed to gather the assets wherever found. The power of the court to confer such authority on a receiver is not limited to property found within the state where he is appointed. It is not necessary that the property should be within the jurisdiction of the court.

Thus the courts of England have appointed receivers to manage landed property in India, Canada, China, Ireland, Italy, the South American states and other places. 2 Daniels' Ch. * 1731, and cases cited.

So on principles of comity, the aid of a New Jersey court was extended to a foreign receiver to obtain possession of property, as against the officers of a corporation of which he was receiver, who may be endeavoring by fraud or subterfuge to withhold it. *Bidlack, Receiver, v. Mason*, 26 N. J. Eq., 230.

The principle announced in *Hurd v. Elizabeth*, supra, which is a late and well considered case, is in our judgment supported by reason and authority. A few of the cases are: *Pond v. Cooke*, 6 Reporter (Conn.) 516; *Hunt v. Columbian Ins. Co.* 55 Maine 297-8; *Ex parte Norwood*, 3 Bissell 504; *Gray, Receivers, v. Davis*, 1 Wood, 420, affirmed in *Davis v. Gray*, 16 Wallace, 203; *Runk et al., Receiver, v. St. John*, 29 Barb., 585; *Barclay v. The Quicksilver Mining Co.*, 6 Lan. 25; *Willetts v. Waite*, 25 N.Y. 577; *Peterson v. The Chemical Bank*, 32; *Pugh v. Hunt*, 52 Howard (N.Y.), 22; *Graydon v. Church*, 7 Mich., 36.

Great reliance is placed on the remarks of Mr. Justice Wayne in deciding the case of *Booth v. Clark*, 17 Howard, 334, where it is said, "that the receiver's right to the possession of the property is limited to the jurisdiction of his appointment." This and other remarks of the learned Judge are termed dicta, when applied to cases like the present. In *Hurd v. The City of Elizabeth*, 41 N. J., Law 1. *Ex parte, Norwood* 3 Bissell, 512. *Booth v. Clark* was correctly decided upon the facts before the court. One Camara recovered a judgment in the court of New York against Clark, and upon a return of no goods on which to levy, had Booth appointed receiver in 1842, to reach equitable assets and choses in action of Clark to satisfy his judgment. In 1851 Booth, as receiver, filed a bill in the Circuit Court of the District of Columbia, seeking to reach a claim upon Mexico in favor of Clark,

which had been awarded to him in 1848. Clark was adjudged a Bankrupt in 1843, and this claim against Mexico, which was then existing, passed to his assignee. It was held in *Clark v. Clark*, 17 Howard, 315, that this claim belonged to the assignee in bankruptcy. The controversy in this case was, therefore, one between Clark's assignee in bankruptcy, and Booth, receiver, under the creditor's bill of Camara filed in New York, as to which was entitled to collect from the United States the amount awarded to Clark by the commission under the treaty between the United States and Mexico. It was held that the assignee in bankruptcy, by virtue of his office, had the best right to the fund. There were no liens or vested rights of the judgment creditor to his debtor's claim or chose in action. The receiver only acquired an authority to sue for and reduce to possession this claim. This authority had no extra territorial force as against the assignee in bankruptcy, who represented all creditors alike, and who by the adjudication in bankruptcy, became invested with the right to choses in action wherever found.

Unlike the present case, there was no lien or mortgage, or other vested interest in the receiver. So far we have taken no notice of the fact that the litigating parties are both citizens of Kentucky. The plaintiff in error has no right to invoke that protection against the principles of comity, which this state would accord to her own citizens. Wharton Conflict of Laws, Secs. 364-369. In such case it is said held, "where questions as to extra territorial property arise between foreign assignees and foreign creditors, domiciled in the same state, the foreign law to which such parties are subject will be upheld. *Ibid.* Sec. 369, and note.

In *Rhode Island Bank v. Danforth* 14, Gray 123, that a mortgage on chattels in Massachusetts by a Rhode Island mortgagor to a mortgagee residing in the same state, would be sustained in the courts of Massachusetts as against an attachment in Massachusetts by a Rhode Island creditor. The court say, all the parties are citizens of Rhode Island, and a valid mortgage there will transfer the property in Massachusetts. If this were not the rule, it would enable a Kentucky creditor of an insolvent debtor, by an attachment in Ohio, to defeat an assignment made in Kentucky for the equal benefit of creditors, and thereby secure a priority over others, and even over a valid mortgage.

Judgment affirmed. [To appear in 38 O. S.]

VIRGINIA MILITARY LANDS IN OHIO.

[*Norvill's Case concluded.*]

Meanwhile the lands had been sold for taxes, or by order of probate courts and otherwise. Where the parties to the original entry had omitted to obtain legal titles and the period in which legal titles might have been obtained, had passed and nearly a generation of time had subsequently intervened, and the land had long been in peaceful possession and actual occupancy under possessory rights, and titles derived through the tax sales or judicial proceeding, or by purchase from the holders

of the original entry, the evidence of which was often imperfect and not infrequently lost, there was manifestly good reason why legislation that would provoke litigation and throw titles into confusion or disturb long possession under claim of title, should be avoided.

The second section of the act of 1880 declared valid all legal surveys that had been returned to the land office on or before March 3, 1857, on entries made on or before January 1, 1852.

The effect of this section was to confirm all patents that had been issued on such surveys, and to prevent the grantees of the State, under the act of 1871, from asserting a claim to any such lands on account of defective proceedings or technical irregularities connected with the surveys and entries on which the patents were issued.

A mistake of the land office in issuing patents where the basis of the patent was legal but the proceedings in some manner irregular could not thereafter be inquired into by the courts. Surveys had been made but not returned within the time prescribed in the act under which they were made, but were returned before March 3, 1857. The surveys so validated were such as had been returned to the General Land Office at the seat of Government on or before March 3, 1857. It has been argued before me, that the office of the principal surveyor of the Virginia Military District at Chillicothe was meant as the office to which the surveys should be returned, or that if returned to that office, they were validated by the act of 1880. The proposition is untenable. The office to which the returns were to be made under former laws, to which the provisions of this act conformed was the General Land Office at Washington as successor to the Department of War for this purpose. There was otherwise no evidence of the survey, and no basis on which a patent could be issued. The return to the General Land Office was a positive requirement of law, and a precedent condition to the acquirement of any rights under the entry, failure in compliance with which was fatal to the legality of the survey. Legal surveys only were affected by the provision of the 2nd section. A survey not returned to the General Land Office on or before March 3, 1857, was not a legal survey. Notice to the world of the appropriation of the land must have been given in the manner prescribed by the statute, and a survey filed elsewhere than in the office designated by law, was not notice to anybody and no rights could be established, maintained, or concluded in the absence of such notice filed in the General Land Office within the prescribed time. As a minor, but no less effective consideration, it may be observed that the office of the principal surveyor of the Virginia Military District is never termed a "land office." The descriptive words "land office" and "General Land Office" are sometimes used convertibly; the words "land office" and "office of the principal surveyor" etc. are never so used. The land office is an office of the government universally recognized by this descriptive designation. The office of the principal surveyor of the Virginia Military District is not. This latter office is specifically mentioned in the 3rd section of the act in relation to the record required by previous laws to be made in that office. The "General Land Office" is also mentioned in said section in the same relation as "land office" is mentioned in the 2nd section. Obviously there was no intention of confounding the General Land Office with the office of the principal surveyor of the Virginia Military District or of confusing the functions, duties, or obligations respectively connected with those district offices. An essential modification of a system that has been maintained from the period of the establishment of the boundary line of the Virginia Military District, cannot be assumed by implication. The proposition to which I have adverted appears to have been raised upon the point that the initial letters of the words "land office" in the second section of the statute are not printed in capitals. This is a mere clerical or typographical incident and does not control the law. If it were of sufficient importance to be mentioned it might be stated that in the report of Senate proceedings (Cong. Record, Vol. 10, 2nd Sess. 46th Cong. p. 3572) it is seen that this section inserted in the bill by the Senate used the words "Land Office" spelling the same with capital letters. The substitution of small letters was an apparent fancy, or accident of the copying clerk.

The 3rd section of the act of May 27, 1880, is not a revival of the act of 1804. It is a new act, and it is in effect and in fact a new grant. The parties entitled to bounty lands under former laws but whose rights had lapsed by

the efflux of time and the limitations of the statutes, were allowed three years in which to make surveys in cases in which by virtue of a proper warrant, entries had been made and duly recorded on or before January 1st, 1852, and where the surveys had not been made previous to the passage of this act.

The language of the act is "shall be allowed" three years from and after the passage of "this act to make and return their surveys" etc. Such surveys were to be recorded in the office of the principal surveyor and the original plat of survey and the warrants or certified copies of warrants were to be filed in the General Land Office in the same manner as formerly provided by the act of 1804.

This was the application of the old and familiar method to the new grant. An important limitation of the act is the restriction of its application to cases where there had never been a survey, and it is in such cases only that a survey was authorized to be made in the manner and within the time prescribed, and patent authorized to be issued. Patents could therefore be issued only on surveys made after the passage of the act and not on surveys made before the passage of the act.

Congress is presumed to be familiar with the subject matter of its legislation and the reasons which under the existing situation of titles to lands, in the Virginia Military District would have sanctioned and in justice and equity required this limitation, must be presumed to have been the reasons which operated on the legislative mind in affixing such limitation and restriction; after making an entry by virtue of their warrants and obtaining surveys, many parties neglected to return the surveys and warrants to the General Land Office as required, and therefore never obtained legal title to the land. Whether this was mere negligence or a design to escape taxation is not material. The fact is known to be, that such title as the holders of entries or their assigns originally had passed by tax sales and otherwise to third parties and their transferees, and that the lands at the date of the act of 1880, were as now the cultivated farms and homes of numerous citizens. To have authorized the issue of patents to the original holders of entries or their immediate assigns who had slept on their rights for a period of from twenty-five to seventy-five years, would have been to prefer stale equities to living rights and to provide a means of wholesale ejectment, and dispossession of actual occupants, and the speculative acquirement after a life-long evasion of a participation in the public burthens and without compensation to the injured parties, of property increased in value by the growth of population and the labor and means of those who had lawfully nurtured and improved it under the protection of the laws of the State. Congress did not intend to perpetrate an injustice of this magnitude, and I find in this necessary inference a reason which satisfies me that the proper construction of the 3rd section of the act of May 27, 1880, is that which follows the strict literal and natural import of the words employed in the statute. If there were any doubt upon the point it would be removed by a consideration of the nature of the act; which I do not regard as the essence of a remedial statute, but as a grant *de novo* operating upon the lands that had been released from all prior reservation for the satisfaction of military claims. I do not however esteem the law doubtful. I do not think it the law or the intention of the law that ancient surveys not lawfully returned prior to March 3, 1857, or surveys made without lawful authority between March 3, 1857, and May 27, 1880, should be habilitated and patents issue thereon under this act.

The 3rd section comprises the sole existing authority for the issue of patents on surveys, founded on Virginia military warrants. It authorizes patents to be issued in certain clearly defined cases, namely: where the warrant was entered on or before January 1, 1852, and the survey had not been made and returned to the General Land Office at the date of the passage of the act, but should after that date be made and recorded in the office of the principal surveyor of the Virginia Military District and returned to the office of the Commissioner of the General Land Office, together with the original or certified copies of the warrants.

Patents can only be issued when specifically authorized by law. Specific authority is found in this section for the issue of patents in the cases thus described in the statute. No authority exists under this act for the issue of patents in any other case or class of cases and if there were any doubt upon the point, it would still be my duty

to decline to issue patents in doubtful cases, by the very reason of such doubt.

Applying the principles and views above set forth to the case presented by you, I find as follows:

1st. An entry appears to have been made by virtue of the warrant prior to January 1, 1852, to-wit: in or prior to 1822, and if so, the case is to that extent within the statute.

2nd. The survey was made in 1822, as would appear from the purported copy now filed, but was not returned to the office of the Commissioner of the General Land Office on or before March 3, 1857, and so far the case is not within the statute.

3rd. There is no authority of law under which a patent can issue in this case.

Very respectfully,

N. C. MCFARLAND,

Commissioner.

Since this decision was made, an appeal has been taken to the Secretary of the Interior by Jeremiah Hall, Attorney. The question will again be argued and decided hereafter.

LAWYERS vs. LAW-MAKERS.

The London *Law Times*, in commenting upon the lawyers in the House of Commons and in the Senate of the United States, says:

It is a matter of common historical knowledge that towards the end of the 16th, and during the earlier part of the 17th century, the House of Commons included among its members a large proportion of the legal profession, whose energy and eloquence earned for them from Lord Bacon the title of "the *literæ vocales* of the House." In later times, even if their actual number has not diminished, it is certain that their proportion to the remainder of the House has become smaller, and it is more than certain that they have never attained the preponderance that the profession enjoys at the present time in the Legislature of the United States. In the Senate of that country no less than fifty-seven out of seventy-six members are lawyers, and in the lower house as many as 195 out of the 293 representatives; in other words, more than two-thirds of the whole legislature belong to the legal brotherhood.

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

Tuesday, June, 6, 1882.

GENERAL DOCKET.

No. 140. Thomas C. Dye v. Thomas C. Bowen et al. Error to the District Court of Marion County. Cause settled as per agreement on file.

194. Allen M. Watson v. John J. Barnhouse et al. Error to the District Court of Jefferson County. Settled as per agreement on file.

542. Roderick L. Watts, executor, v. J. M. Miller. Error to the District Court of Highland County. Dismissed at costs of plaintiff in error by consent of parties.

1102. Lydia London, administratrix, v. James Patterson, administrator. Error to the District Court of Co-

lumbiana County. Time of filing printed record extended to June 30, 1882.

1117. Charles Stoddard v. The State of Ohio. Error to the Court of Common Pleas of Ashland County. Judgment affirmed. There will be no further report.

MOTION DOCKET.

No. 67. Edward A. Bratton v. E. D. Dodge et al. Motion to modify decree in cause No. 41 on the General Docket. Motion overruled.

70. Frederick W. Newburg v. The State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Franklin County. Motion overruled.

83. Philo Tilden v. C. O. Edison. Motion to stay execution and appoint a receiver in cause No. 1144 on the General Docket. Motion overruled.

84. Adin G. Hibbs, administrator, &c. and William Miller v. The Union Central Life Insurance Company. Motion for stay of execution in cause No. 783 on the General Docket. Motion granted. Execution stayed upon the execution of a bond by William Miller in the sum of \$500, conditioned according to the 3d clause of Section 6718, of the Revised Statutes.

86. Jasper Liming v. E. J. Homphill. Motion to dismiss cause No. 1917, of the General Docket, for want of printed record. Motion overruled, and counter-motion to extend time for printing granted, and time extended for 60 days.

89. Charles Williams v. The State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Franklin County. Motion overruled. Although there are great irregularities occurring at the trial, there are no substantial errors to the prejudice of the plaintiff in error. There will be no further report.

90. Germania Building Association v. George F. Windhorst. Motion for leave to file a petition in error to the Superior Court of Cincinnati. Motion overruled.

91. Robert Cone v. The State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Hamilton County. Motion overruled on the ground that the application should be made to the District Court of Hamilton County.

92. Irving W. Pope v. John Bleasdale. Motion for stay of execution in cause No. 1171 on the General Docket. Motion overruled.

95. H. C. Rutter, Superintendent, &c. v. Ohio ex rel., James Gätrel. Motion to take cause No. 1183, of the General Docket, out of its order for hearing. Motion granted.

96. Pittsburgh, Cincinnati & St. Louis Railway Company v. George Leathley. Motion for stay of execution in cause No. 1174 of the General Docket. Motion passed for specific statement in writing of errors relied on, and so much of the facts as show how the points arise.

97. Ohio ex rel., Attorney General v. Pioneer Live Stock Co. Motion to take cause No. 1191, of the General Docket, out of its order for hearing. Motion granted.

98. A. B. Coffin v. James Secor, et al. Motion to stay proceedings in cause No. 943 of the General Docket. Motion overruled.

99. Lewis Cosler v. W. R. Hardman, et al. Motion to stay execution in cause No. 1167 of the General Docket. Motion granted. Bond fixed at \$200, conditioned to pay all costs and damages in case the judgment should finally be affirmed.

100. City of Youngstown v. James E. Montgomery. Motion to dismiss cause No. 966, of the General Docket, for want of printed record. Motion granted.

102. Thomas H. Gardner v. Lina Murphy. Motion to dismiss cause No. 628, of the General Docket, and counter-motion to permit the printing of the remaining portions of the record. Motion to dismiss overruled, and counter-motion granted. The printing additional portions of the record to be done within 60 days.

108. Pittsburgh, Cincinnati & St. Louis Railway Co. v. J. W. Haynor, et al. Motion to stay execution in cause No. 1176 of the General Docket. Motion overruled.

Ohio Law Journal.

COLUMBUS, OHIO, : : JUNE 15, 1882.

HONORS.

The Republican Convention of this State, last week, placed in nomination, for Judge of the Supreme Court, Hon. John H. Doyle of Toledo, now Judge of the Court of Common Pleas of Lucas County. Judge Doyle is an able, conscientious jurist, upon whom this compliment is well bestowed, and should he be elected to the office of Supreme Judge, will wear the Judicial ermine with dignity befitting that high office. The Democratic Convention will meet in this city July 20th, and will beyond question place in nomination the present occupant of the bench, Hon. John W. Okey, who deserves a nomination at the hands of his party. He is so well known that he needs no introduction to the people of the State, and his ability as a lawyer and judge is beyond question.

LAND WARRANT—SURVEY—LANDS OF VIRGINIA MILITARY DISTRICT.

SUPREME COURT OF OHIO.

JOHN A. COAN,
v.
WILLIAM J. FLAGG.

1. A survey, embracing sixteen hundred and eighty-two acres, on an entry of lands in the Virginia Military District made on a warrant for five hundred acres, is, by reason of such excess, fraudulent as against the Government of the United States, and vests in the owner of the warrant no estate or interest in the land, which the government of the United States, on principles of equity, is bound to protect by issuing a patent for the whole or any part of the survey.

2. Whether the act of Congress of February 18, 1871, granting to the State of Ohio, lands in the Virginia Military District "remaining unsurveyed," passed title to lands covered by a previous survey voidable on account of excess in the quantity of land embraced, *quere?* But, if it did not, the title to such land sold by the Ohio Agricultural and Mechanical College, grantees of the State of Ohio, to a purchaser for a valuable consideration, was ratified and confirmed to such purchaser, by the 4th section of the act of May 27, 1880.

May 30, 1882.

Error to the District Court of Scioto County.

The original action was brought by defendant in error against plaintiff in error to quiet his title to certain real estate within the Virginia military district, and known as survey 15882, containing 1682 acres, and also known as lot No. 99, in the allotment of lands granted by the United States to the State of Ohio by act of Congress passed April 18, 1871, and afterwards by the State of Ohio to the Ohio Agricultural and Mechanical College.

The plaintiff, Flagg, in his petition, claimed to be the owner of the legal title to, and to be in possession of, the whole of said tract.

The defendant, Coan, by his answer, disclaimed title or possession to that part of survey 15882, which is south of a line drawn from the northwest corner of survey 14304 to the easterly corner of survey 15771, and denying the plaintiff's title and possession to that portion of survey 15882, north of the line described, asserts title and possession in himself.

The original suit was commenced in the Court of Common Pleas of Scioto County, on the 19th of October, 1875. From the decree of the common pleas an appeal was taken to the district court, wherein a final decree was rendered in favor of the plaintiff, Flagg, at the December Term, 1877. On a motion for a new trial by defendant, Coan, being overruled, a bill of exceptions, containing all the testimony, was made part of the record.

McILVAINE, J.

Each party traces his title to the cession of territory northwest of the Ohio river by the State of Virginia to the United States, in 1784, (1 vol. U. S. Laws, 472), whereby lands situate in this state, between the Scioto and Little Miami rivers, were devoted to the satisfaction of warrants, as bounties, issued by the State of Virginia to troops for services in the revolutionary war, on the continental establishment.

Flagg, plaintiff below, claims title under the act of Congress of April 18, 1871, (16 vol. of Statutes at large, 416), which reads as follows:—"Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That the lands remaining unsurveyed and unsold in the Virginia military district in the State of Ohio, be, and the same are ceded to the State of Ohio upon the conditions following, to-wit: Any person who, at the time of the passage of this act, is a bona fide settler on any portion of said lands, may hold not exceeding one hundred and sixty acres so by him occupied, by his pre-empting the same, in such manner as the legislature of the State of Ohio may direct." To complete his chain of title, the plaintiff below claims further under a grant from the State of Ohio to the Ohio Agricultural and Mechanical College, and from the college to himself.

Coan, the defendant below, claims title under an exchange military warrant No. 494, issued by the State of Virginia on the 16th day of June, 1840, to the children and heirs of Francis Gordon, a child and heir of John Gordon, the only heir of Thomas Gordon, who was a lieutenant of cavalry in the revolutionary line of Virginia troops in the revolutionary war, for five hundred acres of land to be laid off in one or more surveys.

An entry, No. 15882, purporting to cover five hundred acres of land under the foregoing warrant, No. 494, made on the 18th day of December, 1849, by the said heirs of Francis Gordon and one David F. Heaton, an assignee of part of said warrant.

A survey under said entry, No. 15882, purporting to contain four hundred acres—375 acres for the heirs of Francis Gordon and 25 acres for said Heaton—made by said D. F. Heaton, a deputy surveyor of the district, on the 10th day of April, 1851, giving the metes and bounds of the land surveyed, which was duly recorded on the 23rd of December, 1851. And mesne conveyances from the heirs of said Francis Gordon and said Heaton to himself. It appears, however, that this survey, No. 15882, embraces, in fact, one thousand six hundred and eighty-two acres.

No patent has ever been issued on this entry and survey, for the reason, among others, that the quantity of land embraced is grossly in excess of the quantity named in the warrant No. 494.

Upon these facts the main questions in the case arise:

1st. Did the entry and survey invest the owners of the warrant or their assignee with an equitable interest in the lands conveyed? If, as against the United States, an equitable estate had passed to the defendant below, it may be admitted that the subsequent grant by the United States to the State of Ohio did not divest such estate. Upon general principles, it cannot be doubted, that a fraud so palpable as is shown to have been attempted against the laws of the United States by this entry and survey, would have avoided the survey entirely. The excess is so great that no reasonable supposition can arise that it occurred through an honest mistake. True, the United States, against whom it was intended, might waive the fraud and relieve the party from its consequences, in whole or in part; and it is claimed that such was the effect of the act of Congress of July 7, 1838, (vol. 5, Stat. at large, 262), the second section of which provides: that no patent shall be issued *by virtue of the preceding action*, for a greater quantity of land than the rank or term of service of the officer or soldier to whom, or to whose heirs or assigns such warrant has been granted, would have entitled him to under the laws of Virginia and of the United States, regulating the issuing of such warrants; and whenever it appears to the secretary of war that the survey made by any of the aforesaid warrants is for a greater quantity of land than the officer or soldier is entitled to for his services, the secretary of war shall certify on each survey the amount of such surplus quantity, and the officer or soldier, his heirs or assigns, shall have leave to withdraw his survey from the office of the secretary of war and resurvey his location, excluding such surplus quantity, in one body, from any part of his resurvey, and a patent shall issue upon such resurvey as in other cases." &c. Clearly this section forbids the issuing of a patent for a greater quantity of land than the officer or soldier was entitled to under the laws regulating the subject; and by fair construction it would seem that the relief provided was only in cases where the quantity named in the warranty was in excess of

the quantity to which the warrantee was entitled, and not to cases where the survey was in excess of the warrant. But however that may be, the operation of the section is expressly limited to cases arising under the preceding section of the act, and the operation of that section expired by its own limitation on the 10th of August, 1840. If it be claimed that the operation of section two of this act was extended by reason of the extension and revival of the first section by the act of August 19, 1841, (vol. 5, U. S. L., 449), it is, at most, sufficient for this case to say, that the "preceding section" thus revived and continued in force for a limited time, contained the sole authority for making and returning entries and surveys under these Virginia warrants, and since March 3rd, 1857, there has been no authority for making or returning surveys under any circumstances whatsoever. So that, at all events, the right to relief against excessive surveys granted by the 2d section of the act of 1838, whatever it may have been, has not existed since 1857, even if it be conceded that it was continued at all after 1840. See Statute Mar. 3, 1855, (10 vol. Stat. at large, 701). Again, it is claimed that congress has recognized the validity of surveys within the district, notwithstanding the quantity embraced in the survey was excessive, by the *proviso* in the act of March 23, 1807, (4 U. S. L., 92), which reads as follows: "Provided, that no locations as aforesaid, within the above mentioned tract, shall, after the passage of this act, be made on tracts of land for which patents had previously issued, or which had been previously surveyed; and any patent which may, nevertheless, be obtained for land located contrary to the provisions of this section, shall be considered as null and void."

It has undoubtedly been settled by repeated decisions that under this proviso that excess in the quantity of land embraced in a survey does not vitiate the survey so as to authorize a subsequent location or entry under another warrant. But it has not been settled, nor was it the intention of congress, by this proviso, to require a patent to be issued on an excessive survey.

As between locators, lands actually surveyed, whether the survey was fraudulent or not, were withdrawn from subsequent entry and survey until the previous survey should be withdrawn or set aside. This legislation was in the interest of peace, as between locators of warrants, and was a wise provision. But to hold that congress intended, as against the Government of the United States, to declare that excessive surveys, whether by mistake or design, should be binding, so as to establish an equitable estate in the holder of the warrant and entitle him to a patent for the whole or any part of the survey, would do violence to the language of the *proviso*, and would show a disregard for the faithful execution of the trust imposed by the cession of these lands by Virginia to the United States, amounting to wickedness.

As far as we are advised, we know of no rule or practice, based either upon congressional en-

actment or principles of justice, by which the United States Government could be justified in recognizing in the defendant below an equitable estate in the whole or any part of the lands in dispute, arising upon an entry and survey so palpably fraudulent as those upon which he relies, and, therefore, it was within the power of congress, on the 18th of April, 1871, to grant to the State of Ohio the lands in dispute, free from any claim of right or interest therein of the defendant below.

It is claimed, however, that these lands were not conveyed, or intended to be conveyed, by the act of April 18, 1871. The following is the description of the lands intended to be conveyed by that act, to-wit: "The lands remaining unsurveyed and unsold in the Virginia military district in the State of Ohio."

On the part of the plaintiff in error, it is contended that the word "unsurveyed" is used in this statute as the counterpart of the word, "surveyed," as used in the proviso in the act of 1807, which has been construed to mean "surveyed in fact," whether the survey was valid or voidable in point of law. On the other side it is contended that the intention of congress was to grant to the state all the lands remaining in the district of which the United States had the power of disposition, so that the word "unsurveyed" included land covered by an invalid or void survey. This construction is supported strongly by the facts that subsequent to the year 1852 no entries under warrants for military services in Virginia were authorized, and subsequent to 1857 the right to make surveys on account of such warrants ceased—provision having been made by congress for the satisfaction of out-standing warrants by other means—and that prior to the act of 1871 congress had provided no other means for the dispositions of lands remaining subject to its power of disposition.

But inasmuch as congress, by the act of May 27, 1880, (2nd Session 46th Congress, Statutes page 142), has declared the true intent and meaning of the act of 1871, to be, that the word "unsurveyed" excluded lands which had been included "in any survey," whether valid or invalid; and as we do not deem it necessary to the decision of this case to declare the effect of the act of 1871, we leave it undecided. The decision of this question becomes unnecessary, from the fact that congress, in the 4th section of the act of 1880, provides, "This act shall not in any way affect or interfere with the title to any lands sold for a valuable consideration by the Ohio Agricultural and Mechanical College granted under the act of February 18th, 1871." This section we construe to be a ratification on the part of congress of the title of Flagg, plaintiff below, who was a purchaser from the college for a valuable consideration. True, the language of the section was not happily selected to express such ratification, but we think such was the intention of the section. Construed literally, the section can have no effect whatever. Of course, the declaratory act of 1880 could not

"affect or interfere" with any right acquired under the act of 1871. Congress knew that the Ohio Agricultural and Mechanical College had assumed to convey title to portions of these lands for a valuable consideration under the belief and claim that it had a right to do so under the act of 1871. The title which the act was not to "affect or interfere with" was not one which in the view of congress was valid and indefeasible, but one which, under the construction placed upon the act of 1871, by the act of 1880, the college had no power to convey for want of title in itself. A title which the college intended to sell for a valuable consideration, but by reason of the construction claimed for the act of 1871, it could not convey, was the subject of this section, and the purpose undoubtedly was to confirm the sale so made and give it effect according to the intention of the parties.

The title of Flagg thus ratified took effect as of the date of the conveyance, no other rights having intervened.

Several other questions have been raised and considered, which need not be reported.

Judgment affirmed.

[This case will appear in 38 O. S.]

VOID BILL OF EXCHANGE—VIOLATION OF CHARTER OF TRUST COMPANY.

SUPREME COURT OF OHIO.

JAMES P. KILBRETH, ASSIGNEE,

v.

ISAAC BATES, ET AL.

May 30, 1882.

1. Under the charter of the Ohio Insurance Life and Trust Company, the discounting of a bill of exchange at a higher rate of interest than was allowed by the charter, rendered such bill void in the hands of the company. *Bank of Chillicothe v. Swayne*, (8 Ohio, 257) followed.

2. The effect of the clause in the charter declaring its forfeiture, was not to validate, in whole or in part, an instrument that would, in the absence of such clause, have been invalid; but to enforce upon the company additional motives for observing in the management of its business the requirements of its charter.

Error to the Superior Court of Cincinnati.

The original action was brought by James P. Kilbreth assignee of the Ohio Life Insurance and Trust Company, in the Superior Court of Cincinnati, against Isaac Bates as acceptor, and Eden B. Reeder as endorser of two bills of exchange. One of the bills was dated June 11, 1857, for \$3500, and payable three months after date at the office of the Ohio Life Insurance and Trust Company, New York, and the other was dated July 14, 1857, for \$2500, payable two months after date also payable at the office of the company in New York.

One of the defenses interposed by Bates was as follows:

"And the said defendant, for a second answer to said petition, states that he is only an accommodation acceptor upon said bills of exchange in the petition described, for said Eden B. Reeder, who is the principal thereon, and this de-

fendant is only his surety. That this fact was well known to the said Ohio Life Insurance and Trust Company, the original holder of said bills of exchange, when she took the said paper, and he asks that he have the benefit thereof. And further this defendant states, that the said bills of exchange, on the petition named, were so made in pursuance of an arrangement made between the said Reeder and the said Ohio Life Insurance and Trust Company, in order that the latter might discount the same at the rate of six per cent. per annum, and discount therefrom the rate of exchange between Cincinnati and New York, which was, at that time, one and one half per cent, and which discounts were so made, whereby the said company did reserve to itself for the loan and forbearance of the principal money, covered by said two bills of exchange, a per cent. equal to seven and one-half per cent. upon the aggregate amount of both bills, which was in contravention of the charter of said company, and in violation of the law of the land.

That said Ohio Life Insurance and Trust Company, at the time of said arrangement and discounting said bills, well knew that said Reeder and this defendant had no money at New York to meet said bills, and were not expected to have any when said bills matured, but the same were to be paid and taken up at the City of Cincinnati. That such was the understanding and agreement of said Reeder and the company when they discounted said bills, and that said arrangement was a mere shift and device to evade the provisions of the charter of said company against the reservation of more than six per cent. per annum for the loan and forbearance of money by said company. And the defendant further states, that by the charter of said company, and which was in force at the said time of said discounts of said bills, it was and is provided that the said company should not loan money at a rate of interest exceeding six per cent. per annum, whereas the said loans and discounts upon said bills of exchange, were at the rate of seven and one-half per cent. per annum, and which loan and discounting, as aforesaid, of said bills of exchange were usurious and null and void."

To this defense a demurrer was filed, which was overruled and judgment rendered for the defendant.

On error this judgment was affirmed in general terms: and the present petition in error is prosecuted to reverse these judgments.

WHITE, J.

The first ground relied on in this case for the reversal of the judgment is, that the charter of the plaintiff not being pleaded, it cannot be known by the court whether the loans in question were in violation of the charter or not.

In answer to this it is sufficient to say that the only authority of the plaintiff to maintain the action is derived from its charter, which is required by section 28 thereof to "be taken and received in all courts, and by all judges, magistrates, and

all other public officers as a public act." [32 Ohio Laws 68.]

Section 7 of the charter requires the whole of the capital stock to be invested in bonds or notes drawing interest, not exceeding seven per centum per annum, secured by unincumbered real estate within the state of at least double the value in each case of the sum so secured.

Section 19 authorizes the trustees to invest "the premium and profits received by the company and the moneys received by them in trust in government, or other public stocks of the United States or of any State, or in the stock of any incorporated city, or in such real or personal securities as they may deem proper or loan the same to any county, city, incorporated town or company."

The investments referred to in this section are investments otherwise than by way of loan; and the loans which the section authorizes to be made are limited to counties, cities, incorporated towns or companies.

The loans now in question come within neither section 7 nor section 19, but under section 23 of the act. The section last named provides that the company may lend money "on notes or obligations, or such other securities as the said trustees may require, at a rate of interest not exceeding six per cent per annum. If said company suspend payment on its bills or notes, in silver or gold coin, lawful money of the United States, for more than thirty days, or shall demand and receive a greater rate of interest in any case than seven per cent. per annum, its charter shall be thereby forfeited."

The language used in this section prescribing the rate of interest at which loans may be made is substantially the same as that used in the charter of the Chillicothe Bank in the case of the Bank of Chillicothe v. Swayne, and others, 8 Ohio 257. The language of the charter in that case was: "The said corporation shall not take more than at the rate of 6 per centum per annum, on its loans or discounts; and the court held that the bank had no capacity to loan money at a higher rate, and that if a loan at a higher rate be effected by discounting a bill of exchange, no recovery could be had thereon. That case was decided in 1838, and contains an elaborate discussion of the question involved, and has ever since been recognized as authority in this State. Croed v. The Commercial Bank, 11 Ohio 489; The Miami Exporting Co. v. Clark, 13 id. 1, 17, 21; Bank of Wooster v. Stevens, 1 Ohio S. 233; Preble County Bank v. Russell, id. 313, 320; Russell v. Failor, id. 329; Strans v. Eagle Ins. Co., 5 id. 59; Union Bank of Massillon v. Bell, 14 id. 209; First National Bank v. Garlinghouse, 22 id. 502.

The same principle had previously been decided by the Supreme Court of the United States in the case of the Bank of the United States v. Owens, 2 Peters 257. The authority of the case last named is fully recognized by the same court in Tiffany v. Boatman's Institution, 18 Wall.

375. In the opinion in the last named case the court say: "The defendant is, by its charter, authorized to lend money on interest, but is forbidden to exact more than 8 per cent. for the loan. No penalty is prescribed for transgressing the law nor does the charter declare what effect shall be given to the usurious contract. This effect must, therefore, be determined by the general rules of law. The modern decisions in this country are not uniform on the question whether, if the bank takes more than the rate prescribed, the contract shall be avoided or not on these general rules; nor is this a matter of surprise if we consider the growing inclination to construe statutes against usury so as not to destroy the contract. It is, however, unnecessary to review these cases, or the earlier ones in England and in this country which uniformly hold that the contract is avoided, because this court has in the case of the Bank of United States *v* Owens, decided the question. The bank in that case brought suit upon a promissory note that was discounted at a higher rate of interest than 6 per cent., which was the limit allowed by its charter upon its loans or discounts. The charter, like that of the Boatman's Institution did not declare void any contract transcending the permitted limits, nor affix any penalty for the violation of the law. It was contended in that case, as it has been in this that a mere prohibition to take more than a given percent. does not avoid a contract reserving a greater rate, and that when a contract is avoided, it is always in consequence of an express provision of law to that effect. But the court held otherwise, and decided that such contracts are void in law upon general principles; 'that there can be no civil right where there is no legal remedy, and that there can be no legal remedy for that which is illegal.' Chief Justice Taney, in the Maryland Circuit as late as 1854, in a similar case held similar views, and supported them by the decision in this case. Dill *v* Ellicott, Taney Circuit Court Decisions 233." See also Pearce *v* Railroad Co. et al. 21. How. (U. S.) 441; Ashbury Railway Carriage and Iron Co *v* Riche, L. R. 7 Eng. & Ir. App. cases, 653; The Attorney General *v* Great Eastern Railway Co., L. R. 5 App. Cases 473; Thomas *v* Railroad Co. 101 U. S. 71. But the principle decided in Bank of Chillicothe *v* Swayne is recognized by this court as applying to the charter now in question in the case of The Bank of Ashland *v* James et al. 19 Ohio St. 145. The question in that case was, whether the present plaintiff in error acquired the bonds in question by way of purchase, or for a loan of money at an illegal rate of interest. The court below held that the bonds were taken by the company in the mode last mentioned, and held them void for that reason. This court reversed this judgment on the sole ground that the transaction was not a loan, but a purchase of the bonds. Two members of the court dissented on the ground that the transaction was a loan of money and not a sale of bonds, at a rate of interest above that allowed by the charter. The only difference between the majority of the

court and the minority was as to the character of the transaction, but all agreed, that if the bonds were taken by the company for a loan of money they were void, in the hands of the company.

The decisions as to the effect of agreeing for unlawful interest under the National Banking act, have no bearing on the question now under consideration. For as was said by this court in the case of the First National Bank of Columbus *v* Garlinghouse, 22 Ohio St. 502, the forfeiture provided for in that act "is expressly limited to the interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In thus limiting the forfeiture to the interest, the right of the bank to the principal, is necessarily implied. And so far as the argument as to the entire invalidity of the note is founded on the supposed want of power or capacity in the bank, it is enough to say that authority implied is as effective and available as authority expressly conferred.

The statute operates on the instrument given for the loan, and, in effect, declares it to be invalid as to the entire interest, but valid and binding as an obligation for the payment of the principle.

Upon the same principle it is claimed by the plaintiff in error that the only effect of stipulating for an unlawful rate of interest under the charter now in question is the forfeiture of the charter. We think the provisions in the charter in relation to forfeiture will bear no such construction. Its effect is not to validate an instrument, in whole or in part, that would in the absence of the forfeiture clause have been invalid; but to enforce upon the company additional motive for observing in the management of its business the requirements of its charter.

No question arises in this case as to the right of the company to sue for the recovery of the money from the principal who received it. The action in this case, as in the case of the Chillicothe Bank, is brought on the instruments given for the loan, which being void, constitute no cause of action. See Pearce *v* Railroad Company, 21 How., *supra*, 441, 444; Miami Exporting Co. *v* Clark, 13 Ohio 1, 19.

Judgment affirmed.

[This case will appear in 38 O. S.]

EMPANELING A JURY—COMPETENCY OF JUROR.

SUPREME COURT OF OHIO.

McHUGH *v* THE STATE.

May 30, 1882.

1. Sections 7267 to 7275 inclusive, of the Revised Statutes, are not repealed by the act of March 29th, 1881, (78 O. L. 96), in respect to empanelling juries in capital cases, or affected otherwise than in substituting the wheel, therein provided for, in place of the box from which the names of electors shall be drawn for jury service.

2. A person summoned as a juror who states upon his *voir dire* that he has formed or expressed an opinion, touching the guilt or innocence o

the accused is *prima facie* incompetent, and such *prima facie* incompetency is not removed until it has been made to appear that such opinion was formed from reading mere newspaper statements, communications, comments or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony, or hearing them testify, and that, notwithstanding such previously formed or expressed opinion, the juror is able to render an impartial verdict upon the law and the evidence.

LONGWORTH, J.

The plaintiff in error, William McHugh, was convicted in the Court of Common Pleas of Hamilton County, of murder in the first degree, and sentenced to suffer death. Numerous errors are assigned in the proceedings; only two of which we think it advisable to consider.

I. It is said that the court erred in selecting the names of persons to serve as jurors in the special *venires* issued, and in refusing the motion of plaintiff in error that the names be drawn from the wheel as provided by the act of March 29th, 1881, (78, O. L. 95). In this we think there was no error. The method of empanelling juries in capital cases is specially provided for in Chap. 6, Title II. of the code by secs. 7267 to 7275 inclusive, and differs essentially from that employed for obtaining juries in all other cases. These sections are not repealed and are not affected by the subsequent Act of March 29th, 1881, otherwise than in substituting the wheel for the box containing the names of electors from which the original panel is to be drawn. It was provided by sec. 7275, that in case a full panel should not be obtained or the whole array should be set aside, the vacancies should be filled from the bystanders. To this a proviso was added by the amendment of April 18th, 1881, (78, O. L. 181), authorizing the issuance of a special venire upon the demand of either party as provided in sec. 5173. By the last quoted section the court is required to select the talesman as was done in the case at bar. Hence the court did not err in overruling the motion of the prisoner.

II. The second error alleged is the action of the court below in overruling the challenge for cause of the prisoner's counsel to M. O. Osgood who was permitted to serve as a juror upon the trial. This juror testified upon his *voir dire* that he had both formed and expressed an opinion touching the guilt of the prisoner and that this opinion was formed from reading the accounts of the case in the newspapers and the published account of the examination before the coroner. It was decided by this court in *Frazier v. State*, 23, O. S. 551, that no juror is competent who has formed or expressed an opinion from having read what purported to be a report of the testimony of witnesses of the transaction. This is decisive of the question before us; for, although it is argued by the States' Attorney that it *no where* appears that any testimony of witnesses was offered at the examination before the coroner, we are clearly of opinion that to establish the competency of the juror, it should be shown affirmatively that no such testimony was offered or appeared in the printed report. Where a proposed juror states

that he has formed or expressed such an opinion he is *prima facie* incompetent, and it is error in the court to permit him to serve, unless the presumption of incompetency be removed by showing that his opinion was formed from reading mere newspaper statements, communications, comments or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony, or hearing them testify. The case at bar is, in this respect, indistinguishable from that of *Frazier v. State* above cited, and for this reason a new trial should have been granted.

Judgment reversed.

[This case will appear in 38 O. S.]

OVERDUE CHECKS.

The head-note to the case of *The London and County Bank v. Groom*, reported in the April number of the *Law Journal Reports*, was probably read with some surprise. In it we are informed that a check eight days old is not necessarily taken subject to the equities attached to it; but that it is a question of fact for a jury whether the holder took it under such circumstances as ought to have aroused his suspicions. The mind is accustomed to look upon a check as a short-lived bill of exchange. Overdue bills of exchange, payable at a fixed date, it is well known, are taken subject to the equities, whether the holder has or has not notice of them. The legitimate life of a bill of exchange is the interval between its creation and its maturity. After the date at which it is payable, nothing remains except duly to pay it. At that date it is a dead thing and any one who chooses to treat it as alive must do so at his own risk! It has lost its power of negotiability in the sense of its starting afresh at every new transfer, and carrying a better title to a new holder than belonged to the person from whom it came. If this is true with regard to a bill of exchange, at first sight it would seem even more appropriate to the evanescent life of a check, which, in general, exists only for one day more than that on which it is brought into being. A check given to-day to a person in the same town as the banker ought to be presented to-morrow, otherwise the holder will lose his money if the banker become insolvent. Reflection, however, and a study of the judgment of Mr. Justice Field, show that these considerations by no means exhaust the matter. A check, in fact, more closely resembles, in regard to the title it confers, a bill of exchange or promissory note payable on demand. With regard to these instruments no period has been assigned after which their vitality must be considered spent. The rule has only been applied to instruments payable at a fixed future date. With regard to bills and notes payable on demand, it cannot be contended that they are held subject to the equities at any definite date from their making. Those documents are intended to be negotiated;

but a check different. The negotiability of a check has not been much favored by the law, and the present decision is one of the few which gives security to the holder of a check, and, therefore, must be considered as of no small importance.

The facts of the case were of a familiar type. On August 21, 1880, Groome, the defendant, drew a check for 98£. on the National Bank, payable to bearer. At that time the defendant received a bill for discount from one Colls, to whom he gave the check as security, and upon a promise by Colls that he would not part with it until the defendant procured discount of the bill. The defendant was unable to discount the bill, and gave notice to Colls, who, notwithstanding, paid the check to his bankers, the plaintiffs, who gave consideration for it. Questions were raised on the pleadings as to notice in fact and want of consideration from the plaintiffs, but these were all abandoned, and the case narrowed itself into the question of law whether a check eight days old is taken subject to equities such as that which was undoubtedly attached to the check in this case in favor of the defendant. The defendant's counsel relied entirely on the case of *Down v. Halling*, 4 B & C. 330; while the plaintiffs, counsel relied mainly on *Rothschild v. Corney*, 9 B. & C. 388. In the former case, the plaintiff was the drawer of the check, which had been paid to the defendant by the bankers. Six days after the check was drawn it was handed to the defendant by a woman unknown to him, who bought goods in his shop, paying for them with the check, and receiving change. The plaintiff produced no evidence showing how the check had left his hands, and the defendant claimed a non-suit. Lord Tenterden, who tried the case, did not non-suit the plaintiff, but left to the jury the question whether the defendant had taken the check under circumstances which ought to have excited his suspicion; on which direction the jury found for the plaintiff. So far the case does not support the position that a check is like an overdue bill. It is rather the other way. On a motion, however, for a new trial, Mr Justice Bayley is reported to have said: 'If a bill, note or check be taken after it is due, the party taking it can have no better title to it than the party from whom he takes it.' This dictum from a judge of high authority, supported as it was by Mr. Justice Holroyd, and to the extent of throwing the onus of proof of title on the defendant by the third judge (the Chief Justice), is the foundation for the proposition contended for. On the other hand, in *Rothschild v. Corney*, the plaintiff, the drawer of a check, sued the defendant, who had cashed it at the bankers', on the ground that the check had been obtained from the plaintiff by the fraud of one Brady, and handed to the defendant five days after date. The judge directed the jury in the same terms as Lord Tenterden in the previous case. The jury found for the defendant; and, on a motion for a new trial—in the course of which *Down v. Halling* was cited—Lord Tenterden laid down that

it could not be held, as a matter of law, that a person taking a check after any fixed time from its date does so at his peril.

The dictum of Mr Justice Bayley did not, therefore, obtain the support of the subsequent case, and must stand or fall on its own merits. If the learned judge be accurately reported, the expression used is not of the most exact. Bills, notes and checks are placed in the same category, as if all kinds of bills, and notes, as well as checks, were subject to the same rule. The learned judge can hardly have said advisedly that a promissory note, payable on demand, is absolutely subject to equities when overdue. When, in fact, is such a note overdue? Practically, it must be always overdue, because the person to whom it was offered could never know whether the demand had been made; whereas, in the case of a note payable at a future date, the note speaks for itself. The fact that bills and notes are involved indiscriminately with checks seems to detract from the weight of Mr. Justice Bayley's opinion, as showing that the subject had hardly been sufficiently considered. Still, it may be that checks stand on a different footing from bills and notes payable on demand. With regard to such bills and notes we are left in doubt at what date Mr. Justice Bayley meant that they were overdue. With regard to checks there can be no such doubt. If they are ever overdue, they are always overdue. If Mr. Justice Bayley's view be correct, a check cannot be utilized as a negotiable instrument. We see no reason why the utility of checks should be so restricted. The only reason for such restriction is the inconvenience it may be to the drawer to have a check afloat in the world for any considerable period. Most men like to see all the checks drawn down to the last few days returned to them with their pass book; and to keep a check for more than a day or so without presenting it is not considered a business-like proceeding. The negotiability of checks, for these reasons, is never likely to be extended; but there is no reason why persons having no banking account, or for other reasons, should not be allowed to negotiate them. The man who takes a check many days old will, according to the ruling of Mr. Justice Field, still be liable to have his conduct scrutinized by a jury of business men, who will largely be governed by the view taken of the position of checks by the community. It may, therefore, be safely taken that Mr. Justice Field's decision is sound in policy as well as law, and in accordance with the ideas of the day, which lean greatly in favor of freedom of negotiability.—*Law Journal*.

By an ancient Anglo-Saxon law, which still remains in force, it is enacted, "Albeit as often as Leape Yeare doathe occurre, the woman holdeth prerogative over the manne, in matter of courtship, love and matrimonie; soe that when the ladie proposeth, it shall not be lawful for menne to say her nae, but shall receive her proposal in all good courtesai."

THE ACKNOWLEDGMENT OF WILLS.

A harmless love of mystery, not uncommon in the feminine mind, produced the case of *Blake v. Blake*, reported in the May number of the *Law Journal Reports*. Some women have a weakness for hiding keys not always to the convenience of domestic arrangements; but it is in such solemn matters as making a will that the love of mystery comes out the strongest. Mrs. Mary Gunston did not apparently employ a solicitor when she wished to make her will, but she knew a retired clerk in the probate office; and as the result of a consultation with him, an attestation clause, with which no fault could be found, was appended to her will. Beneath the clause appeared the signature of the testatrix and two witnesses, Ann Harradine and Susan Harradine, in so regular a form that it seemed the will would be proved without question. Unluckily, however, there were some erasures in the will, and when the attesting witnesses were appealed to for an affidavit it appeared that they could not say that Mrs. Gunston had signed the will in their presence. The gentleman who had been in the probate office gave her accurate instructions in writing as to the proper mode of executing a will; but instructions of that kind frequently go wrong, unless there is some one to see them carried out. He probably did not anticipate erasures; and if there had been no erasures, the defect in the execution of the will would never have come out. The will, notwithstanding, was defective, as many seemingly perfect wills are, and the circumstances which brought about its informality possesses more dramatic interest than is usually to be found in a law report.

Mrs. Gunston, it appears, took the opportunity of a visit paid to her house by the aunt of her maid-servant to have her will attested. Ann and Susan Harradine were duly called into the room, when the important document was disclosed, or rather, not disclosed, under a piece of blotting paper. Mrs. Gunston naturally did not care that they should read her will; she did not even wish them to know she was making a will. The two women were not quite agreed as to what she did say. Susan, the aunt, believed that she said, "We have all our little wishes, and this is one of mine." Ann, the servant, thought the words were simply, "This is a little whim of mine." Mrs. Gunston might safely have indulged her little turn for mystery by hiding the will. She need not even have said that the paper was her will. But when she signed the will before the witnesses came in, and hid her signature under the blotting paper, she made the false step which has proved enough to undo all her care. Sir James Hannen has decided that the execution was irregular, and the court of appeal have upheld his decision. No attempt was made to argue that the testatrix signed, as the attestation clause professed, in the presence of the witnesses. But it was contended that she acknowledged her signature in their

presence. The facts that they did not see her signature, and that she did not say her signature was on the paper, or that the paper was her will, were enough, in the opinion of all the judges, to show that there was no acknowledgment of the signature. The same view is taken by all the judges of the essential requisite of an acknowledgment, although some little difference of opinion existed as to the meaning of two previous cases. All the judges agree that there cannot be an acknowledgment unless the witnesses see, or are able to see, the signature, just as there cannot be an attestation unless the witnesses see, or have the means of seeing, the signature. This view is in accordance with the case of *Hudson v. Parker*, 3 Robert., 25, in which Dr. Lushington held that there was no sufficient acknowledgment unless the witness saw the signature. The master of rolls says that it is in accordance also with *Gwillim v. Gwillim* 3 Sw. & Tr., 200—a decision of Sir Cresswell Cresswell, which Lord Penzance followed, or believed he followed, in *Beckett v. Howe*, 39 Law J. Rep., P. & M., 1. Both the master of rolls and Lord Justice Brett agree in overruling *Beckett v. Howe*, in which Lord Penzance laid down that, if the testator told the witnesses that the paper was his will, and the will was already signed, there was a sufficient acknowledgment. Lord Justice Brett thought *Gwillim v. Gwillim*, on which Lord Penzance relied, must go with *Beckett v. Howe*. On the other hand, the master of rolls is of opinion that Lord Penzance misunderstood *Gwillim v. Gwillim*, which he thinks good law. Lord Justice Holker, the third judge present, does not take part in this controversy, which is not of a very important character.

In *Gwillim v. Gwillim* the testator's signature was immediately above the signatures of the witnesses, and there was no evidence that the signature was covered over. According to the master of rolls, Sir Cresswell Cresswell drew the inference of fact that the signature must have been seen by the witnesses. Lord Justice Brett, on the other hand, refers to the statement by Sir Cresswell Cresswell that he "was at liberty to judge from the circumstances of the case, whether the name of the testator was on his will," as showing, in the mind of a judge accustomed to express himself clearly, that the existence of the signature, added to the statement that it was the testator's will, was enough. Whether Sir Cresswell Cresswell did or did not take an erroneous view of the law is not practically of much importance. It involves more a question of evidence than principle. The principle that is to guide in the matter is clearly established. The acknowledgment will not be sufficient unless the witnesses see, or have the opportunity of seeing, the signature, and unless the testator says, "This is my signature," "This is my will," or something to that effect. The best advice to testators is, however, not to resort to an acknowledgment at all, but to sign their will in the witnesses' sight in the ordinary way.—*London Law Journal*.

NEW ATTORNEYS.

The following graduates of the Cincinnati Law School were admitted to practice by the Supreme Court:

R. W. E. Davis, Cincinnati.
 D. V. Herider, Jr., Cincinnati.
 John R. Carter, Cincinnati.
 Richard Hingson, Cincinnati.
 Moritz Macks, Cincinnati.
 J. H. Martin, Cincinnati.
 Joseph W. Molyneaux, Cincinnati.
 James J. McCarter, Cincinnati.
 Emmet N. Parker, Cincinnati.
 Buchanan Perin, Cincinnati.
 E. C. L. Rehm, Cincinnati.
 Rufus S. Simmons, Cincinnati.
 S. W. Smith Jr., Cincinnati.
 Frank O. Suire, Cincinnati.
 A. K. Woodbury, Cincinnati.
 W. E. Wynne, Cincinnati.
 J. N. Bailey, Spencerville.
 Vance Brodrix, Paulding.
 St D. Cameron, Salineville.
 Alfred S. Coffeen, Wyoming.
 Geo. D. Copeland, Marion.
 James A. Divine, Monterey.
 Frank Doty, Middletown.
 Joseph C. Douglas, Chillicothe.
 David M. Massie, Chillicothe.
 John M. Downey, Jackson.
 Edmond S. Dye, Eaton.
 Abel C. Risinger, Eaton.
 George B. Goodhart, Harrison.
 Clarence Hart, Greenville.
 Chas B. Holmes, Cumberland.
 A. A. Ingram, Wooster.
 George G. Jennings, Caldwell.
 Raymond A. Johnson, Leesburg.
 A. D. Knapp, Ravenna.
 Chas H. Kyle, Cedarville.
 Elmer E. McKeever, Barnesville.
 David Pierce, Camden.
 William F. Ring, Urbana.
 John Robbins, Dove.
 John T. Schoonover, Wapakoneta.
 Howard E. Sears, Randolph.
 John W. Spindler, Ashville.
 Thomas S. Wood, Steubenville.
 Frank Ford, Washington C. H.
 George W. Sieber, Akron.
 M. F. Parrish, New Lexington.
 John M. Hamilton, Bellefontaine.

The following named gentlemen were examined last week, and on Wednesday admitted to practice:

James W. Drouillard, Portsmouth.
 E. O. Bowman, Springfield.
 Lawrence Heiskell, Springfield.
 Frank S. Chryst, Warren.
 Forrest E. Dougherty, Waverly.
 James H. Guy, Rushsylvania.
 Albert Griggs, Cincinnati.
 Homer Harper, Painesville.

Warren W. Hole, Salem.
 John Harper, Jackson.
 Emery L. Hoskins, Marysville.
 Malcolm Jackson, Hamilton.
 George L. Knight, Coshocton.
 Benjamin Linzee, Wapakoneta.
 Clement A. Stuve, Wapakoneta.
 Liston McMillen, Cardington.
 Walter S. Marlin, Covington.
 Albert W. Marsh, Mt. Vernon.
 A. R. McKenzie, Urbana.
 James B. McLaughlin, Chillicothe.
 Wm. M. Miller, Steubenville.
 J. W. Nichols, Morristown.
 Edward E. Olmsted, Wilmot.
 Noah W. Parker, Lynchburg.
 Noble T. Robbins, Niles.
 Charles H. Stewart, Norwalk.
 Florizel Smith, Columbus.
 George A. Ramsey, Columbus.
 John Sheridan, Findlay.
 Thomas D. Shirkey, Proctorville.
 John M. Thomas, Niles.
 William Ford Upson, Akron.
 S. W. Van Winkle, Richwood.
 William C. Wilson, Cleveland.
 Homer M. Sewell, Mansfield.
 Americus A. Wilson, Mansfield.
 Joseph P. Henry, Mansfield.

OPENING PRIVATE LETTERS.

In *United States v. McCready*, 11 Fed. Rep. 225, where a letter carrier left a letter in the hall of the residence of the person to whom it was addressed, and the defendant opened it with intent to pry into the business and secrets of the owner of the letter, *held*, to be a violation of section 3892 of the Revised Statutes, and that the protection of a letter so situated is within the constitutional power of Congress. The statute is as follows: "Any person who shall take any letter, postal card, or packet, although it does not contain any article of value or evidence thereof, out of a post-office or branch post-office, or from a letter or mail carrier, or which has been in any post-office or branch post-office, or in the custody of any letter or mail carrier before it has been delivered to the person to whom it was directed, with a design to obstruct the correspondence or to pry into the business or secrets of another, or shall secrete, embezzle, or destroy the same, shall, for every such offense, be punishable by a fine of not more than \$500, or by imprisonment at hard labor for not more than one year, or both." The court, Hammond, D. J., said: "But it is insisted for the defendant that these facts do not constitute a violation of the statute, because, as the letter was taken by the defendant after its delivery by the letter carrier at a place designated by Lettie Amis for the delivery of her mail, it had in law been 'delivered,' within the intent and meaning of the act; and that if a proper construction of its language embraces an offense committed after the letter had passed from the actual control of the post-office officials and

agents, and before manual delivery to the person to whom it was directed, the enactment is to that extent beyond the legislative power of Congress. * * * The system of mail delivery in cities by letter carriers is of comparatively modern date, and is constantly increasing with the growth and development of the country. It necessarily affords greater and more abundant opportunity for the commission of offenses like those charged in this case than the older method of delivery at the post-office. Letters are left in private boxes, on tables, counters, and under doors, and if the system is to be efficient they must be protected in that situation. Indeed, the postmasters general have for years, by their printed regulations, urged the public to 'provide, in cities where letter carriers are employed, letter-boxes at places of business or private residences, thereby saving much delay in the delivery of mail matter.' For the above reason, it seems to me that section 3892 should receive a liberal construction by the courts. The evil to be remedied and guarded against is so easy of accomplishment. it could not under an opposite or different construction be prevented by the existing statute. It is ample in its letter and spirit, and was no doubt intended to protect the seals of all correspondence through the mails until actual manual delivery to the party addressed, or his authorized agent. The courts should, in my judgment, effectuate that intention by so construing it, and not devolve the duty of affording the required protection on the States upon any theory that there is a want of constitutional power in Congress to do it. It seems an unnecessary separation of the subject-matter to so divide the duty of protection."—*Albany Law Journal*.

DRUNKENNESS AND CRIME.

A curious defense was raised in a prosecution for perjury at the Manchester Assizes recently, before Mr. Justice Chitty. It was alleged that the prisoner at the time of giving evidence was under the influence of drink, and incapable of judging clearly the effect of what he said. He had heard several statements that he believed to be untrue, and got into the box and denied them wholesale. It was argued that the prisoner, being in the condition described, was not responsible for what he was saying, and had not committed "wilful" and "corrupt" perjury. The learned judge directed the jury "that drunkenness was no excuse in a case of this kind, unless the condition of a man in regard to drunkenness when he was giving evidence in an open court might have some bearing upon the point whether what he said was said deliberately and intentionally. It would be a most dangerous thing to allow a man to get off in a case of this kind on the ground of drunkenness, but if the jury was satisfied that the prisoner was in such a state of mind at the time in question that substantially he was not intending to deceive, they might take a merciful view of the

case." The jury found the prisoner guilty, and sentence was deferred.

There is no doubt that, as Patterson, J., said in *R. v. Cruse*, 7 C. & P., 541, "although drunkenness is no excuse for any crime, yet it is often of very great importance in cases where it is a question of intention." And in *R. v. Thomas*, 7 C. & P., 817, Parke, B., in summing up to the jury, said that "where the question is whether words have been uttered with a deliberate purpose, or merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered." This comes very close to the recent case, and the direction given to the jury by Mr. Justice Chitty corresponds with article 29th of Mr. Justice Stephens' Digest of Criminal law, where it is laid down that "if the existence of a specific intention is essential to the commission of a crime, the fact that an offender was drunk when he did the act which if coupled with that intention, would constitute such crime, should be taken into account by the jury in deciding whether he had that intention."—*Solicitor's Journal*.

MEMOIRS.

We reproduce the following from one of our foreign exchanges, believing that it excels anything that was ever said or written about any member of the American Bench or Bar. It certainly will not be adopted as a model here:

JUSTICE ONOOCOOL CHUNDER MOOKERJEE.—The Hindoo English author of a "Memoir of the late Honorable Justice Onoocool Chunder Mookerjee" thus describes the merits of the subject of the memoir before his elevation to the Bench: "Since he joined the native Bar down *adinfinitum* of his career as a pleader, he had won a uniform way of pleading. He made no garish of words, never made his sentences long when he could express his thoughts in small ones. Never he counter-changed strong words with the pleaders or barristers of the other party. In defeating or conducting a case his temper was never incandescent and hazy. He well understood the interest of his client, and never ceased to tussle for it until he was flushed with success, or until the shafts of his arguments made his quiver void. He was never seen to illude or trespass upon the time of court with fiddle-faddle arguments to prove his wits going a-wool-gathering, but what he said was nude truth; based upon *jus civile*, *lex non scripta*, *lex scripta*, etc., and relative to his case and in homo-geneity to the subject matter he discussed, and always true to the points he argued. He made no quotation having no bearing to his case, but cited such acts, clauses and precedents that have a direct affinity to his case, or the subject-matter of his argument. By-the-by, I should not here omit to mention that he had one peculiarity in his pleading which I have observed very minutely. Having first expounded before the court the anatomy of his case, he then launched out on the relative position of his

client with that of the other, pointing out the *quidproquo* or bolstering up the decision of the lower court with his sapience and legal acumen and cognosence, waiting with quietude to see which side the court takes in favorable consideration, knuckling to the arguments of the court, and then inducing it gradually to his favor, giving thereby no offense to the court."

DUTIES OF JURIES.

The refractory jury at Bristol, who refused to take their law from the judge, and desired to be furnished with a copy of the report of *R. v. Negus*, L. R., 2 C. C., 34, were probably unaware that they were guilty of a most unconstitutional usurpation, and a grave breach of their duty. If instead of remitting them with a mild lecture to the bosoms of their families, Lord Coleridge had detained them while he read the observations of one of his predecessors, they would probably have understood more clearly the heinous nature of their offense. "The fundamental definition of trial by jury," said Lord Mansfield in *R. v. Dean of St. Asaph*, 21 How. State Trials. 1039, "depends upon the universal maxim *ad questionem juris non respondent juratores; ad questionem facti non respondent iudices*," and he added, "the constitution trusts that, under the direction of a judge, they will not usurp a jurisdiction which is not in their province. They do not know, and are not presumed to know, the law; they are not sworn to decide the law; they are not required to decide the law. It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences."

It appears that in the United States the question was once raised whether this rule applies in criminal cases, but it was unhesitatingly decided that it did; and Mr Justice Story, in one of the finest of his judgments, laid it down that it is "the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law as it is laid down by the court. This is the right of every citizen, and it is his only protection. * * * Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land, and not by the law as a jury may understand it, or choose, from wantonness, ignorance, or accidental mistake, to interpret it." *United States v. Battiste*, 2 Samn., 243. It would be difficult to state more forcibly the reasons why, in criminal cases, juries should not follow the example of the Bristol wisecracks.—*Solicitors' Journal*.

SUPREME COURT RECORD.

[New cases filed since last report, up to June 13, 1882.]

1199. *John Goodwin et al v. Commissioners of Van Wert County*. Error to the District Court of Van Wert County. I. N. Alexander and J. L. Price for plaintiffs; G. M. Saltzgeber for defendants.

1200. *Waldemar Otis v. Henry M. Clafin*. Error to the District Court of Cuyahoga County. W. C. McFarland and R. E. Knight for plaintiff.

1201. *Margaret I. Jones et al v. Eliza A. Hines et al*. Error to the District Court of Gallia County. W. H. C. Ecker, David Davis and Russell & Russell for plaintiffs; S. A. Nash for defendants.

1202. *Iron Railroad Company v. Jacob Fink*. Error to the District Court of Lawrence County. Neil & Cherrington and W. A. Hutchins for plaintiff; Ralph Leete for defendant.

1203. *Cow Run Iron Tank Co. v. James D. Lehmer*. Error—Reserved in the District Court of Washington County. Sibley, Ewart & Sands for plaintiff; Loomis, Alban & Guthrie for defendant.

1204. *Martin Landon v. John S. Payne*. Error to the District Court of Licking County. Chas. Follett & Son for plaintiff.

1205. *Willis Robbins v. Sylvester Clemings adm'r et al*. Error to the District Court of Licking County. Chas. Follett & Son for plaintiff; J. R. Davis for defendants.

1206. *Kerosene Lamp Heater Co. v. Monitor Oil Stove Co*. Error to the District Court of Cuyahoga County. Foster & Carpenter for plaintiff; R. T. Paine for defendant.

1207. *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. William T. Leech adm'r*. Error to the District Court of Jefferson County. J. Dunbar for plaintiff; W. P. Hays for defendant.

1208. *Mary Fanning v. Hibernia Insurance Company*. Arnold Green for plaintiff; W. S. Kerruish for defendant.

1209. *I. N. Topliff v. William Harrison*. Error to the District Court of Cuyahoga County. Arnold Green for plaintiff; Wilson & Sykora for defendant.

1210. *John Rathburn et al. Error to the District Court of Clarke County*. J. K. Mower, F. C. Goode and Harrison Olds & Marsh for plaintiffs.

1211. *Joseph A. Treat et al v. Ransom Cole exr*. Error to the District Court of Summit County. N. W. Goodhue and John L. Means for plaintiffs; Kohler & Sadler for defendant.

1212. *Nimsila Coal Co. v. Patrick McGuire*. Error to the District Court of Summit County. Green & Robinson for plaintiff; J. A. Kohler for defendant.

1213. *In the matter of the assignment of Cornelius Newkirk, John H. Schneider assignee*. C. W. Coates and C. R. Sanders attorneys.

1214. *David Banker v. Lucy Shepherd et al*. Error to the District Court of Butler County. Morey, Andrews & Morey for plaintiff; Thos. Millikin and Doty & Todhunter for defendants.

1215. *Joseph S. Skerritt et al v. The First Presbyterian Society in Chillicothe*. Error to the District Court of Ross County. L. Friend for plaintiffs.

1216. *The State of Ohio ex rel Geo. K. Nash, Att'y General v. Andrew Baughman et al*. Quo warranto. Attorney General Nash for the State.

1217. *Morris Cadwallader v. Julia A. Cliffinger et al*. Error to the District Court of Delaware County. Powell & Ricketts for plaintiff.

1218. *Charles A. McElroy, Executor v. John McElroy*. Error to the District Court of Delaware County. Powell & Ricketts and Fulton for plaintiff.

1219. *William Miller v. L. D. Warner et al*. Error to the District Court of Champaign County. W. J. Gilmore and T. J. Frank for plaintiff.

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

Tuesday, June, 13, 1882.

117. Robert R. Hamilton et al. v. James S. Rodgers et al. Error to the District Court of Lawrence County.

LONGWORTH, J.

By his will, R. devised his whole estate, consisting principally of personal property, to trustees with directions to pay certain annuities out of the income of the estate and after the "final cessation" of said annuities, to distribute the estate among certain children and grandchildren of the testator, then living, and the heirs of the body of those deceased, and, in default of such heirs, their brothers and sisters. *Held*: 1st. That no estate vests in the beneficiaries under the will, until the time for distribution as fixed by the terms of the will. 2nd. The "final cessation" of annuities mentioned in the will takes place either upon the death of all the annuitants, or upon the surrender or release of their annuities. 3rd. The trustees have no power under the will to purchase in the annuities, and the mere fact that the annuitants declare that they are willing to release their annuities (but not having done so), upon payment to them of a sum in gross, will not authorize the court to order a distribution of the estate, and to decree the payment of such gross sums out of the funds of the estate.

Judgment affirmed.

978. Ohio on relation of Joseph Turney, State Treasurer, v. Lukc A. Staley, Treasurer of Hamilton County. In Mandamus.

McILVAINE, J. *Held*:

1. Proceedings by mandamus, on the relation of the Treasurer of State, will lie to compel the treasurer of a county to transfer to the state treasury the state's proportion of taxes collected by such county treasurer.

2. A petition for a writ of mandamus in such case, which shows the collection of such taxes by the county treasurer, is not defective for want of an averment that the taxes so collected remain in the county treasury subject to the command of the writ.

3. Under section 1043 of Revised Statutes, as amended April 19, 1881 (78 Ohio L. 226), the amount of taxes for which the treasurer stands charged, is the whole amount of taxes levied on the duplicate, less the amount returned delinquent and the collection fees allowed the treasurer.

4. The amount of money in the treasury, for which the treasurer stands charged, cannot be increased or diminished by the exercise of the authority conferred on the auditor by said section to correct "any error which may have occurred in the apportionment of taxes at any previous settlement."

5. In obedience to a writ commanding a county treasurer to pay into the state treasury a balance due the state on its portion of taxes collected by the county treasurer, and for which no provision has been made by the County Auditor in his apportionment of taxes, any excess of money in the treasury over the sums apportioned to other funds for which taxes were levied, may be used by the treasurer in making such payment.

Demurrer to 1st and 4th defenses sustained.

JOHNSON, J. dissents.

34. Charles W. Rowland et al. v. The Meader Furniture Company. Error to the Superior Court of Cincinnati.

WHITE, J., *Held*:

1. Where a corporation *de facto*, in a proceeding in quo warranto, has been ousted from the franchise of being a corporation, such ouster is no defense to a suit by a creditor against stockholders, to enforce payment of their stock subscriptions. *Gaff v. Fleisher*, decided by the Commission, (33 Ohio S. 115, 453), approved and followed.

2. The act of Feb. 27, 1846, "regulating suits by and against companies and partners," (S. & C. 1138), applies only to unincorporated companies. Neither corporations *de jure* nor *de facto* are within its provisions; and an action cannot be maintained under the act, to charge the stockholders with the payment of a judgment against the corporation.

3. Corporations *de facto* and *de jure* stand on the same footing as respects their liability to creditors; and the liability of the stockholders of the former, whether arising by statute or on stock-subscription, may be enforced for the benefit of creditors, the same as the liability of the latter.

Judgment reversed and petition dismissed.

No 1181. Daniel Catoir v. Moses G. Waterson, Treasurer of Cuyahoga County. Error to the Court of Common Pleas of Cuyahoga County. Reserved in the District Court.

OKEY, C. J.

The act of April 5, 1882, "more effectually to provide against the evils resulting from the traffic in intoxicating liquors" (70 Ohio Laws, 40), having been adjudged unconstitutional, a person engaged in such traffic, who paid, under protest, into the county treasury, the sum required of a dealer in liquors by the terms of the act, may maintain an action against the treasurer to recover back the sum so paid.

Judgment reversed.

No. 40. Wm. H. Crabill, Executor of N. Marsh, deceased, v. Nancy Marsh. Error to the District Court of Clark County. Judgments of district and common pleas courts reversed; demurrer to the 2nd defense overruled, and cause remanded for further proceedings. The case will be reported hereafter.

No. 720. William Jumper v. Isabella Day. Error to the District Court of Putnam County. Dismissed at costs of plaintiff in error, by agreement of parties.

No. 730. William Jumper v. Isabella Day. Error to the District Court of Putnam County. Dismissed at costs of plaintiff in error, by agreement of parties.

No. 1045. The State of Ohio on relation of the Attorney General v. Middleburgh Mutual Aid and Life Association. Quo warranto. Judgment of ouster from the franchise to be a corporation. To be reported hereafter.

No. 1047. The State of Ohio on the relation of Attorney General v. The Mutual Life Association of America. Quo warranto. Judgment of ouster from the franchise to be a corporation. To be reported hereafter.

No. 1118. Jacob Ridenour v. The State of Ohio. Error to the Court of Common Pleas of Butler County. Judgment affirmed. To be reported hereafter.

MOTION DOCKET.

104. John Goodwin et al. v. Commissioners of Van Wert County. Motion to dispense with printing bill of exceptions in cause No. 1199 on the General Docket. Motion overruled, unless the plaintiff in error waive the errors assigned on the bill of exceptions.

105. Philip H. Kunkler, city Solicitor of Cincinnati v. The City of Cincinnati et al. Motion to take cause No. 721 of the General Docket out of its order for hearing. Motion granted.

107. Walter Dixon v. J. D. Henry et al. Motion to dismiss cause No. 780 on the General Docket for want of printed record. Motion sustained.

108. Lemuel McManis, Adm'r, v. Edwin Boutwell. Motion to extend time for filing printed record in cause No. 1109 of the General Docket. Motion granted and time extended to July 15, 1882.

109. George Allred v. The State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Hamilton County. Motion overruled.

110. Mary Fanning v. Hibernia Insurance Company. Motion to advance cause 1208 to its original place on the General Docket. Motion Granted. Motion for a super-seedeas overruled on the ground that whatever relief the plaintiff is entitled to, may be had under section 6718 of Revised Statutes.

111. Warren Wilder v. The Commissioners of Hamilton County. Motion to dispense with printing in this cause on the General Docket. Motion granted.

Ohio Law Journal.

COLUMBUS, OHIO, : : JUNE 22, 1882.

THE OHIO STATE BAR ASSOCIATION which was adjourned to re-convene at Cincinnati July 5th, 1882, is notified that the meeting of this year has been postponed until the 27th of December. This is announced from Athens, Ohio, as the action of the Executive Committee of which Gen. C. H. Grosvenor is Chairman and L. J. Critchfield Esq., of this city, Secretary.

We are not sure that this is an improvement upon the old date. The reaction following the Christmas festivities will prove as disastrous, we fear, and will interfere as seriously with a full attendance as the enervating indulgence in 4th-of-July-spread-eagleism would have done. The following is the official notice:

ATHENS, JUNE 16, 1882.

To the Members of the State Bar Association:

Believing that the annual meeting of the Association at Cincinnati on July 5, prox., will fail to bring together as large an attendance as is desirable, by reason of the weather, the condition of the courts, the absence of members, and other reasons not necessary to be given in detail, the Executive Committee, by a nearly unanimous vote has postponed said meeting till December 27, 1882, at which time it will be held at Cincinnati or Columbus, as may be hereafter designated.

By order of the Executive Committee.

C. H. GROSVENOR, Ch'n.

L. J. CRITCHFIELD, Sec'y.

THE OHIO STATE REPORTS,

We have been informed that bids for the publication of the State reports for the term of twenty years have been advertised for, and that in response thereto, two bids have come in which required the intervention of the Attorney General to determine which should be accepted. We never saw the advertisement for bids and did not know that bidding was in progress until after all was over. We do know however that lower bids than either of those offered were waiting the opportunity to be presented. That, however is of no consequence now.

The bids received were:

1st. By H. W. Derby, of Columbus, as follows: Three hundred and fifty volumes to the State at 92½ cents per volume. Those purchased by the profession to be at one dollar and fifty cents per volume.

2nd. By Robt. Clarke & Co., of Cincinnati, as follows: Three hundred and fifty volumes to

the State free of charge; and other folks to pay one dollar and seventy five cents per volume, for the volumes bought by them.

The bid of H. W. Derby was decided by Mr. Nash to be the lower and we believe it has been accepted.

In 1902 the contract will be re-let for another term of years. We promise to keep our readers posted as to who gets the job next time.

NEW BOOKS.

Pleadings Parties and Forms, under the Code. By Clement Bates Esq., of the Cincinnati Bar.

In No. 3 of vol. 2 of this paper the first volume of Mr. Bates' work was noticed at length. What was then said concerning the general plan and purpose of the book applies with equal force to the second volume. It is a thorough and well arranged digest of statute and case law in Ohio and of pertinent citation of authorities in those states where code practice obtains.

The labor involved in the preparation of the book will be appreciated when it is stated that over eight thousand authorities on pleadings and parties are digested, being gathered from twenty-five Code States and Territories. These authorities are *cited*, not *piled up* as is the manner of too many law writers, and the manner of the citation leads to the conclusion that the case cited has a direct bearing upon the point sought to be made plain.

The profession in Ohio has now two excellent works on Code pleading, Green & Kelly's in one volume, and Bates, in two volumes; and one or the other ought to be—and will be, in the hands of every lawyer in the state.

The price is \$12.00 for the two volumes and is sent post paid on receipt of that sum. The mechanical execution of the book is fully up to the usual excellence of the publications of Robt. Clarke & Co., Cincinnati, Ohio.

AMERICAN DECISIONS, VOL. XXXIV.

We have heretofore compared the magnitude of the undertaking of which this volume is one added step, to the building of a Trans-Continental line of railway. As the work progresses we discover a similitude more pertinent, in the character of the undertaking itself. Each succeeding volume is an added section to a great causeway of legal knowledge, which, when completed, will make per

fect the communication between the past and the present interpretation of law, and open to the world of lawyers all the richness of intermediate legal lore. As the work advances the volumes of the American Decisions are more and more eagerly looked for.

We quote from an interesting paper written by J. L. High, Esq., of Chicago, and published in the *American Law Review* for June, under the interrogative caption, "*What shall we do with the Reports?*" the following, which simply indicates the plan and scope of the *American Decisions*, instead of adding frankly that the original intention has been so far fulfilled to the letter.

"In 1878 Mr. John Proffatt began the preparation of the American Decisions, which were intended to include all the cases of general value and authority in the courts of the several States from the earliest issue of their reports down to the year 1869, the period with which the series of Mr. Thompson's American Reports, above mentioned, began. The scope of the work as announced by the reporter, was to present all cases of established general authority which had been indorsed by subsequent decisions or cited by text writers. Cases turning upon local statutory law and of no general authority beyond the particular State, were to be discarded, as well as obsolete cases. The aim was to give, by a series of continued, authoritative decisions, the system of law in each of the States as compared with other States of the Union, and thus to show by a compilation of contemporaneous decisions the structure and growth of American law, and to present in outline a system of comparative American jurisprudence. The points of counsel, are to some extent, preserved with the authorities cited in support of them. When a decision embraces several points, some of which have no present value, or are of merely local interest, or turn upon points of practice, such parts of the decision are eliminated. These reports were intended to embrace all the American decisions of general value down to the American Reports, which were to be regarded as a supplement or continuation of this series,—the two combined thus presenting the entire body of American decisions of value in a condensed form. It was estimated that seventy-five volumes would complete the work; but as thirty-one volumes have already appeared, the last bringing the work down only to the year 1838, it is doubtful whether the original design can be completed within the limits proposed. The last volume comprises the decisions of general im-

portance embodied in twenty-nine volumes of State reports. The Federal reports are not included in the scope of the work. Mr. Proffatt's death occurring after the publication of the eleventh volume, the work has since been continued by Mr. A. C. Freeman."

We desire to add here that the distinguished querist, in all his principal suggestions pointing to a reform in the matter of published reports by which they are so furiously multiplied, simply reiterates some of the protests of the *OHIO LAW JOURNAL*, and the methods we have advised as certain to bring about the desired result. The principal and first inauguration of reform must be within the bosoms of the judges themselves.

We quote again:

* * "the judges themselves should be reminded that the rapid accumulation of reports is, in large measure, due to their own prolixity in the writing of opinions of undue length. The time for learned and elaborate essays, in the form of judicial opinions, with exhaustive reviews of all the authorities from the year-books down, has long since passed. Hair-splitting distinctions and exercises in dialectics should no longer find place in the literature of the law. The overworked lawyer, in the hurry of active practice, reads an opinion for its pith and marrow, and for nothing else. A concise statement of the facts of the case, a brief, pointed, and crisp enunciation of the principle upon which it is decided, with a citation of a few leading authorities, if any, bearing upon the question, are all that he desires. And what more, it may be asked, is necessary, either for the student or practitioner? It is the boast of a learned judge of the writer's acquaintance, who has occupied the bench for a quarter of a century, that he has written more pages of judicial opinions than any judge in America. It should rather be the height of judicial emulation to compress one's judicial opinions into the shortest and most concise form consistent with clearness."

This, with the added designation by the court of all cases which are of *sufficient general interest* to justify publication—excluding all cases where the decision is upon questions of fact—will dispose of half the difficulty met with by the attorney who attempts to "keep up with," or to purchase and store all the volumes of reports published by the various States and Territories. These reforms, however, are not yet inaugurated. Pending their adoption the publishers of this paper have

nearly perfected arrangements by which even the great number of cases decided in all the courts of last resort in all the States may be brought within the means and control of all lawyers. The magnitude of the undertaking, and the great expense, as well as the numberless difficult matters of detail to be first fully arranged has already delayed the work far beyond the expectations of the projectors. However, each day brings us nearer to the accomplishment of our purpose, and then a proper and fitting supplement to the American Decisions will be in the hands of the profession, and the query of the writer above quoted, fully and practically answered. Volume 34 of the American Decisions contains so many valuable cases and such an array of notes and citations on so many different and interesting topics, that it must be seen to be fully appreciated.

WILLIAM DENNISON.

The death of Ex-Governor William Dennison, at his home in this city, Thursday morning last, was the cause of a universal feeling of regret at the loss of one of Ohio's truest and best statesmen and citizens. Many eulogistic words have been spoken and written of him but none better set forth general sentiment than the memorial adopted by the Bar of this city, which we give below

A committee of seven, consisting of Hon. Allen G. Thurman, Hon. R. A. Harrison, Hon. Henry C. Noble, Hon. Chauncey N. Olds, General James A. Wilcox, Edward L. Taylor, Esq., and B. F. Martin, Esq., were appointed a committee to draft resolutions. Senator Thurman from the committee, reported the following:

"The Bar of the Capital of the State of Ohio, assembled upon the occasion of the death of their brother Dennison, in testimony of their respect and esteem for him in life, and of their sense of the loss which they in common with the citizens of Columbus, and of the State at large suffer in his death, adopt the following memorial:

"William Dennison, who died in this city on the morning of June 15, 1882, has been a member of the Bar of Franklin county since 1840. He was born in Cincinnati, November 23, 1815; was graduated from Miami University at Oxford, O., in 1835; studied law at Cincinnati with the Hon. Nathaniel G. Pendleton; was admitted to the Bar in 1840, and soon after married Miss Ann Eliza Neil, of this city, and removed here

to practice his profession, and has ever since except about one year when he resided in Arkansas, been a citizen of Columbus. He was elected an honorary member of this Bar Association July 1, 1869.

"He began the practice of law under the most favorable circumstances. His family connection brought him into close relations with the largest business interests of the city at that time. He showed fine abilities for professional work. He was painstaking and industrious in the preparation of his cases and active and energetic in presenting them and had unusual elegance of manner and diction in addressing court and jury. His management of his early practice gave assurance of attaining great success and a high position in our profession. But he was drawn from its steady pursuit by large business interests other than professional and the great temptation of public affairs. He was a favorite public speaker and the people in 1848 called him into their service as State Senator, and in 1859 he was elected Governor of Ohio.

"He thus found himself a leader in a great party at a time of unusual excitement, and on the breaking out of the war in 1861 he was in a place of great responsibility. He acquitted himself in these important positions with honor, ability and distinction.

"He was afterwards, in 1864, called by President Lincoln to the office of Postmaster General of the United States, and was one of the Cabinet officers who stood by the death bed of Lincoln as he passed from earth to take his place among the immortals.

"He was also a Commissioner of the District of Columbia under an appointment of General Grant. On returning from public office he continued his interest in public affairs to the end.

"He retained his law office and library, and his title as a lawyer until his decease.

"Governor Dennison was a man of the rarest courtesy of manner, springing from unaffected kindness of heart, and treated all men with such grace as won their love.

"He was a pleasant companion, a generous and loyal friend, of noble charity and high moral courage, an earnest patriot, and a true Christian gentleman, whose memory we are proud to cherish as a member of our Bar.

"*Resolved*, That a copy hereof be presented to the family of the deceased by the Secretary of this Association.

"*Resolved*, Farther, as a token of our respect, that we will attend the funeral of the deceased in a body."

TUESDAY morning last, Attorney General Nash appeared before the Supreme Court and in very fitting words moved that the said memorial be spread upon the Journal of the Court. Chief Justice Okey replied that the Court concurred in the just and appropriate estimation set forth, of the deceased, and the motion would be granted.

MANDAMUS—TAXES DUE STATE COLLECTED BY COUNTY TREASURER.

SUPREME COURT OF OHIO.

THE STATE OF OHIO ON RELATION OF JOSEPH TURNER, STATE TREASURER,

LUKE A. STALEY, TREASURER OF HAMILTON COUNTY.

June 13, 1882.

1. Proceedings by mandamus, on the relation of the Treasurer of State, will lie to compel the treasurer of a county to transfer to the state treasury the state's proportion of taxes collected by such county treasurer.

2. A petition for a writ of mandamus in such case, which shows the collection of such taxes by the county treasurer, is not defective for want of an averment that the taxes so collected remain in the county treasury subject to the command of the writ.

3. Under section 1043 of Revised Statutes, as amended April 19, 1881 (78 Ohio L. 226), the amount of taxes for which the treasurer stands charged, is the whole amount of taxes levied on the duplicate, less the amount returned delinquent and the collection fees allowed the treasurer.

4. The amount of money in the treasury, for which the treasurer stands charged, cannot be increased or diminished by the exercise of the authority conferred on the auditor by said section to correct "any error which may have occurred in the apportionment of taxes at any previous settlement."

5. In obedience to a writ commanding a county treasurer to pay into the state treasury a balance due the state on its portion of taxes collected by the county treasurer, and for which no provision has been made by the County Auditor in his apportionment of taxes, any excess of money in the treasury over the sums apportioned to other funds for which taxes were levied, may be used by the treasurer in making such payment.

Demurrer to 1st and 4th defenses sustained.

In mandamus.

The relator, in his petition, represents that on the 28th of October, 1881, the Auditor of State examined the certificate and abstract of the semi-annual settlement between the Auditor and Treasurer of Hamilton county, made on the 23d day of September, 1881, which certificate and abstract were returned by said Auditor of Hamilton County to said State Auditor on the 3rd of October, 1881, as required by law.

That upon such examination, the Auditor of State ascertained the exact sum of money payable by the Treasurer of Hamilton County to the State Treasurer to be \$291,698.19, and also that the amount of Hamilton County's proportion of state common school fund was \$73,183.60; whereupon the Auditor of State certified his findings to the Treasurer of State as required by law, and issued his draft upon the Treasurer of Hamilton County in favor of the relator for \$218,514.59, the same being the difference between the amount so found due to the State Treasurer from the Treasurer of Hamilton County, and the amount of school fund due to said Hamilton County from the state treasury.

That prior to said 28th of October, 1881, the Treasurer of Hamilton County had paid into the state treasury on account of the amount so found due from the Treasurer of Hamilton County to said state treasury, the sum of \$206,979.99, at the last semi-annual settlement in the year

1881, leaving a balance due of \$11,534.60. That said draft had been duly presented for payment by the relator to the defendant, the Treasurer of Hamilton County, and payment of said balance of \$11,534.60 demanded, which has, and ever since has been refused.

Wherefore said relator prays for a writ of mandamus to compel the defendant, the Treasurer of Hamilton County, to pay and deliver to the state treasury the said sum of \$11,534.60, and other relief.

Upon this petition an alternative writ of mandamus was issued as prayed for, and thereupon the defendant filed an answer containing several alleged defenses, to the first and fourth of which the relator demurs.

The first defense is as follows: "That the plaintiff ought not to have its writ of mandamus herein, for the reason that plaintiff has a plain, adequate and specific remedy at law for the grievance of which he complains."

The fourth defense is as follows: "This defendant in further answer to said petition and writ issued herein says, that the Auditor of Hamilton County, Ohio, on the 23d day of September, 1881, at his office, made settlement with defendant and ascertained the amount of taxes with which he, as treasurer, was to be charged, and, after making the deductions to which he was entitled, distributed in just and ratable proportion upon the several taxes charged on the duplicate, ascertained the balance for which said treasurer was to be held liable, and to whom, in their several amounts, he was liable for such balance, and also ascertained the amount remaining in the treasurer's hands belonging to each fund; and thereupon the said auditor, on said day, did issue to the treasurer, this defendant, a certificate and abstract of such settlement, and of the balance of the amount of taxes received and charged to him as due to the state, the balance thereof due to the county, the balance due for road purposes, and the balance due to the townships and the other bodies and purposes to which said aggregate in his hands was found to belong, a copy of which certificate and abstract of settlement, and account with the state, is hereto attached and made a part of this answer.

In pursuance of this settlement, and of the provisions of law in that behalf, the said treasurer forthwith proceeded to transfer and did transfer and enter into their several accounts the sums with which he was charged in said settlement, in favor of the state, the county, the townships, corporations and the said several funds as shown in said certificate of settlement; and said several amounts became thereafter subject to draft upon said treasurer in favor of the several persons or corporations authorized to receive the same. And the said treasurer further says that he forthwith, upon said transfers of said several sums to their respective funds, proceeded to pay them out upon the proper drafts or warrants of the county auditor to the corporations or uses to which they became payable upon said settlement, and thereafter

continued to pay them, up to the service of the writ herein, and has ever since continued to pay them as by law and his obligation he is bound to do.

This defendant further says, that by said settlement he became charged in favor of the State of Ohio with the sum of \$280,163.59, ascertained and certified by said auditor as aforesaid to be the amount and balance of taxes due the state of the moneys collected by said treasurer, which said balance so certified to be due the state he caused to be remitted to the Treasurer of State, as alleged in petition of plaintiff. All the balance of moneys in his hands as treasurer of said county he held—and in part holds—on account and subject to the claims of others than State of Ohio, ascertained and determined by the said county auditor in the settlement and certificate aforesaid, and credited and transferred to them, and he is not authorized or permitted to apply said funds to other uses, and is liable to the corporations and uses to which such funds have been transferred for the amount thereof remaining in his hands. Defendant holds no funds in his possession for the use of the State of Ohio or to its credit.

The contents of the certificate and abstract of settlement referred to and made a part of the answer, are sufficiently stated in the opinion. The grounds of demurrer to these defenses are that the facts stated are not sufficient to constitute a defense to the action.

McILVAINE, J.

The demurrer to the answer brings under review the sufficiency of the petition, and the defendant claims that the facts stated in the petition do not entitle the plaintiff to the writ of mandamus, for the reason that there is a plain and adequate remedy for the grievance complained of, in the ordinary course of the law.

Section 6744, of the revised statutes, provides that "the writ must not be issued in a case where there is a plain and adequate remedy in the ordinary course of law," and, it is claimed, that such a remedy is furnished by an action on the treasurer's bond.

It would seem that an action on the bond might be maintained under authority of section 168 of revised statutes, which provides, "That if any county treasurer, or other officer concerned in the collection of the public revenue, or authorized to collect and pay into the state treasury, money due or accruing to the state, fails to pay over all moneys by him received and belonging to the state, at the time and in the manner required by law, the Auditor of State shall immediately inform the Attorney General thereof, who shall forthwith institute and prosecute the proper suit against such officer and his sureties." The question therefore arises, would such suit afford "a plain and adequate remedy" within the meaning of section 6744? The object of the present action is to compel the transfer of certain funds belonging to the public revenues of the state from the treasury of Hamilton County to

the state treasury. A suit on the treasurer's bond would not accomplish that object. Although the state in an action on the bond might recover the full amount of damages sustained, it would leave in the county treasury the fund to which it is entitled, and to which the county treasury is not entitled.

In deciding the question now before us, it is worthy of remark, that section 6744, above referred to, is merely declaratory of the rule of the common law, which refused relief by the extraordinary writ of mandamus in cases where an adequate remedy was afforded by the usual and accustomed modes of procedure at law, and also, that section 168 does not declare a breach of an official bond, that would not have existed without the section, and for which an action on the bond is the exclusive remedy. Hence, no new rule has been established by this legislation, and it cannot be doubted that the jurisdiction by mandamus to compel payment from the public treasury, where such payment is a mere ministerial act, is a common and acknowledged right. See High on ex. legal Rem., sec. 112, and cases cited.

The defendant relies on the case of *The State v. Meily*, 22 Ohio St. 534, in which it was held that where money is wrongfully retained by a probate judge from the party entitled thereto, such party has a plain and adequate remedy by action on the official bond of the judge, or by an ordinary action against him for the money, and therefore mandamus will not be allowed to compel payment until such ordinary remedy has been resorted to and proved ineffectual. In that case it was said that the retention of the money by the probate judge was his individual act—a conversion of it to his own use—and, no doubt, the identical money might be applied to the payment of a judgment recovered against him; but on the facts before us, the money in the county treasury could not be withdrawn for the payment of a judgment on the treasurer's bond at the option of the treasurer. Such judgment and its payment would not transfer public funds from the county to the state treasury, and any remedy which will not accomplish such transfer is not adequate within the meaning of this rule.

There is no suspicion that the defendant is a defaulter, or that he has embezzled public funds. To which treasury does this money belong is the only question in the case—a mere question of law. If to the state treasury, it should be transferred, and mandamus is the only specific and appropriate remedy under the particular circumstances of the case.

It is also contended that the petition and writ are defective in not alleging that the money claimed is, in fact, in the county treasury.

No doubt, a writ of mandamus should not be issued unless it appears that the thing commanded to be done is capable of being performed. The question, therefore, whether the funds sought to be transferred from the county treasury to the state treasury, are, in fact, in the county treasury, is material. It appears plainly enough that

these funds, before the semi-annual settlement in September, 1881, had been received into the county treasury, and we think it must be presumed that they remain there until the contrary is shown. In view of this presumption, the petition in this respect is not defective. If the issuance of the writ be resisted on the ground that the funds claimed are not in the treasury of the county and under the control of the defendant, such state of facts must be shown by the defendant in his answer.

Are the facts stated in the fourth defense sufficient? The object of the pleader was to show that defendant, as the Treasurer of Hamilton County, had no funds in his possession, or under his control, that were legally subject to the payment of relator's claim. The answer contains such specific averment; but we understand this averment to be a mere conclusion based on facts set forth in the answer, and especially in the certificate and abstract made by the county auditor upon the last semi-annual settlement on account of the taxes of 1880, which are fully set forth and made a part of the answer. This certificate and abstract, which are required and controlled by sections 1043, as amended April 19, 1881, (78 Ohio L. 226), and 1044 of the revised statutes, contain the controlling facts of the case in so far as they are made in conformity to law. Section 1043 provides that, "The auditor shall attend at his office, on or before the 15th day of February, and also on or before the 10th day of August, annually, to make settlement with the treasurer of his county, and ascertain the amount of taxes with which such treasurer is to stand charged; and the auditor shall, at the August settlement, take from the duplicate, previously put into the hands of the treasurer for collection, a list of all such taxes as such treasurer has been unable to collect. * * *; and after deducting the amount of taxes as returned delinquent, and the collection fees allowed the treasurer from the several taxes charged on the duplicate, in a just and ratable proportion, the treasurer shall be held liable for the balance of such taxes; and the auditor, after first *correcting* any error which may have occurred in the apportionment of taxes at any previous settlement, shall certify the balance due to the state, the balance due to the county, the balance due for road purposes, and the balance due to the townships," &c. And section 1044, after giving more specific directions as to the manner of making the settlement, requires that "the auditor shall also make out and deliver to the treasurer a certificate specifying the amount charged on the tax duplicate of the county for each of the several purposes for which taxes have been levied; and also a certificate or an abstract of the taxes which have become due and payable, and which remain unpaid," &c.

Now, it appears from the certificate and abstract of this settlement, as made by the auditor of the county, that after all proper deductions, to-wit: the amount of delinquent taxes and the collection fees allowed the treasurer had

been made from the amount of the duplicate, the auditor found the balance, for which the treasurer should be held liable, to be \$2,811,649.74, and that the proportion thereof due to the state for the sinking fund, general revenue and common school fund, was \$291,658.63. But the certificate also shows that from the aggregate of the treasurer's liability, the auditor further deducted the sum of \$73,413.09, (thus reducing the liability of the treasurer to the sum of \$2,738,236.65), on account of "net balance of errors corrected," and thus reducing the amount due the state by the sum of \$11,534.60, being its proportion of said deduction of \$73,443.09, leaving a balance due the state of \$280,124.03, from which balance, the sum of \$73,183.60, being the proportion of the common school fund to which Hamilton County was entitled, was retained by the treasurer, and deducted from \$280,124.03, so found due to the state, and the remainder, plus \$39.56 for special licenses, to-wit: \$206,979.99, was duly paid into the state treasury by the defendant, in full, as is claimed, of the state's proportion of the amount for which the treasurer of Hamilton County is held liable on account of the duplicate for the year 1880.

The auditor of Hamilton County having transmitted to the auditor of state a duplicate of said certificate and abstract as required by section 1045 of revised statutes, the Auditor of State proceeded to examine the same as required by section 181 of revised statutes, which provides, "The Auditor of State, immediately on the receipt of the certificates and abstracts of each semi-annual settlement between the auditor and treasurer of each county, forwarded to him by the county auditor, shall proceed to examine the same, and ascertain the exact sum or sums payable by each County Treasurer into the state treasury, and shall certify the same to the State Treasurer, specifying in the certificate or certificates the amount belonging to each fund and the total amount to be paid into the state treasury; he shall also ascertain and certify to the State Treasurer the amount of such county's proportion of the State common school fund, and of school, ministerial and other trust funds, if any, due and payable to such county; and at the same time he shall issue his draft or drafts upon the County Treasurer in favor of the County Treasurer, for the sum or sums so found due and payable, after deducting the amount of the several sums found due to the county on account of school, trust or other funds."

On such examination the Auditor of State ascertained the "exact sum" due to the state to be \$291,658.63, and after deducting therefrom the sum of \$73,183.60, the county's proportion of the State common school fund, drew his draft on the County Treasurer in favor of the State Treasurer for the remainder, plus the sum of \$39.56 for special licenses, to-wit: for the sum of \$218,514.59. The Treasurer of State having given a credit, on this draft, of the money theretofore paid into the state treasury by the defendant, prosecutes this suit for the balance, to-wit: \$11,

534.60, the same being the exact amount deducted from the state's proportion of taxes on account of "net balance of errors corrected," as above stated.

The right of the state to this balance is not now submitted for our decision, but, we are clear, that if this right is hereafter determined to be in the state, there are funds in the county treasury and under the control of the defendant, that should be subjected to its payment. The county auditor had no warrant or authority of law for deducting from the amount for which the treasurer should be held liable any sum whatever on account of "errors corrected" the only sums authorized to be deducted from the full amount of the duplicate are two: 1st. the amount of delinquent taxes. 2d. the amount of the treasurer's fees. The remainder is the amount for which the treasurer is held liable, and the whole amount of this liability should have been apportioned among the different funds for which the taxes were levied. This amount is \$2,811,649.74. The amount actually apportioned by the auditor to the several funds was only \$2,738,236.65 leaving a balance in the treasury of \$73,413.09, no part of which has been apportioned to any fund. True, in making the apportionment the auditor is authorized to correct any error "which may have occurred in the apportionment of taxes at any previous settlement". But by correcting such errors, the amount to be apportioned is neither increased nor diminished. Whatever sum may thus be taken from one fund must be added to another. This has not been done in this case. The \$73,413.09 of "net balance of errors corrected" were ratably deducted from the several funds for which taxes were levied. Hence the whole of this sum remains in the treasury of the county unappropriated, and may be made subject to any judgment which may be rendered in this cause.

Demurrers to 1st and 4th defenses sustained.

CONSTRUCTION OF WILL.

SUPREME COURT OF OHIO.

ROBERT R. HAMILTON ET AL.

v.

JAMES S. RODGERS ET AL.

June 13, 1882.

By his will, R. devised his whole estate, consisting principally of personal property, to trustees with directions to pay certain annuities out of the income of the estate and after the "final cessation" of said annuities, to distribute the estate among certain children and grandchildren of the testator, then living, and the heirs of the body of those deceased, and, in default of such heirs, their brothers and sisters. *Held*: 1st. That no estate vests in the beneficiaries under the will, until the time for distribution as fixed by the terms of the will. 2nd. The "final cessation" of annuities mentioned in the will takes place either upon the death of all the annuitants, or upon the surrender or release of their annuities. 3rd. The trustees have no power under the will to purchase in the annuities, and the mere fact that the annuitants declare that they are willing to release their annuities (but not having done so), upon pay-

ment to them of a sum in gross, will not authorize the court to order a distribution of the estate, and to decree the payment of such gross sums out of the funds of the estate.

Error to the District Court of Lawrence County.

This action was originally brought in the Court of Common Pleas of Lawrence County by Robert R. Hamilton, minor child of Rosalie Rodgers Hamilton, by William Means his guardian and next friend; Ellen I. Parkinson, who intermarried with James Spriggs, Allen R. Parkinson, Rosalie R. Parkinson, Anna Olivia Parkinson, Mary M. Parkinson, minor children of Catherine M. Parkinson deceased, by William Parkinson, their guardian and next friend; James C. Rodgers and William P. Rodgers, Rosalie Rodgers, minor children of Henry C. Rodgers deceased, who sue by James C. Rodgers, their next friend, plaintiffs, against James S. Rodgers, Oliver Rodgers, aged sixteen years, minor child of James Rodgers deceased, Harry O. Rodgers, aged eighteen years, Minnie Hamilton Rodgers aged sixteen years, Eleanor Matilda Rodgers aged fourteen years, Clarence Frederick Rodgers aged nine years, minor children of Robert Edwin Rodgers deceased; Clara R. Rodgers, Nancy Rodgers, Matilda Rodgers as guardian of Anna Olivia Rodgers, and George Willard, trustee under the last will and testament of James Rodgers deceased, defendants, to obtain a construction of the last will and testament of James Rodgers, deceased, and to obtain a distribution of his estate thereby devised. The testator died in the year 1860 leaving a large estate consisting principally of personal property. After various bequests and annuities he devised the whole of his residuary estate as follows:

"Sixteen. I do hereby devise and bequeath to said George Willard and Henry S. Neal all my property, real and personal, wheresoever situate and of whatever character (including the lands in Kentucky opposite Ironton with the appurtenance, also my dwelling house in which I now live, and the lands in Hamilton Township, bequeathed as aforesaid to my beloved wife, and the dwelling house, with the lots in Ironton bequeathed as aforesaid to my daughters-in-law Mary F. Rodgers and Clara Rodgers upon the determination of the particular estates in said several premises by this will created) which may remain after the payment of my debts, the aforesaid legacies and the first year annuities herein granted in trust for the following purpose, to-wit: First, to sell said real estate whenever they may deem it advantageous for my estate so to do upon such terms either by public or private sale, as they may think best, and in the mean time to rent or lease the same and execute proper conveyances of the same to the purchaser thereof, to invest the proceeds of said sales and all other funds coming into their hands, either from collections by them made, dividends of stocks owned by me or in any other manner or from any other source

whatever in such manner as they may conceive most beneficial for my estate, and I further authorize and empower them to change the investments I have hitherto made whenever they may deem it advisable to do so. Second, To pay the expenses of this trust including a yearly compensation to themselves for their services in executing this trust to be allowed by the Probate Judge. Third, To pay the annuities herein granted, as herein provided, so long as the income of my estate be sufficient, and should it ever at any time prove insufficient, then said annuities shall be paid pro rata, except the one to my beloved wife, which shall be paid in full.

And in the execution of this trust I authorize and empower the said Trustees to take charge of, manage and control my said property in all things as fully as I now have the right to do, and they shall be held responsible in the execution of this trust only for fraudulent conduct, but said Trustees shall make an exhibit yearly to the Probate Court of Lawrence County of their doings in the premises, which I desire to be filed with their accounts as Executors.

"Seventeenth: Upon the complete determination of the particular estate herein created, and upon the final cessation of all the aforementioned annuities, I direct and require my said Trustees to make a final distribution of my estate then remaining, as follows:

"To my son James and the heirs of his body, One sixth;—To my son Thomas and the heirs of his body, One sixth;—To my son Oliver and the heirs of his body, One sixth; To the children of my son Henry C. Rodgers and if any of them be deceased, to the heirs of their bodies, One ninth; To the children of my son Robert Edwin, and if any of them be deceased, to heirs of their bodies One ninth; To the children of my daughter Catharine M. Parkinson and if any of them be deceased to the heirs of their bodies, One ninth;—To the children of my daughter Rosalie Hamilton, and if any of them be deceased to the heirs of their bodies, One sixth; And it is hereby declared to be the true intent and meaning of this direction of distribution that the children only of deceased children shall inherit, and in case that any of said above mentioned persons die without heirs of their bodies, then the interest which he would be entitled to shall go to their brothers and sisters.

"Eighteenth: Upon the arrival at the age of maturity of either or all my said minor children, to-wit; James, Thomas and Oliver if the same happen before the determination of the aforesaid particular estates and the creation of said annuities, I direct and empower my said Trustees to pay to any such son the sum of two thousand dollars, to enable such son to enter into business, provided if said Trustees shall be of opinion that the giving of said sum to said son would be an injury to him, and that he would not expend it in a suitable manner then I authorize them in their discretion to spend said sum as they may deem for the well being of said son, and any sum so going to or expended

for such son shall be taken into consideration, and with annual interest thereon shall be charged against such son's distributive share. Not desiring that any of my grandchildren should become destitute, I hereby authorize and empower my said Trustees upon the death of the parents of any such grand-child, or their inability to support them, to provide for a prudent and economical support of any such grand child, provided however, that the annuities granted to any parent of such child shall be no longer payable, if the said Trustees shall be of opinion that such destitution arises from the bad conduct of any such annuitant.

The widow refused to take under the will, and, at the time of commencing this action, the only annuitants living were Clara Creighton, then aged 36 years and Nancy Rogers, aged 60 years, to whom annuities amounting to \$250 and \$300, respectively, had been granted.

Willard, the sole trustee, Neal having resigned, had converted the whole estate into personal property, consisting of bills receivable, stocks and other securities. All debts had been paid.

Of the seven children of the testator, living at the time of his death, his sons James S. and Oliver alone survived; Thomas died in 1867, unmarried and childless; the others all left children, who have been named as plaintiffs and defendants, and who united in asking for a distribution of the estate under the provisions of item 17 of the will.

Clara Creighton and Nancy Rodgers filed answers setting up their right to annuities but offering to release the same upon receipt of a sum in gross. The trustee resisted a distribution, claiming that, by the terms of item 18 of the will it was made his duty to provide for any of the testator's grandchildren who might at any time become destitute, and that this was a continuing trust. It was shown at the hearing that for many years prior to the testator's death his sons Henry and Robert had been unsuccessful in business and were in embarrassed circumstances. Upon appeal the district court decided that neither the plaintiffs nor any of the devisees were entitled to either a general or partial distribution under the will, and that no such distribution could be had until the death of all the annuitants or all of said annuities should be otherwise terminated. We are now asked to review this decision.

LONGWORTH, J. The first question which arises in the construction of this will is whether an estate vested in the distributees at the time of the testator's death, or not until the happening of the events upon which a distribution was to take place.

Although conceded that in the interpretation of wills, courts in general favor that construction under which estates will vest at the time of testator's death, yet this, like every other rule of construction, will be controlled by the intention of the testator as gathered from the whole will.

As was said by Scott J. in *Richey v. Johnson*, 30. O. S. 288-292: "We are to read the whole

will and ascertain not only what the testator has said, but what he has forborne to say; and the construction given to any part of the will should conform to its general scope and purpose as collected from the whole document. It is to be observed that the testator gives no interest in the farm in question, or in its proceeds, to his brothers and sisters, or to the children of any of them by way of direct devise or bequest. The gift is to be found only in the direction to distribute the proceeds of its sale and in the designation of the persons among whom distribution is to be made."

These remarks apply with equal force to the case before us. The only words of gift in the will are to be found in the devise of the whole estate to trustees, and in the direction to distribute the estate, after the determination of the particular estates and the final cessation of the annuities, among persons, some of whom perhaps were yet to be born. Color is given to a contrary construction by the provision directing the trustees to make certain payments to, or provision for the minor sons, when they should become of age, to be thereafter charged against their distributive shares, but, taking the will as a whole, we are persuaded that the real intention of the testator was that no estate should vest in any of the objects of his bounty until the time for distribution should arrive, and then in those persons only who should answer the description at that time. Speaking for myself only I wish to say that it is after much hesitation and still not without some embarrassing doubts that I have arrived at this conclusion. These doubts arise from the vague and uncertain language in which the intention of the testator is expressed, and from which no thoroughly satisfactory conclusion can be drawn. Still I am satisfied that the most reasonable and probable interpretation is that given by my brethren. Has the time then arrived for a distribution of the estate, either final or partial? Clearly not. No partial distribution could be made until it is ascertained who the parties may be who are entitled to take, and this cannot be ascertained until the time arrives for final distribution. And here we may say that we think it clear that but one distribution was ever contemplated by the testator and that his object in calling it a "final distribution" was simply to distinguish it from what might be called the partial distribution of \$2,000 each to his minor sons when they should come of age.

On the one hand it is contended that the time arrives only upon the death of all of the annuitants; on the other, that it depends upon the cessation of the annuities as a charge upon the estate by release or otherwise by operation of law. That the latter is the proper interpretation we entertain no doubt. The testator does not speak of the death of the annuitants; but of the "final cessation" of the annuities; and surely it is but fair to take him to have intended just what he has said. Had he intended to postpone the division of his estate to such time as all of

the annuitants, (one of whom at least was at his death little more than a child), should die, we think he would have taken pains to make such intention appear in plain language. So long as these annuities were outstanding it is evident that no distribution could take place, seeing that these were to be paid only from the income of the estate; but upon their "final cessation," as charges upon the estate, no valid reason could exist against a final distribution, unless it should appear that the testator intended a further postponement, and such intention is not to be found either in the words used or in the surrounding circumstances of the case. We are unanimously of opinion that upon the "final cessation" of these annuities, either by death or release or surrender to the estate, it will become the duty of the trustee to distribute the estate in accordance with the provisions of the will. True the trustee alleges in his answer that he knows from conversations held with the deceased that he contemplated a remote period as the time of distribution, but we are not to regard any such averment. We are to find the intention of the testator in the will itself and are not at liberty to allow its terms to be varied or contradicted by conversations or parol statements made either before or after its execution. Under neither interpretation, however, has the time for distribution yet arrived; the annuities of Clara Creighton and Nancy Rodgers being still outstanding valid charges upon the income of the whole estate. The widow's annuity ceased by operation of law when she refused to take under the will, and the others, except the two mentioned, have ceased by the death of their owners; but these two are still in full force. It does not remove this obstacle to say that these ladies are ready and willing to release them to the estate, for they have not yet done so, nor can the court compel them to do so. The trustee clearly has no power under the will to purchase them; but should their owners see fit to release them to the estate, then, and not until then, will the time arrive for a distribution.

We regard as wholly untenable the claim of the trustee that no distribution can be made so long as there may be grandchildren, now living, or hereafter to be born, who may, by possibility, at some time become destitute. Such construction would postpone the vesting of the estate and its enjoyment beyond the lives of all the beneficiaries now in being and for more than 21 years thereafter. It is clear to our mind that this provision as to the support of destitute grandchildren was intended to apply only during such time as the estate should remain in the hands of the trustee and pending its distribution, and was not intended to control or limit the time fixed for such distribution by item 17 of the will.

We are asked to decide to whom shall pass upon distribution the share which Thomas Rodgers would have received had he lived. It is stated in argument, although it is not disclosed in the record, that the testator was twice mar-

ried, and that his younger sons, James S., Thomas and Oliver, were children of the second marriage. If this be true, we are clearly of opinion that the testator, in providing that if any of the persons mentioned as distributees should die without issue, "then the interest which he would be entitled to shall go to their brothers and sisters," referred to brothers of the whole blood only as respects his own children. This is rendered manifest from the care taken to exclude his other children from any share whatever in his estate. The sons had been unfortunate in business, and were insolvent, and it is evident that the testator believed that a gift to them would have been a gift to their creditors, from which neither his sons nor their children would reap the benefit. The provision in question could apply only to the grandchildren and to these younger sons, seeing that no share could come to the older sons and daughters. We are therefore of opinion that, at the time of distribution, Thomas' share will pass to his brothers James S. and Oliver, if they be then living, and to their children if deceased. This conclusion also follows of necessity from our previous holding concerning the vesting of the estate only in the persons answering the description of the will at the time of distribution.

Judgment affirmed.

[This case will appear in 38 O. S.]

PHYSICIAN AND SURGEON—CONTRACT FOR CHARGES—THIRD PARTIES.

COURT OF APPEALS OF KENTUCKY.

BERRY v. PUSEY.

March, 1882.

A person, having been injured through accident on a boat of which A. was captain, was brought by him to B., a surgeon, then absent from his office, and was left there with instructions to give the injured person every attention. The wounds were dressed by B. on his return. *Held*, that A. was liable to B. for the value of such services.

Action brought by appellee, a surgeon, to recover fees for services rendered. The facts sufficiently appear in the opinion.

PRYOR, J.,

It is evident from the history of this case, as detailed by the witnesses, that the appellant, either for himself or those he was representing, undertook to have young Bogard taken care of, and treated by medical skill, on account of the injury he had received by reason of the accident occurring on the boat of which the appellant was captain. This injury seems to have been the result of negligence on the part of the owners of the boat, or its employees, and the claim of Bogard for damages afterwards compromised; but whether so or not, the young man was taken to Brandenburg at the instance of the appellant, and, from what transpired at the time, both the young man and his parents had the right to believe that the appellant, either for himself or the company for which he was acting, was assuming

the liabilities that must necessarily arise from the medical treatment of the injured boy. He took him in his boat to Brandenburg and had him carried to the office of Dr. Sherrill, the physician of the young man's family, and the doctor being absent he was carried by the appellant and others to the office of Dr. Pusey, the appellee. This surgeon being also absent, and the appellant being desirous of pursuing his journey with the boat, had the young man left at the office of the appellee, with instructions to have every necessary attention given him, and have him ready to be sent home on the boat going down that night. The appellant leaving for his boat, the appellee came to his office, and finding the young man there, carefully and skilfully dressed his mangled limb, and had him in such a condition as to enable him to go back to his house on the same evening in accordance with appellant's request, on the return boat. This was the substance of the testimony introduced by the appellee, and the principle error complained of, is the refusal of the court to instruct the jury to find for the defendant. We think this motion was properly overruled, as the facts of this case, although Pusey may never have seen or ever known the appellant, authorized the verdict against him. The young man occupied no such relation, by blood or employment, to the appellant as would create an implied promise to pay, but he did bring the young man to the office of the surgeon, have his wound examined and dressed by him, that had originated, as was supposed at the time, from some negligence of those in charge of the boat. Having carried the young man to the office of the surgeon, the appellant left instructions to have him attended to so that he might return on the evening boat. This was done, and the surgeon should be paid, and upon the facts of this case the jury had the right to say that the employment was made by the appellant.

Judgment affirmed.

LAY OPINIONS OF A BANKRUPT LAW

At a meeting of the Milwaukee Merchants' Association, recently held, a memorial to Congress on the Ingall's bankrupt bill was adopted and forwarded to Congress. It points out numerous defects in the bill, but is decidedly in favor of a national law on the subject. From their memorial we quote the following:

"The punishment by imprisonment contained in the former law is an unfortunate omission in the proposed law. Fraud is crime, and crime should be adequately punished. It is the experience of thousands that great frauds were prevented by the threatened punishment contained in the late law against the acts of fraud. The composition feature of the former law appears in the Ingalls bill. In practice it was the worst of all its provisions. It was that which caused the well nigh universal demand for the total repeal of the law. Under it the most gross, outrageous and shamefaced frauds were perpetrated. Honesty and honor in business

were nearly destroyed. The honest merchant was at the mercy of the knave, and was compelled to retire from business, being unable to compete with those whose frauds everywhere surrounded him. The instances were numerous within our own knowledge where men of integrity retired from business and abandoned all further attempts to compete with the rascality and frauds committed under the protection of this provision of law. Adventurers and dishonest men had only to become possessed of the largest possible amount of property, their credit and honest pretensions could command from all the confiding creditors they could reach, and then turn and convert the property into money at 80 to 90 cents on the dollar of the co t, to the ruin of all honest competition, and then again turn upon the betrayed creditors and offer 10 cents on the dollar, as high as 20 cents being rarely offered, and threaten nothing unless that sum was instantly accepted, and so through threats and fears and other causes obtain the required amount and number of his creditors to agree to his terms."

The memorial argues at length in favor of having the law national.

SUPREME COURT RECORD.

[New cases filed since last report, up to June 20, 1882.]

1220. Jacob Counterman et al v. Trustees of Dublin Township. Error to the District Court of Mercer County. Isaiah Pillars for plaintiffs; I. N. Alexander for defendants.

1221. Warren Wilder v. Commissioners of Hamilton County. Error to the District Court of Hamilton County. H. C. Whitman for plaintiff; Charles Evans for defendant.

1222. Laura W. Hillard et al v. The New York Gas and Coal Company. Error to the District Court of Cuyahoga County. Henderson & Kline and W. H. Gaylord for plaintiffs; A. J. Marvin for defendant.

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

Tuesday, June, 20, 1882.

GENERAL DOCKET.

No. 1118. Ridenour v. State. Error to the Court of Common Pleas of Butler County.

LONGWORTH, J. *Held*:

1. An indictment for shooting with intent to maim is not defective for want of averment as to what member or members of the body the accused intended to injure or disable. If in the words of the statute it is sufficient.

2. Where one shot another in the trunk of the body and the result was to produce paralysis of a leg, causing a permanent disabling of that member, a verdict of guilty of shooting with

intent to maim is supported by sufficient evidence. The accused might fairly be presumed to have intended the actual and natural result of his unlawful act.

3. An indictment contained three counts, the first and second did not charge the offense to have been committed "against the peace and dignity of the State of Ohio," but the third did so charge. The accused was acquitted under the first two counts and convicted under the third.

Held: That, where it did not appear from the record that evidence had been introduced against the prisoner under the first two counts which would have been incompetent under the third and prejudicial, there was no error in refusing to grant a motion for a new trial.

Judgment affirmed.

124. William Coppin v. The Greenlees and Ransom Company. Error to the District Court of Hamilton County.

McILVAINE, J. *Held*:

An executory agreement between a manufacturing corporation of this State and one of its stockholders, for the purchase of the stock of such corporation, by the former from the latter, cannot be enforced either by action for specific performance or for damages.

Judgment affirmed.

1047. Ohio ex. rel. the Attorney General v. The Standard Life Association of America.

Quo warranto.

JOHNSON, J. *Held*:

1. Corporations organized under the laws of Ohio, are of two classes: 1st. Those organized for profit, which must have a capital stock owned by stockholders. 2nd. Those organized for purposes other than for profit, consisting of members associated together for a lawful purpose. To the second class belong corporations formed under the provisions of Section 3630 of the Revised Statutes for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the family or heirs of deceased members.

2. Corporations formed for this purpose, though not subject to the provisions of Chap. 10, Title II of the Revised Statutes, relating to Life Insurance Companies, on the mutual or stock plan, are subject to all the general provisions of Chap. 1 Title II, which apply to corporations formed for purposes other than profit.

3. After such a company or association has been organized and incorporated, the members thereof are those mutually engaged in promoting the purposes of the organization, and who, by virtue of their relation to the corporation are entitled to the mutual protection and relief provided, or whose family or heirs are, in case of his death, entitled to the specific relief provided for them.

4. The members of such a corporation are the elective and controlling body, authorized to elect trustees and prescribe regulations for the government of the same, not inconsistent with the

laws of the State. Neither the incorporators nor the trustees first elected are authorized to adopt a by-law or regulation providing that they shall hold office during life, and in case of vacancy, to fill the same by appointment.

5. Trustees are charged with the duty of faithfully executing the trust which the law and regulations impose on them. They are entitled to a reasonable compensation for the service rendered; but any plan or scheme by which money is collected from members by assessment or otherwise, with a view to their individual profit, and beyond what is necessary to defray the reasonable expenses of executing the trust, is a breach of trust.

6. A certificate of membership in such a corporation by which the member in consideration of his payment of a membership fee, annual dues and a pro rata assessment with his fellow members to pay a sum of money to the family or heirs of a deceased member, in consideration of which the association at his death stipulates to pay to his family or heirs a sum of money, graduated by the number of members in his class, is a contract of life insurance.

7. Such a contract of insurance to pay in case of a member's death "to himself or assignees" "to his estate," "to his executors or administrator," or to any person, whether a relation or not, who is not of his family or heirs, is against public policy, and void.

Judgment of ouster.

OKEY, C. J. took no part in the decision of this case.

111. *Hezekiah S. Bundy v. The Ophir Iron Company, et. al.* Error to the District Court of Jackson County.

WHITE, J.

A stockholder in a manufacturing corporation endorsed notes of the company in consideration that the payment of the notes should be secured and the endorser protected by mortgage on the property of the company. Through mistake the mortgage was made by the stockholders in their own names instead of in the name of the corporation. A subsequent mortgage was made in the name of the corporation to its creditors and recorded, which, by its terms, was subject, to the first. *Held:*

1. That the mortgage by the stockholders was a good, equitable mortgage against the corporation, which, independently of our statute, could be enforced against subsequent judgment creditors.

2. That the second mortgage operated to give priority to the first both as against parties claiming under the second mortgage and those claiming liens under judgments subsequently rendered.

3. An express acceptance of the second mortgage by the mortgagees is not required. The acceptance may be implied from circumstances. Nor is it necessary that all the mortgagees should accept the mortgage; part may accept though others refuse to do so.

Judgment reversed and cause remanded.

1138. *Nelson Stone, on behalf of himself and others, v. Henry C. Viele, Treasurer of Summit County.* Error to the District Court of Summit County.

OKEY, C. J.

Where a contractor for paving a street has failed to perform his contract, so that there is "a substantial defect in the improvement," within the meaning of Revised Statutes § 2289, and an assessment against the abutting lots has been placed on the tax duplicate, and the county treasurer is taking the necessary steps to sell such lots, under authority of the duplicate, the owners of such property may, in an action against the treasurer and the municipal corporation, enjoin such proceeding, unless it appear that it would be inequitable to do so. Secs. 1777, 1778, Rev. Stats., have no application in such case.

Judgment reversed and cause remanded for further proceedings.

1116. *Robert J. Turnbull v. Horatio Page.* Error to the District Court of Franklin County. Leave granted to file printed record.

MOTION DOCKET.

No. 106. *Joseph A. Treat et al. v. Ransom Cole, Executor, &c.* Motion for stay of proceedings in cause No. 1211 on the General Docket. Motion granted. Undertaking fixed at \$500, conditioned that the plaintiff in error will pay such damages as the defendant in error may sustain by the delay, in case the judgment should be affirmed, and also in that event, that plaintiff in error will pay all costs.

112. *Day Williams & Co. v. New York, Pennsylvania & Ohio Railroad Co.* Motion to take cause No. 1185 on the General Docket out of its order for hearing. Motion overruled.

113. *James Clark v. Margaret Bruce.* Motion for an extension of time to print record, &c. Motion granted and time extended for 30 days.

114. *Samuel Martin et al. v. E. E. Roney, Auditor, &c., et al.* Motion to stay collection of an assessment in cause No. 1059 on the General Docket. Motion granted on plaintiffs executing to defendants an undertaking in \$1000, to the approval of the Clerk of the District Court of Brown County conditioned to pay all costs and damages if the judgment should be affirmed.

115. *Jacob Counterman et al. v. Trustees of Dublin Township.* Motion to take cause No. 1220 on the General Docket out of its order for hearing. Motion granted.

116. *Wm. J. Brown v. The State.* Motion to take cause No. 1155 on the General Docket out of its order for hearing. Motion granted and cause set for hearing June 21, 1882.

117. *John Rathbone et al. v. George H. Frey et al.* Motion for stay of execution in cause No. 1210 of the general docket. Motion granted on the execution of an undertaking to be approved by the Clerk of the District Court of Clarke County by plaintiffs in error, for \$1,000, conditioned to prosecute said action to effect and pay all costs and damages that may be adjudged against them in case the judgment is affirmed.

Ohio Law Journal.

COLUMBUS, OHIO, : : JUNE 29, 1882.

No decisions were announced by the Supreme Court, Tuesday morning. The Court will meet to-morrow, (Friday) morning, and after announcing decisions in cases under consideration, will adjourn until September.

EXECUTORY AGREEMENT BETWEEN MANUFACTURING CORPORATION AND STOCKHOLDER.

SUPREME COURT OF OHIO.

WILLIAM COPPIN

v

THE GREENLESS AND RANSOM COMPANY.

June 20, 1882.

An executory agreement between a manufacturing corporation of this State and one of its stockholders, for the purchase of the stock of such corporation, by the former from the latter, cannot be enforced either by action for specific performance or for damages.

Error to the District Court of Hamilton County.

The original action was brought by plaintiff in error against defendant in error, in the Court of Common Pleas of Hamilton County, and the cause of action was thus stated in the petition:

"The plaintiff states that the defendant is and for several years past has been a corporation, duly incorporated under the laws of the State of Ohio, for manufacturing purposes.

That it has been the custom of said corporation that its officers and others, actively engaged in its service, should be holders of shares of its stock, and upon ceasing to be connected with said company, such persons have been accustomed to sell, and said company to buy their said stock.

That the plaintiff was formerly in the employ of said company as a workman, and that while so engaged he became the holder of shares of the capital stock of said company to the amount, at its par value, of \$3,300.

That having ceased to work for said company, he sought a purchaser for said stock, and offered to sell the same to the defendant for two lots of land, hereinafter described, valued respectively at \$1,100 and \$700, and the balance of \$1,500 in manufactured work to be made by the defendant, at ten per cent. off their bill of prices, to which the defendant assented and agreed, and to carry the same into effect, the plaintiff, on May 28, 1875, caused to be prepared a written contract, which the defendant then duly exe-

cuted and delivered to the plaintiff, of which the following is a copy:

"CINCINNATI, May 28, 1875.

"For and in consideration of thirty-three shares of the capital stock in the Greenlees & Ransom Company, the receipt whereof is hereby acknowledged, said Greenlees & Ransom Company promise to pay, or cause to be paid, to William Coppin the sum of three thousand three hundred dollars, payable, viz: said Coppin to take a lot of ground, No. 46 on the plat of the Wyoming Land and Building Co's sub-division of the Burn's farm, Wyoming, Ohio, in part payment, amounting to \$1,100.00; also a lot of ground on the north side of Wyoming avenue owned by—Caruthers, and next to Mr. Beeson's house, fifty feet front by two hundred and forty-five feet deep, more or less, for the sum of \$700.00; leaving a balance of \$1,500.00 to be paid in manufactured work, joist, scantling, etc., the manufactured work at ten per cent. off their bill of prices; the other material at the usual rates; the work and material to be delivered from time to time to him as said Coppin may order it.

"GREENLEES & RANSOM COMPANY.

"By E. P. RANSOM, President."

And the plaintiff says that afterwards, in the month of June, 1875, he tendered said shares of stock to the defendant, and offered to transfer the same to it, and demanded performance of said contract, but the defendant refused to accept the same, and refused to convey said lots, or either of them, or to deliver said manufactured goods, although the plaintiff then demanded the same.

Wherefore he now brings said stock into Court, and offers to transfer the same to the plaintiff, and prays that the defendant may be compelled to convey said lots by a perfect title, and to deliver said goods, and for such other and further relief as in equity and good conscience he may prove to be entitled to."

To this petition an amendment was afterward allowed and filed as follows:

"And now comes the plaintiff, William Coppin, and by leave of Court files this amendment to his petition herein, and for such amendment says, that the value of said land, and of said building material, was thirty-three hundred dollar.

That said lots were worth respectively \$1,100 and \$700, and re-affirming all the allegations of his petition except such as may be inconsistent herewith, prays a judgment for said value of said land and building material, to-wit: the sum of \$3,300, with interest from the 28th day of May, A. D. 1875, against the said defendant, and withdraws his prayer for specific performances."

After an issue of fact joined by answer the cause was tried and verdict and judgment rendered in favor of the plaintiff for \$3,817.00.

On petition in error, the district court reversed the judgment of the common pleas, and caused it to be certified on the record, "that the judg-

ment of the court of common pleas was reversed by this court on the ground that the petition and amendment to the petition failed to show a sufficient cause of action and on the ground that the verdict was contrary to law," and not on the ground that the verdict was contrary to the evidence.

This proceeding is now prosecuted to reverse the judgment of the district court.

McILVAINE, J

Whether the defendant corporation was bound by its executory agreement with the plaintiff to purchase shares of its own stock under the circumstances detailed in the petition, was, undoubtedly the question upon which the case turned in the district court.

The power of a trading corporation to traffic in its own stock, where no authority to do so is conferred upon it by the terms of its charter, has been a subject of much discussion in the courts; and the conclusions reached by different courts have been conflicting. Of course, cases wherein the power is found to exist by express or implied grant in the charter, furnish no aid in the solution of the question before us, unless the claim of the plaintiff can be sustained: that such power was conferred on the defendant by Section LXVIII of the corporation act of 1852, (S. & C. 301), as amended, which confers on manufacturing corporations the powers enumerated in the 3rd Section of the act, and, among others, the power "to acquire and convey at pleasure, all such real and personal estate as may be necessary or convenient, to carry into effect the objects of the corporation." We think, however, that this claim cannot be maintained. The sole object of the defendant's organization was "for manufacturing purposes," and it cannot be said, in any just sense, that the power to acquire or convey its own stock was either necessary or convenient "for manufacturing purposes."

The doctrine, that corporations, when not prohibited by their charters, may buy and sell their own stocks, is supported by a line of authorities, and prominent among them may be mentioned the cases of *Dupee v. The Boston Water Power Co.*, 114 Mass. 37, and *C. P. & S. R. R. Co. v. Marshalls*, 84 Ill. 145. But, nevertheless, we think the decided weight of authority, both in England and in the United States, is against the existence of the power unless conferred by express grant, or clear implication. The foundation principle, upon which these latter cases rest, is, that a corporation possesses no powers except such as are conferred upon it by its charter, either by express grant or necessary implication; and this principle has been frequently declared by the Supreme Court of this State, and by none more emphatically than by this court. It is true, however, that in most jurisdictions, where the right of a corporation to traffic in its own stock has been denied, an exception to the rule has been admitted to exist, whereby a corporation has been allowed to take its own stock in satisfaction of a debt due to it. This exception

is supposed to rest on a necessity which arises in order to avoid loss, and was recognized in this State as early as *Taylor v. The Miami Exporting Co.*, 6 Ohio R. 176, and has been incidentally referred to as an existing right since the adoption of our present constitution. *State v. Building Association*, 35 Ohio St. 258.

But, however that may be, the right of a corporation to traffic in its own stock at pleasure, appears to us to be inconsistent with the principle of the provisions of the present constitution. Article 13, Section 3, which reads as follows: "Dues from corporations shall be secured by such individual liability of stockholders, and other means as may be prescribed by law, but in all cases each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal to such stock." Now, it is just as plain, that a business or trading corporation cannot exist without stock and stockholders, as it is that the creditors of such corporations are entitled to the security named in the constitution. *State ex rel Att'y Gen. v. Sherman*, 22 Ohio St. 411. The corporation itself cannot be a stockholder of its own stocks within the meaning of this provision of the constitution. Nobody will deny this proposition. And if a corporation can buy one share of its stock at pleasure, why may it not buy every share? If the right of a corporation to purchase its own stock at pleasure exists, and is unlimited, where is the provision intended for the benefit of creditors? This is not the security to which the constitution invites the creditors of corporations. I am aware that the amount of stock required to be issued, is not fixed by the constitution, or by statute, and also, that provision is made by statute for the reduction of the capital stock of corporations, but of these matters creditors are bound to take notice. They have a right, however, to assume that stock once issued, and not called back in the manner provided by law, remains outstanding in the hands of stockholders, liable to respond to creditors to the extent of the individual liability prescribed. In this view it matters not whether the stock purchased by the corporation that issued it, becomes extinct, or is held subject to be re-issued. It is enough to know that the corporation, as purchaser of its own stock, does not afford to creditors, the security intended. And surely, if the law forbids the organization of a corporation without stock, because the required security is not furnished, it cannot be, that having brought the corporation into existence, it invests it with power to assume at pleasure the identical character or relation to the public, that was an insurmountable objection to the giving of corporate existence in the first place.

Plaintiff in error lays much stress on the averments in the petition, that it had been the custom of the corporation, that its officers and others actively engaged in its service, should be holders of shares of its stock, and upon ceasing to be connected with the company, such persons

had been accustomed to sell, and the company to buy such stock, and that the plaintiff had purchased the stock for the price of which suit was brought while in the employment of defendant.

We cannot see why these averments should take the case out of the general rule.

If it were averred that the plaintiff had purchased this stock from the defendant, or from others under an agreement with the company that it buy the same from him when he quit its employment, or if the contract of purchase by the defendant had been executed, very different questions would arise.

It is not even averred that the plaintiff relied upon such custom either in making the purchase or the sale of the stock; so that in fact he is unaffected by the alleged custom. But if such custom had been relied on by the plaintiff when he purchased the stock, it would not have made the executory contract of the defendant to buy the stock binding, which, without such custom would be void. The usage of a corporation does not become the law of its existence, or the measure of its powers. The general law of the State, of which all persons are presumed to have knowledge, is the source and limit of all its powers and duties, and these cannot be varied either by usage or contract. The doctrine of estoppel has no application in the case. Nor is there any such equity in the case as would have arisen between the parties, in case the contract had been executed.

Judgment affirmed.

[This case will appear in 38 O. S.]

STREET IMPROVEMENTS—DAMAGE TO PROPERTY—LIABILITY OF CORPORATION.

SUPREME COURT OF OHIO.

KEATING V. CINCINNATI.

May 9, 1882.

A municipal corporation in making a street along a hillside, so excavated the ground in the street as to cause the land above to slide and injure the lot of the plaintiff. *Held:*

1. That the fact that the plaintiff's lot did not abut immediately on the street did not exempt the corporation from liability. Its liability did not depend upon the ownership of the injured property, but upon the extent of the injury of which its removal of the lateral support of the hill was the efficient cause.

2. That the liability extends to damages to buildings as well as to the land in its natural state, where the owner is not chargeable with negligence in making such improvements, and such damages result from want of due skill and care in making the street.

Error to the District Court of Hamilton County.

The original action was brought by Edward Keating, to recover the damages he sustained to his premises by the construction of Gilbert Avenue in said city. The plaintiff's lot fronts on the west side of Sixth Street twenty-five feet, extending back towards Gilbert Avenue ninety feet more or less. The petition states that more than twenty-six years since there was erected

upon the front portion of said lot a dwelling house and out houses, to be used as a dwelling for himself and family, and which he has so used and occupied ever since. That in the year 1873, the defendant, in constructing Gilbert Avenue, illegally and wrongfully caused the base of the hillside to be cut away and removed, upon and above which the lot and improvements of the plaintiff are situated, whereby the surface of the plaintiff's lot was made to slip, the support removed injuring the lot, breaking the surface, the foundation walls of his house, and rendering the dwelling and improvements untenable.

The petition charges negligence and want of skill in the original location and grade of the street and in the execution of the work which caused the injury complained of; and also averred that his improvements were made in good faith and with reference to the grade of the streets and alleys existing at the time, and that he had no reason to expect or apprehend the city would ever cause a cut to be made in the rear of his lot of the nature and character of the one so made.

The answer took issue with the averments in the petition.

On the trial as it appeared by the bill of exceptions, the lot of the plaintiff lies with reference to Gilbert Avenue, thus:

[Here follows a plat showing location of the lot, street, alleys &c.]

It also appeared that the plaintiff bought his lot in 1864; and that it had a house on it, fronting on Sixth Street, erected more than twenty-five years before the action was brought. That the land on which Gilbert Avenue lies had been condemned by the city for the purpose of an avenue in 1869, but that none of the plaintiff's ground was condemned; that Gilbert Avenue was a new wide street projected and laid out in 1869 and ran diagonally to the old established streets and at a different grade; that the plaintiff's lot had been improved in accordance with the established grade of the adjoining streets and used for over thirty years; that without the cutting in the avenue his buildings and lot would have remained undisturbed, and his lot lies fifteen or twenty feet east of the avenue, with a ten feet unimproved alley between, on which his lot abuts at the west end. Gilbert Avenue is built along a hillside; the hill rises to the east so that the plaintiff's lot slopes upward from the avenue; Sixth Street is above both and the hill continues to rise until it reaches perhaps a hundred feet above the avenue and the ground falls away westward below the avenue.

The bill of exceptions also contains the following statement.

"The plaintiff then gave testimony as to the values and amount of injury, and the reasonable cost of repairing the same, and the values of such improvements as he claimed to be wholly destroyed by the cut and the slip, which amounted in all to \$985.00. And thereupon it was agreed between the parties that plaintiff's estimates were reasonable and honest, and neither

side would offer testimony on that point, either to corroborate or attack his testimony as to amount of damages, or value, or cost of repairs, they being accepted as true, which consisted in destroying totally the stone foundations, breaking and cracking the walls and ceilings, breaking and destroying and rendering entirely useless and valueless a cistern and privy, and compelling plaintiff to make new foundation walls, paint and plaster anew in great part of his house; also, great loss of rents; also the general deterioration."

Mallon & Coffey, for plaintiff in error.

Kumler, Ampt and Warrington, for defendant in error.

WHITE, J.

The only question in this case is, whether the evidence supports the verdict. The jury was instructed as requested by the defendant; and as the instructions are not set out in the record they must be presumed to have been correct.

It appears from the evidence, that the defendant in excavating for the avenue on the hill side, below the plaintiff's premises, caused damages to his lot as well as to the improvements. The aggregate amount of such damages is stated to have been \$985.00; but how much of that sum is attributable to the lot without the improvements, and how much to the improvements is not specifically stated. The jury assessed the damages at \$450.00, which was less than half the damages admitted to have been sustained, including the damages to the improvements.

The finding of the jury must be presumed to have been in accordance with the instructions of the court, and may have included only the damages to the lot without reference to the improvements.

The excavation on the upper side of the avenue, opposite the plaintiff's premises, was twelve feet; and the whole surface of the hill moved from a point on sixth street down, passing diagonally under the plaintiff's dwelling, showing a wide opening in the ground.

A. E. Tripp, the city civil engineer testified: "The cut caused the slip, and we did nothing to stop the slip; I saw it at the time. A retaining wall would be the only way to stop a land slide, to put it in by sections as the cut progressed. We made no wall in front of Keating's lot."

A. L. Anderson, who was the city civil engineer at the time of the trial, testified as follows: "The hill is of alternate layers of clay, more or less hardened, and limestone and surface soil, it is the latter that slips on the smooth surface of the former. There is no way to prevent the slipping, except by a retaining wall or drains on the property, made more cheaply by trenches and drains up the hill itself, dug down to the solid part of the hill so as carry away the water, which causes the surface to slide on the layers of blue clay underneath, as if on glass. It is impossible to foresee the weight of the soil that will slip, so as to know the size of retaining wall required."

It was admitted that the city built no retaining walls opposite any of the property on the avenue at the time in controversy; but that she did subsequently.

This case is governed by the principles settled by our own decisions, whatever may have been held elsewhere. In *Rhodes v. the City of Cleveland* it was held that a municipal corporation, acting within the scope of its powers, was liable for cutting ditches and water courses in such a manner as to cause the water to overflow and wash away the plaintiff's land. In the opinion of the court, the principle of the decision is thus stated: "that the rights of one should be so used as not to impair the rights of another, is a principle of morals, which, from very remote ages, has been recognized as a maxim of law. If an individual, exercising his lawful powers, commits an injury, the action on the case is the familiar remedy; if a corporation, acting within the scope of its authority, should work wrong to another, the same principle of ethics demands of them to repair it; and no reason occurs to the court why the same should not be applied to compel justice from them." 10 Ohio 160. This case was decided more than forty years ago, and has been often approved since. *McComb v. Akron*, 15 Ohio 479; *Akron v. McComb*, 18 Id. 229; *Crawford v. Delaware*, 7 Ohio S. 459. See also *Pumpelly v. Green Bay Company*, 13 Wall 166; and *Eaton v. Railroad Company*, 51 N. H. 504.

In this state, private property is entitled to the same protection against all classes of corporations as against natural persons, subject to the right of appropriating property to public use upon the terms of making full compensation.

The case under consideration involves no question of inconvenience to the owners caused by the making of a neighboring or abutting public improvement, leaving the corpus of the property intact; but the case is one of the invasion or injury of the property itself; and it can make no difference in principle, whether the property is flooded and the soil washed away, or the property is injured and the soil removed from some other cause. It is the injury to the property that gives the right of action; and the author of it is bound to make reparation.

It is claimed on behalf of the city that as the plaintiff's lot does not abut on the avenue, and as the damages resulted from the removal of the lateral support to the abutting property, the city is not liable. The fact that the property of others intervened between the lot of the plaintiff and the avenue can make no difference. The liability would be the same whether the several parcels were owned by one or by different owners. The liability of the city did not depend upon the character of the ownership of the damaged property; but upon the extent to which its wrongful act was the cause of the damages.

In regard to the buildings and improvements, it may be said that there is nothing in their

character or in the circumstances, to indicate that the slide in the land would not have occurred as it did if they had not been there. The additional weight which they imposed cannot reasonably be supposed to have contributed materially to the giving away of the soil.

The case of *Gilmore v Driscoll*, (122 Mass. 199), relied upon by the defendant fully supports the verdict in this case, and would have warranted the jury in allowing the damages to the improvements as well as to the land, where the plaintiff is not chargeable with negligence in making them. On page 205, referring to the case of *Foley v Wyeth*, it is said, "that the right of support from adjoining soil for land in its natural state stands on natural justice, and is essential to the protection and enjoyment of property in the soil, and is a right of property which passes with the soil without any grant for the purpose. 'It is a necessary consequence from this principle, that for any injury to his soil, resulting from the removal of the natural support to which it is entitled, by means of excavation of an adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done and the mischief thereby occasioned. This does not depend upon negligence or unskillfulness, but upon the violation of a right of property which has been invaded and disturbed. This unqualified rule is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures, for an injury to buildings, which is unavoidably incident to the depression or slide of the soil on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained when a want of due care or skill, or positive negligence, has contributed to produce it.'"

It is upon this principle that the City of Cincinnati *v* Penny (21 Ohio S. 499), was decided. The city in that case was held exempt from liability for damages to buildings, because it was free from negligence in making the excavation. The same rule of liability from want of proper care and skill is held in City of Quincy *v* Jones, 76 Ill. 232.

The evidence in this case would have warranted the jury in finding that the city, failed to exercise such care and skill in making the avenue in question; and hence the judgment of the court of common pleas ought not to have been reversed.

Judgment of the district court reversed; and that of the common pleas affirmed.

LONGWORTH J. did not sit in the case.

[This case will appear in 38 O. S.]

STREET ASSESSMENT—FAILURE TO PERFORM CONTRACT—INJUNCTION TO ENJOIN COLLECTION.

SUPREME COURT OF OHIO.

NELSON B. STONE,

v.

HENRY C. VIELE.

June 20, 1882.

Where a contractor for paving a street has failed to perform his contract, so that there is "a substantial defect in the improvement," within the meaning of Revised Statutes, § 2289, and an assessment against the abutting lots has been placed on the tax duplicate, and the county treasurer is taking the necessary steps to sell such lots, under authority of the duplicate, the owners of such property may, in an action against the treasurer and the municipal corporation, enjoin such proceeding, unless it appear that it would be inequitable to do so. Secs. 1777, 1778, Rev. Stats., have no application in such case.

Error to the District Court of Summit County.

On December 20, 1881, Nelson B. Stone commenced an action in the Court of Common Pleas of Summit County, against Henry C. Viele, treasurer of that county. The cause was appealed to the district court, where a demurrer to the petition was sustained on the ground that sufficient facts were not set forth to constitute a cause of action, and the action was dismissed by the court. The question arising on the petition in error filed by Stone in this court is, therefore, whether the petition of Stone filed in the court below, contains facts sufficient to constitute a cause of action against Viele.

The action was brought by the plaintiff in his own behalf and in behalf of other designated persons and it is stated in substance in the petition that the following are the facts: The plaintiff and the persons so named are owners of lots abutting on East Market Street, between the original west line of the corporation of Middlebury and the east line of High Street, in Akron, which is a city of the third grade of the second class. On June 27th, 1881, the city council having determined to pave, gutter and curb with stone the part of East Market Street above mentioned, to the width of thirty feet, and having taken the proper preliminary steps, assessed in due form upon the abutting lots, three dollars and sixty-two and one-half cents on each front foot thereof, being the estimated cost of the work and materials, payable in five annual installments, and, under appropriate resolutions, the council authorized the city to and it did issue its bonds, and the proceeds thereof, \$40,854.56, were placed in the hands of the defendant, as treasurer, for the purpose of paying for the improvement. Notice having been given, the bid of the Austin Flag Stone Company was accepted, and on August 16th, 1881, a contract was entered into in due form, between the city and the company,

by which the company agreed to furnish the material and do the work according to the plans and specifications, and to the acceptance of the street committee and the civil engineer, at specified prices.

The contract contained, among others, the following stipulation: "The party of the second part further covenants and agrees that all of said material shall be of the best of their several kinds and qualities, and that all of said work shall be performed in a thorough and workmanlike manner, and that all of said work, labor and materials shall be subjected to the inspection and approval of the city civil engineer, and in case any of such material and work shall be rejected by the said engineer, as defective or unsuitable, then the said material shall be removed and replaced with other materials, and the said work shall be taken down and done anew, to the satisfaction and approval of the said city engineer, at the cost and expense of the said party of the second part."

The terms of the contract as to work and material were not complied with, and the repeated protest of the civil engineer, and his orders that portions of the pavement should be taken up and relaid, were disregarded. The agents of the company, after laying one hundred feet of the pavement, informed the civil engineer and city council that the company did not intend to construct the pavement in accordance with the terms, conditions or specifications of the contract; and with respect to that part of the work, it is alleged that the pavement was "comparatively worthless." It is also alleged that at this point, the committee on streets entered into a parol contract with the company for the construction, by the company, of a pavement of an entirely different character, and of greatly inferior quality to the one contracted for originally; and that, under this agreement, two thousand feet of pavement have been constructed, the same being "greatly inferior to and in no wise corresponding with the one contracted for by the said city council." Against all this action, the plaintiff and those for whom he sues have repeatedly protested to the company and the city council. No part of the remaining portion of the work has been completed.

The plaintiff further avers that the clerk of the city has certified the assessment to the county auditor, who has placed the same on the tax duplicate for collection by the defendant in the usual mode. The plaintiff and those in interest with him are ready to pay and have tendered all taxes due on their lots, but they are unwilling to pay this assessment or any part of it. They, therefore, pray that the defendant, as treasurer, may be restrained from proceeding to collect the assessment.

HALL V. WATERS, E. W. STUART, and W. W. BOYNTON, for plaintiff in error.

C. S. COBBS, and E. P. GREEN, for defendant in error.

OKEY, C. J.

Admitting that the plaintiff was not without

a remedy, the defendant insists that relief should have been sought by requesting the city solicitor to bring suit (R. S. § 1777), and that on his failure to comply with the request, there would have been a right of action at the suit of the plaintiff (R. S. § 1778). But these sections have no application. Section 550 of the municipal code of 1869, as amended in the revision (R. S. § 2289), provides that in an action by the city (R. S. §§ 2286, 2294, 2303), to enforce an assessment, "a substantial defect in the construction of the improvement shall be a complete defense." Doubtless the same rule would apply in a suit by the treasurer to collect the assessment. (77 Ohio L. 13; R. S. § 1102, 1103.) But a treasurer may collect taxes or assessments by distraining goods and chattels (R. S. § 1095), or he may sell the land upon which taxes or assessments have been levied, the duplicate having the force of an execution, (R. S. § 2870); and the latter, it is fair to say from the averments of this petition, was the mode intended to be pursued by this defendant. Where the proceeding is by distraint, or the treasurer is proceeding to sell under the authority conferred by the duplicate, the provision of section 2289, above quoted, will not in terms apply; but by confining it to actions brought by the city or the treasurer, we would place upon the provision a construction which is wholly unwarranted. Such a construction would enable the city and treasurer to render the provision wholly nugatory. We are satisfied that whether a question arises upon that provision at law or in equity, the rule ought to be the same (31 Ohio St. 450), and that where the treasurer, as here, is enforcing an assessment of the character claimed, without suit, he may be restrained. True, it is a well known maxim, that he who seeks equity must do equity; but we are unable to say, looking to the averments of this petition, and giving to them the liberal construction required (R. S. § 5096,) that relief should be denied by the application of that rule.

It is urged that the improvement contemplated in the proceedings of council, and contracted for between the city and the company, was entirely abandoned, and hence that the assessment is illegal and may be enjoined. (R. S. Pt. 3, Tit. 1, Div. 7, ch. 13.) No doubt an assessment not based on proper preliminary steps is illegal. (R. S. § 2264 et seq.; *Folz v. Cincinnati*, 2 Handy, 261.) And where proceedings for an improvement are abandoned, and a contract for a new and wholly different improvement is substituted for the former contract, without the proper preliminary steps, an assessment against abutting lots, to pay the cost of such new improvement, would be equally illegal. Whether the petition presents such a case, we need not now determine.

We are of opinion that the petition is sufficient, and that the district court erred in sustaining a demurrer to it, and in dismissing the action. The treasurer was a necessary party, and as to him a cause of action was stated. But we are also of opinion that it is the duty of

the court to require the city to be made a party, and that a failure to comply with such order would be ground for dismissing the action. (R. S. §§ 5013, 5314.) The ground upon which we reverse the judgment does not relate to the legality of the assessment. We assume for this purpose that it was not illegal. The question finally to be determined on this branch of the case is whether there was such a departure from the contract in the performance of the work, as to afford ground of relief against the enforcement of the assessment, and upon that question the city is plainly interested and should be heard.

We purposely abstain from laying down any rule by which to determine what is a "substantial defect" within the meaning of section 2289, or what will constitute an abandonment of the preliminary steps and the contract for the construction of the work, and the substitution of a new contract. These matters can be more properly considered in a case like this, when all the facts are ascertained.

Judgment reversed.

[This case will appear in 38 O. S.]

CRIMINAL LAW—AVERMENT IN INDICTMENT IN THE WORDS OF THE STATUTE SUFFICIENT.

SUPREME COURT OF OHIO.

RIDENOUR V. THE STATE.

June 20, 1882.

1. An indictment for shooting with intent to maim is not defective for want of averment as to what member or members of the body the accused intended to injure or disable. If in the words of the statute it is sufficient.

2. Where one shot another in the trunk of the body and the result was to produce paralysis of a leg, causing a permanent disabling of that member, a verdict of guilty of shooting with intent to maim is supported by sufficient evidence. The accused might fairly be presumed to have intended the actual and natural result of his unlawful act.

3. An indictment contained three counts, the first and second did not charge the offense to have been committed "against the peace and dignity of the State of Ohio," but the third did so charge. The accused was acquitted under the first two counts and convicted under the third.

Held: That, where it did not appear from the record that evidence had been introduced against the prisoner under the first two counts which would have been incompetent under the third and prejudicial, there was no error in refusing to grant a motion for a new trial.

Error to the District Court of Common Pleas of Butler County.

LONGWORTH, J.

Plaintiff in error was convicted and sen-

tenced in the Common Pleas Court of Butler County, of shooting one Samuel Montgomery, with intent to maim. The indictment under which he was tried, contained three counts charging the shooting to have been with intent, first to kill, second to wound, and third to maim. Under the first two counts the prisoner was acquitted. These two counts closed without alleging that the offence charged, was committed "against the peace and dignity of the State of Ohio." The third count however was not defective in this respect. What would have been the effect of a conviction and sentence under either of these defective counts is not necessary for us now to determine. The prisoner was not prejudiced by his acquittal; and such acquittal cured any previous errors which may have intervened in the action of the court touching this objection. We can understand that, where evidence has been introduced against the prisoner upon counts, under which no conviction could be had, and such evidence is incompetent against him upon the valid charge under which he is convicted, the prejudice may be such as to warrant a reversal of the judgment; but it is enough to say that no such case is disclosed by the record before us.

II. It is objected further that the third count of the indictment is insufficient, for the reason that it simply charges an intent to maim without setting forth what member of the body the prisoner intended to injure, disable or destroy. In this respect we do not consider it defective. Although both at common law and under our present more liberal practice, it is necessary in charging the offence of "mayhem" or "maiming", to set forth what member of the body was actually injured or destroyed, yet under a charge of assault with intent to wound or to maim, it was never necessary to do more than to allege the intent in the words of the statute without setting forth particularly the manner in which it was intended to inflict the injury. Any other rule would lead to absurd results. Suppose a case where one shoots at another, but, not wishing to kill, aims low, so that the ball may probably strike and disable the leg, it would result from the argument of prisoner's counsel, that no indictment would be valid or conviction legal, unless it should be alleged and proved, that the intention was to hit one leg and not the other.

III. The evidence showed that the accused shot Montgomery in the trunk of the body near the naval, and from this it is argued that the intent, though possibly to kill or to wound could not have been to maim. It further appeared, however, that a nerve was destroyed by the bullet in its course and that, although

the patient has recovered, his right leg is disabled by paralysis, from which it is said he will never, in all probability, recover. From this it seems that the result of the shooting was actually to *maim*. Can it be said that the verdict, finding that the accused intended the result of his criminal act, was not warranted? We think not. The law presumes all persons to contemplate the natural and probable results of their actions; and we cannot say that the natural and probable result of such an injury as this is not to cause the loss of the use of some important member of the body.

Unquestionably, upon this state of the evidence, the accused might have been properly convicted, under section 6819 of the Rev. Statutes, of disabling the limb, or, in other words, of the offence of *actually* "maiming" the injured man; nor could he be heard for a moment to say that he did not *intend* to do the very thing he did.

Numerous other errors in the proceedings are alleged which we do not think it desirable to consider in detail or notice further than to say that we are unanimously of opinion that no errors intervened at the trial to the prejudice of the accused.

Judgment affirmed.

[This case will appear in 38 O. S.]

IGNORANCE AND MISMANAGEMENT OF PRISONER'S COUNSEL—NEW TRIAL.

ST. LOUIS, MO., COURT OF APPEALS.

THE STATE V. JONES.

The general rule recognized that a party cannot avail himself of the mistakes, ignorance or mismanagement of his own counsel as ground for a new trial; but the rule held not to apply in an extreme case, where the prisoner was convicted of a capital crime and the record showed that he could not have been worse defended if he had been defended by an idiot or lunatic, and that, in consequence of the ignorance of his attorney, he had suffered a deprivation of a substantial right.

LEWIS, P. J.

The defendant was convicted of murder in the first degree, and sentenced to death. It is not satisfactorily shown to us that any error was committed by the court in the conduct of the trial, but our attention is strongly called to its refusal to sustain a motion for a new trial, based upon the alleged ignorance, imbecility, and incompetency of the defendant's attorney, and his gross mismanagement of the cause.

Such a claim for reversal must be considered with great caution. The law has provided means whereby only persons qualified by learning, intellectual capacity, and good moral character, may be permitted to defend, in any court of justice, the reputation, property or life of a fellow citizen. This being done, the presumption necessarily follows that one who, by such means, has become armed with the proper credentials,

will be competent to judge, and faithful to adopt, the best methods for securing a vindication of his client's rights; with the further presumption that the client in selecting him has elected to abide by the results of his skill and fidelity. It would be difficult to state with too much emphasis, how the stern severity of the courts has generally compelled parties to stand by the consequences of negligent omission, blundering or improper management by their attorneys in legal proceedings. This severity is generally justified by the most important considerations of public policy, as well as by the plain demands of justice, as between the parties to the cause. In civil cases the rule is broadly laid down, that "neither the ignorance, blunders, nor misapprehension of counsel, not occasioned by the adverse party, is a ground for vacating a judgment or decree." *Boston v. Haynes*, 33 Cal., 31; *Farmers' Co. v. Bank*, 23 Wis., 249; *Burton v. Hynson*, 14 Ark., 32; *Burton v. Wiley*, 26 Vt., 430; *Quinn v. Wetherbee*, 41 Cal., 247.

But must there be absolutely no limit to the operation of this rule, even where a human life is at stake? If an attorney should become insane during the progress of a trial, and should thereupon take such steps as would ensure the conviction of an innocent client, would no relief be possible? To say so, would be a libel on the law. In looking over this record we find in the performance of the counsel for the defendant an exhibition of ignorance, stupidity, and silliness, that could not be more absurd or fantastical if it came from an idiot or a lunatic. Among many similar examples it was urged that no act of Congress had ever authorized the State of Missouri to delegate to the city of Saint Louis the power of enforcing the laws; and that the State could not offer proof of the killing, without first proving affirmatively that the deceased was alive, and that he did not kill himself. Objection was made to an officer testifying, "because he undertakes to testify to a confession which he has already testified in the other court, and because it is presumed that he will do the same in this court."

It was objected that a confession made in Illinois could not be proved in Missouri for want of jurisdiction, because "the United States have made no law" to authorize it. These are only a few of the absurdities with which the record painfully abounds.

It must be admitted that an attorney who is ignorant or imbecile in a general way, may, nevertheless, conduct a cause with propriety, and omit nothing on the trial which would secure any right or advantage in his client's behalf. So much weight at least, must be accorded to the fact of his admission to the bar. The record before us would indicate no reason for disturbing the judgment, if it contained no evidence of specific and gross mismanagement, by which the prisoner was deprived of some essential right guaranteed to him by law, necessary for his proper defense, and inseparable from a fair trial. Such evidence is not wanting on the present occasion.

No witness saw the fatal shooting. The pris-

oner, in aid of his application for a new trial, filed an affidavit stating, in effect, that several weeks before the trial, he had informed his attorney that he could prove by three several witnesses, naming them, that the deceased had repeatedly threatened to kill the affiant on sight; but the said attorney, "by reason of his incompetency and imbecility, refused and neglected to bring said facts before the court." That the facts, as to the homicide were, that when defendant approached the deceased, who was lying in a hammock, and requested him to settle certain bills, the deceased arose with an oath, saying he would kill defendant, at the same time drawing a pistol. That defendant thereupon shot in self-defense. The affiant further stated that he informed his attorney of these facts, and requested to be put upon the stand to testify to them. But the said attorney, "by reason of incompetency, imbecility, and ignorance of the law, informed this affiant that the law was such that this affiant, being charged with murder, could not swear in his own defense." The attorney filed a counter-affidavit, in which he "denies that the defendant was not fully informed as to his right to take the stand as a witness," and alleges that "it was concluded and agreed" that the defendant should not be put upon the stand, for the reason, in effect, that the testimony of the officer to the defendant's confession would accomplish all that was desired.

Considering the existing exigencies, it may be doubted whether the reason given by the attorney for keeping his client off the stand, was any more creditable to his professional discrimination than the one stated by the prisoner. But waiving that, and also the seeming impropriety of an attorneys volunteering an affidavit to prevent his convicted client from getting a new trial, we think that the general aspect of the record so far corroborates the affidavit of the prisoner, as to entitle him to the benefit of the doubt. We feel constrained to act upon the supposition that the attorney, ignorantly or otherwise, advised his client against going upon the stand, on the ground that, under a charge of murder, he could not lawfully testify in his own behalf.

Of course, we cannot assume that the jury would have believed the prisoner's testimony, if it had been given. But if it could have been considered in connection with the proofs of threats from the deceased by three other witnesses, as is alleged, there is at least a reasonable probability that the prisoner would have gotten off with conviction of a lower grade of crime, and a lighter punishment than are recorded against him. In any event he has been deprived, in the manner complained of, of a most important weapon for his defense, and one whose use at his option was guaranteed to him by law, for whatever it might be worth.

While it is true, as was held in *Bowman v. Field*, 9 Mo. App., 576, that there can be no relief against a mere negligent omission of an attorney presumably competent, and notwithstand-

ing the rigid rule in ordinary civil cases, as before stated, yet there is high authority for the granting of relief in extreme cases where the client's loss results not merely from negligence, but from the gross ignorance, incompetency or misconduct of the attorney. In *Sharp v. The Mayor, etc.*, 31 Barb., 578, a judgment was obtained against the city of New York for over \$40,000. The corporation counsel failed to prove facts in defense, which were known to him, and which it was his plain duty to prove. After the judgment, although urged by the proper city authorities to take an appeal, he refused to do so. The Supreme Court, in general term, set aside the judgment. Said the court: "Courts of law are not to be used by parties in effecting, through the forms of law, the ruin of a party who has employed an incompetent, negligent, or unworthy attorney."

If such considerations can prevail where only money or property is concerned, how much weightier should they be, in every rightly constituted mind, where a human life is in the balance! Modern civilization stands aghast at the barbarity of the ancient law which denied to a prisoner the aid of counsel "learned in the law," when on trial for his life. The wisdom and humanity of the present age demand that the maxim, "Every man is presumed to know the law" shall be reversed both in theory and in practice when applied to the legal methods of conducting a defense against a charge of felony. Our State constitution (Art. 11, § 22) commands that "in criminal prosecutions, the accused shall have the right to appear and defend, in person and by counsel," and the legislative authority has supplemented this with the provision that, "if any person about to be arraigned upon an indictment for felony be without counsel to conduct his defense, and he be unable to employ any, it shall be the duty of the court to assign him counsel," etc. (Rev. Stat., § 1844.) To say that these beneficent requirements were satisfied in the circumstances of the present case by the share taken in the proceedings by a licensed attorney would be a mockery of the purposes of the constitution and the law. It would be a most unworthy exercise of the judicial function to administer the shadow of the law but not its substance. We consider that the prisoner here, in effect, went to his trial and doom without counsel such as the law would secure to every person accused of crime.

The judgment is reversed and the cause remanded.—*Western Jurist*.

THE RIGHT TO SELL TICKETS ON THE SIDEWALK IN FRONT OF OWNER'S PREMISES.

NEW YORK SUPREME COURT.

LESTER WALLACK v. CERTAIN TICKET SPECULATORS.

June, 1882.

The war in behalf of the theatrical managers

against the ticket speculators has thus far proven advantageous to Mr. Lester Wallack, in whose behalf Messrs. Howe & Hummel obtained a preliminary injunction preventing the sale of tickets in front of his theater. In opposition to his motion to make the injunction perpetual, the defendants urged that Mr. Wallack had not acted in good faith and that the license held by the speculators gave them authority to sell their tickets. Mr. Wallack's answer to these statements was a denial, and Judge Donohue rendered his decision, making the injunction permanent. The following is the decision in full:

"In this case the plaintiff claims that the defendants and others obstruct the way to the theater, and interfere with the proper right to which he is entitled as the occupant of the premises on which his theater is. The defendants do not deny the selling of tickets on the sidewalk in front of the theater, but content themselves with the denial of doing so in the vestibule or the entrance, or in front of it or in any part except as the license provides. It is substantially admitted that the defendants do claim the right to sell tickets for his theater, on the sidewalk in front thereof, and the first ground taken by them is that they have a license so to do from the mayor. The answer to this is simply to refer to the opinion of Mr. Justice Van Vorst, in *Ely v. Campbell*, 59 How. Pr. 333, in which this question is considered, and to state the conclusion arrived at, that the city has no right by license to appropriate any man's sidewalk or street, for any obstruction to him or the public. It does not add to the defendant's right; as he secondly claims, that he is selling what the plaintiff sold him. As well might the man who purchased goods from any wholesale dealer, claim the right to sell the goods as purchased on the sidewalk in front of the store from which they were purchased. The authorities referred to in the case cited, clearly demonstrate that the city has no power to license any business on the sidewalk or in front of any man's premises without his consent. It is hardly necessary to discuss the question whether the use of the street to carry on any business not necessarily confined to the streets, is a hindrance to the public, as it is too plain for argument.

If the right exists for one employment not so necessary, it is for all, and people would hardly pay rent for offices if the sidewalk could be had for such uses. It was stated on the argument that the legislature passed some law on the subject, which was before the Governor, and the decision of this case was asked to be suspended until that was disposed of, as it might give the defendants the right to carry on the business sought to be restrained. What right the Legislature will leave to the citizens or property owners of the city might be difficult to say, and in this case we cannot speculate upon it; but, as this case arose before any such act passed, it must be disposed of as the law is, and hold with Judge VanVorst's decision that the public

and private owners have some rights. I must hold that the motion must be granted.

MARRIAGE—CONTRACT—EVIDENCE—COHABITATION—REPUTE—MODE OF LIFE.

NEW YORK COURT OF APPEALS.

BADGER v. BADGER.

April 11, 1882.

Marriage may be established by the proof of cohabitation when such cohabitation has the elements of a matrimonial relation; and in trying an issue of fact as to the character of such cohabitation, evidence that one of the parties was reputed to be single is not competent; that he or she lived as a single person is competent.

The plaintiff claims dower in the lands of Jacob Badger, deceased, whom she alleges to have been her husband. The defendants deny the marriage, and so raise an issue of fact, which forms the vital point of the controversy. No formal or ceremonial marriage is proven, nor any express agreement between the parties, constituting such relation. The proof offered is that of cohabitation, continued for a long period of time, and characterized by general repute, and by conduct and conversation indicating, as is claimed, an intercourse rather matrimonial than meretricious. It is not our duty to solve the problem raised by the evidence, but some general understanding of the facts is necessary to a proper appreciation of the questions of law which are submitted for decision. The decedent appears to have lived two lives. They ran parallel with each other for more than a third of a century, and without approach or collision. In one locality, and among his own relatives and friends, he seemed to be a bachelor, possessing considerable wealth, at the head of a respectable business, occupying rooms with his sister and with others during much of the period, and if not always at home, yet not so frequently absent as to arouse suspicion or remark. In another locality in the same city, but perhaps in a humbler neighborhood, he appears as John Baker, living with the plaintiff as his wife, introducing her as such, called uncle by her nephew, and deemed father by her daughter, paying her bills and expenses, furnishing her with the food and shelter he shared, nursing her through severe and continued illness. Seldom absent at night, attending her mother's funeral as one of the family of mourners, the intercourse created no scandal, but reputed to be virtuous and respectable, and that of husband and wife. Other facts are stated in the opinion.

FINCH, J. It is over the cohabitation and its true character and meaning that the controversy arises. So far as we know, the association began when the plaintiff was young and the decedent in middle life, and continued until he fell dead an old man of seventy-six. It lasted without break or interruption. It survived the loss of youth and its attractions; it ran on through sickness, paralysis, and some degree of mental weakness; it showed no trace of the satisfied passion that tires of its victim and abandons her for new temptation; it did not change when the girl had grown into the matron and became deaf and lame; it stayed with the tenacity of love and duty, remaining patient and faithful until the end. It is argued with great force that if this relation was that of lover and mistress, it approached strangely near to matrimonial truth and devotion, and gave to unlawful lust an endurance and virtue not common or expected.

The reputation attending this cohabitation in the neighborhood where it existed and was known, among those brought into its presence by relationship, business, or society, was that which ordinarily attends the dwelling together of husband and wife. It has been well described as the shadow cast by their daily lives. 1 Bishop on Mar. and Div. § 438. In the general repute surrounding them, the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest because disinterested and safer to be trusted because prone to suspect, we are enabled to see the character of the cohabitation and discern its distinctive features. It is for that

reason that such general repute is permitted to be proven. It sums up a multitude of trivial details. It compacts into the brief phrase of a verdict the teaching of many incidents and the conduct of years. It is the average intelligence drawing its conclusion. It would lead us without serious doubt to the true inference to be adopted, but for the apparent concealment indicated by the assumption of a false name, and the persistent silence of the decedent among his own relatives. We have no certain explanation of those facts. We cannot tell why they existed. While not necessarily inconsistent with the fact of a marriage, and perhaps possible of explanation, we cannot deny that they belong more naturally to and are more easily explained by an illicit and clandestine intercourse than one honest and open and not needing disguise. They tended, therefore, to throw some doubt upon the character of the cohabitation, and to raise over it a question as to the legitimate inference to be drawn.

To another alleged fact pressed upon us for the same purpose by the defendants we give little heed. It was said that this cohabitation was illicit in its origin, and must be presumed to retain that character until proof is given of a change in its object or purpose. To establish the fact the appellants go back to the girlhood of the plaintiff and recall an event which they claim reflects upon her purity. At the age of about seventeen she returns to her home with an infant of tender years. No husband comes with her or is known; there is no acknowledged father of the child; not a word of explanation seems to have been made; and we are asked, for this reason, to infer that an illicit connection had existed between the mother and some person unknown. When this child was two or three years old the mother and Jacob Badger are found living together in Macdougall Street, keeping house, to all appearance as husband and wife, and their cohabitation assuming at once, to all outward seeming, the characteristics which attended it to the end. Because of this alleged lapse of virtue on the part of the woman it is argued that the cohabitation was illicit in its origin. The proof does not warrant such a conclusion. It shows no connection whatever between the parties prior to the commencement of their cohabitation in Macdougall Street. Back of that, it is sufficient to say we have no information or evidence of any intercourse between them. We do not even know, except, perhaps, presumptively, that the child born before is the plaintiff's daughter. We certainly do not know who was its father, nor whether the offspring of an illicit intercourse or a matrimonial connection. At all events the testimony introduces Jacob Badger for the first time at the commencement of the cohabitation which is the subject of dispute. To say that it was illicit in its origin is to assume its moretetricious character in the face of the evidence which tends to show it to have been matrimonial, and so beg the question, since the cohabitation at the beginning is not shown to be other or different from its continuous character to the end. Prior to this we are without information and must not presume guilt where innocence is possible, and least of all indulge in a more guess that Jacob Badger was a party to the wrong.

The rule that a connection confessedly illicit in its origin, or shown to have been such, will be presumed to retain that character until some change is established, is both logical and just. The force and effect of such a fact is always very great, and we are not disposed in the least degree to weaken or disregard it. *Brinkley v. Brinkley*, 50 N. Y. 198. Very often the character of the cohabitation is indicated by facts and circumstances which explain the cause, and locate the period of the change. So that in spite of the illicit origin the subsequent intercourse is deemed matrimonial. *Fenton v. Reed*, 4 Johns. 52; *Rose v. Clark*, 8 Paige, 574; *Star v. Peck*, 1 Hill, 270; *Jackson v. Claw*, 18 Johns. 344. But a change may occur, and be satisfactorily established, although the precise time or occasion cannot be clearly ascertained. If the facts show that there was or must have been a change, that the illicit beginning has become transformed into a cohabitation matrimonial in its character, it is not imperative that we should be able to say precisely when or exactly why the change occurred. *Cugjolle v. Ferrie*, 23 N. Y. 90. While we have no hesitation about the rule, and shall be prompt to apply it in a case which demands such application, we do not see that the facts before us require it, since they fail to establish an illicit origin of the cohabitation as a separate and independent fact. But the other facts remain and are en-

titled to their due consideration. The disguise of a false name, known and assented to by both parties; the two lives so different and utterly unlike, running on at the same time and demanding adequate explanation, must be admitted to bear upon the character of the intercourse, and to have introduced into it possible elements of doubt.

We are thus enabled to see what the precise question of fact was. A continuous cohabitation for about thirty-five years between these parties was established. It was either moretetricious or matrimonial, and all the evidence properly admissible and touching that inquiry was such only as tended to solve the doubt.

The defendants were permitted to prove, under repeated objections and exceptions, that Jacob Badger was reputed to be a bachelor and unmarried. This proof was given by persons who were his friends and acquaintances, but who knew nothing of the plaintiff, were unconscious of her existence, and in total ignorance of her cohabitation with the decedent. The repute thus proven was not the product of the cohabitation, and did not tend to explain it, or solve its character. It could not by possibility bear upon it. It was not its shadow, for it cast none into the locality where these witnesses were. It was the shadow of a different and distant fact which in itself was not ambiguous, and needed no explanation to relieve its character of doubt.

That the decedent lived a single life without presence or appearance of wife or daughter, at his rooms when boarding with his sister, was a fact properly proved, and clearly admissible. But that among those who thus saw him, and before whom nothing had occurred to raise the question, he was reputed to be unmarried, was pure hearsay, explaining nothing since there was nothing to be explained. The life of John Baker, in Macdougall Street, was ambiguous in the sense that it might indicate an illicit intercourse or a matrimonial connection. To ascertain which, the shadow it cast upon surrounding society could be examined and studied usefully for the solution of the doubt. The life of Jacob Badger, in Jorammon Street, was not ambiguous at all, and needed no help to solve its character. It is indeed said that the purpose was to show a divided repute, and so contradict the reputation of marriage which, to be effective, must be general. But the general repute proved, and that required to be shown, does not and cannot go beyond the range of knowledge of the cohabitation. If within that range there is division as to the character of the fact, the divided repute merely continues the ambiguity and determines nothing.

In *Clayton v. Wardell*, 4 N. Y. 230, the divided repute was of a marriage among some friends, and a disreputable connection among others; thus negating a general repute of connubial intercourse among those having knowledge of the cohabitation. In *Commonwealth v. Stump*, 53 Penn. St. 135, the reputation shown related to the parties and their association, and was that they were not married. In *Vincent's Appeal*, 60 Penn. St. 228, the husband lived two lives as here, and his repute as a bachelor among those who knew him by his true name was proved, but no question was raised over it, and it was not allowed to prevail as against the general repute of marriage in the locality where both parties lived. It was treated as utterly ineffective to produce a divided reputation. In *Lyle v. Ellwood*, 19 Eq. Cas. 98, the repute was divided, and that of marriage allowed to prevail, but it was among those cognizant of the cohabitation and having reference to it as a fact to be explained. We have been able to find no case where such evidence as was here given, upon its admissibility being challenged by objection, has been held competent. The evidence of reputation, when admitted, is an exception to general rules. It should never be allowed to stray beyond some useful or necessary purpose. In its application to cases of pedigree it is justified by the difficulties of proof, and confined generally to the family and relatives whose knowledge is assumed, and who have spoken before a controversy arisen. In its application to the fact of marriage it is more than mere hearsay. It involves and is made up of social conduct and recognition giving character to an admitted and unconcealed cohabitation. But in its application to a man living in appearance a single life, it adds nothing to that fact, it creates no further contradiction to an intercourse carried on elsewhere under the appearance of matrimony, and throws no additional light upon it. It amounts to bare hearsay, and the unsworn declarations of persons knowing nothing of the facts in

controversy. In the present case twenty-three different witnesses were allowed to testify to the reputation of the decedent as a bachelor, not one of whom before his death, had seen or heard of the plaintiff, or known of her connection with him. We do not think this evidence was admissible. Its very volume and frequency indicates the dangerous effect it may have produced upon the mind of the court, and we cannot disregard the error.

We think also that the letter offered in evidence, the body of which was in the handwriting of the decedent, and which was signed by the plaintiff as Mrs. Mary Baker, and addressed to her nephew, was improperly excluded. That the decedent wrote the body of the letter, and was at least assenting to its transmission, is not denied. Although signed by her it was their joint act. It congratulated the nephew upon his marriage; it said "we wish you much joy;" it added "we expected a visit from you and your wife;" it announced that a present was awaiting him, and that his mother called on a previous day; and its signature was a representation by the woman signing that she was a married woman passing by the name of Baker. *The Dysart Peeverge Appeal*, H. of L. Cas. part 4, p. 512. The nephew swears that decedent afterwards asked him if he received the letter, and that he called and obtained the promised present. Here was an act which tended to characterize the existing relation and indicated in many ways its connubial character. The use of the plural "we" without unnecessary explanation, and assuming that it would be perfectly understood, is one such fact. If the connection was unhalloved and disgraceful, would the parties to it be likely to invite a newly married couple, beginning in their youth a life of virtue, to a scene of concubinage and lechery? And if they were shameless enough for that, would they have called the person addressed nephew, and sent the letter with a distinct assertion of marriage in its signature? It seems to us, as we read it, to indicate a conscious innocence in the relation of the parties sending it, and an entire confidence that the nephew already so understood its character. It was a joint act, occurring during the cohabitation, calculated to reflect light upon its character, and clearly admissible as a part of the *res gestæ*. We think it was error to exclude it.

A further question arose over the evidence of a witness sought to be contradicted. One Whitbeck, called on behalf of the plaintiff, testified to a conversation with decedent when living in Bainbridge Street, and when they were sitting on the front piazza, in which the latter said he was a married man once, when he was a young man. The witness was cross-examined as to this conversation and then dismissed. At a subsequent stage of the trial he was recalled by the plaintiff and testified only to the date of his residence in Bainbridge Street, to the fact that Almira Badger lived there as his tenant, and that Jacob Badger did not reside there or stay there at night. On cross-examination he was asked by defendant's counsel whether on an occasion when they were moving furniture he did not ask decedent, in the presence of Almira, whether he was married, to which he replied, "No, sir; I am a bachelor." The witness denied any such conversation. Later in the trial Almira Badger was called to testify to this conversation. Objection was interposed on behalf of plaintiff. The court admitted the evidence, "to contradict Whitbeck and not as a declaration of deceased." The limitation of the court seems to concede that the declarations of decedent were incompetent as such in behalf of the defendants. While it is now claimed that they were admissible as part of the *res gestæ*, it is quite evident that the ruling at the trial went on a different ground. In *Van Tust v. Van Tust*, 57 Barb. 241, it was held that the declarations of Taylor, made in promiscuous conversations, having no reference to Mrs. Taylor, that he was not a married man, were properly excluded; that they did not refer to her status, and constituted no part of the *res gestæ*. This is a somewhat narrower statement of the rule than that given by the chancellor in *Taylor's case*, 9 Paige, 614. But the case here is different from both. It resembles the former in the peculiar fact of two lives running parallel with each other, and tending to contradictory inferences. Taylor seemed to be a married man at Harlem, where he dwelt with a woman whom he recognized as his wife, and appeared to be a bachelor at Rye, where he lived with his own immediate relatives. His declarations at the latter place were excluded. Without determining the propriety of that ruling, there is in the present case an additional

fact of very great importance in its bearing on the question of evidence. The plaintiff proved a long cohabitation, matrimonial and respectable in its character, and relied upon the inference of marriage to be drawn from it. To rebut that inference and weaken its force the defendants proved a parallel life wearing the appearance of celebrity. To modify that fact, and break its force as founding a counter inference, the plaintiff proved the declarations of decedent that he had been a married man, but it would not do to let "the women," meaning the relatives with whom he was living, know it. This statement tended to explain consistently with an existing marriage the silence of the decedent to his relatives, and to take away the natural inference to which his life as a single man led. And thus the meaning of that life was challenged. The defendants then sought to restore the inference by showing the declarations of decedent to the same witness that he was unmarried. No objection was made to the effort by the plaintiff, but it failed by reason of the denial of the witness. Then Almira Badger was called and the declaration of decedent to Whitbeck proved by her. At this point an objection was interposed, but general, and assigning no specific ground. The declaration was certainly relevant and material. It tended to restore to the defendants the benefit of the inference to be derived from the decedent's bachelor life, as against the effect of the declarations proved by plaintiff. It bore, therefore, in the end upon the main issue, and cannot be treated as a collateral matter and immaterial so as to prevent contradiction, and make the answer conclusive. Being evidence relevant and material, it was admissible unless some rule of law excluded it. *Platner v. Platner*, 78 N. Y. 90. The objection taken at the trial pointed out none. On the argument here, two only are stated. These are that defendants were bound by Whitbeck's answer, which would have been true if the subject of inquiry had been collateral instead of bearing, as we have seen, upon the precise issue involved; and that Almira was an interested party and could not testify to a personal transaction between herself and deceased. It was not such. There was no transaction or conversation between her and decedent. She was merely a listener to one between him and the witness. *Corey v. White*, 59 N. Y. 336; *Hillebrand v. Crawford*, 65 Ib. 107. We cannot say, then, that error was committed in the reception of this evidence, in view of the course of the trial and the character of the objections taken. Underlying the whole subject are grave questions as to what, in a case like the present, constitutes the *res gestæ*, and the limitations which properly attach to declarations offered on that ground, which we do not undertake to determine since they were not sufficiently raised.

Judgment reversed.

COLORADO.

(Supreme Court.)

PALMER V. RAY ET AL. AND THE CITY OF DENVER.

1. *Taxation—Assessment—Sidewalks—Eminent Domain.*—There is but one mode of taxation provided in the constitution of Colorado. This mode requires that all taxes must be "uniform upon the same class of subjects within the territorial limits of authority levying the tax," and assessed upon all property according to its just valuation.

Assessments upon abutting property to defray the costs of making sidewalks are a form of taxation. Street improvements, being mainly for the public benefit, it would contravene the rule of uniformity as well as that of valuation, to impose the whole burden, or an unequal portion of it, upon part only of the same class of subjects within the territorial limits of the authority levying the tax." Hence, neither under the taxing power, nor under the right of eminent domain, can the cost of making sidewalks be assessed against abutting property.

2. *Police Power—Sidewalks.*—Though the authority to regulate the relative rights, privileges and duties of individuals in society in respect to property or business is a mere police regulation, yet it may assume the form of taxation, and, under the police powers of municipal corporations, the owners of adjacent lots may be required, at their own expense, to construct sidewalks, and the cost thereof may be made a lien upon such abutting lots

Ohio Law Journal.

COLUMBUS, OHIO, : : JULY 6, 1882.

THE Supreme Court last Saturday morning, adjourned until September 25th, next.

Chief Justice Okey will remain in Columbus for the present; Judge McIlvaine will go to New Mexico; Judge White will spend part of the summer among the Lake Erie Islands; Judge Longworth will go to Lake George and the Adirondack Mountains, and Judge Johnson for the present will remain at his home in Iron-ton.

Dwight Crowel, Clerk of the Court is still confined to his home in Ashtabula County, where he has been a sufferer for nearly three months. We are glad to know he is improving.

Law Librarian, Mr. Frank N. Beebe will probably spend the heated term among his possessions in northern Michigan. Assistant Librarian, Mr. James Bell, will spend his summer vacation in camp with the Governor's Guard at Deer Park.

Deputy Clerk, Orange Frazer, will spend his summer vacation in his canoe among the Thousand Islands. Sub-Deputy, W. W. Sharpe, will remain in charge of the clerk's office.

CORRESPONDENCE.

EDITORS OHIO LAW JOURNAL:

A proceeding before a Justice of the Peace, the other day in our city, revealed an opinion on the part of said Justice—and some investigation warrants the assertion that the opinion is not limited to him alone, but is held and exercised by others in his position and endorsed by not a few attorneys—that an adjournment of a trial in forcible detainer is entirely discretionary with the Justice, provided the adjournment or aggregate of adjournments do not exceed eight days.

The facts will afford a better understanding of the legal proposition. Summons in forcible detainer was returnable Monday, June 12th, 1882, at 10 A. M., parties appeared by attorney and continuance had by consent of parties at request of defendant. Friday, June 16th, 1882, at same hour, again parties appeared by attorney, defendant not present in person, and defendant's attorney asked a further adjournment—the re-

mainder of the eight days mentioned in Sec. 6606, Rev. Stat.—upon the ground of absence of the "regular attorney in the case," "absence of the defendant," and "not ready for trial." Plaintiff objected to adjournment and insisted upon trial. No affidavit offered, witness sworn or other showing made for continuance, nor was a jury required, or the Justice actually engaged in other official business. The Justice granted the adjournment until Monday, June 19th, 1882, the entire eight days, basing his authority upon *discretion* and Sec. 6606 Rev. Stat. Was the magistrate's conduct authorized by law? We think not.

His authority can be found in neither of the sources he mentioned.

A Justice of the Peace's power is purely statutory, defined and limited by positive law. *Harding v. Trustees*, 3. Ohio 546, 549. *Davis v. Bartlett, et al*, 12, O. S. 530, 534, and the primary meaning of the word *discretion* as defined in the books is "the decision of what is equitable, judicious, or right in view of and guided by the circumstances of the case and the wisdom of the magistrate, *unfettered* by specific rules of *positive law*."

Where the manner of exercising a power or jurisdiction conferred upon a Justice of the Peace is prescribed and limited by statute, it must be confined to those limits, and cannot be exercised in any other mode, i. e. the trial magistrate can exercise no discretion where his duties are pointed out. *McCleary v. McLain*, 2, O, S. 368.

The Legislature has undertaken to define the duties of Justices upon the subject of adjournments. Sec. 6534, Rev. Stat., provides for adjournments without the consent of either party and gives to the Justice a limited choice in three classes of cases, only upon the transpiring of either of two events, viz. "if a jury be required," or "if the Justice be actually engaged in other official business;" if either of these events occur upon the return day, then the maximum length of adjournment is fixed by: 1. That the defendant is not a resident of the County. 2. That he is in attendance under arrest. In these two classes the adjournment is limited to forty-eight hours. And 3. All other cases are classified together and the time limited to eight days, and

it must be born in mind that this power to adjourn where the parties do not consent can only be exercised either when time is required to obtain a jury, or the Justice is at the time otherwise officially engaged.

Sec's. 6535 and 6536, Rev. Stat. provides for adjournments by either party without the consent of the other, and in which the Justice has no choice or discretion whatever.

From the foregoing we must conclude that the Justice can legally grant an adjournment against the objection of either party for no length of time whatever, except as follows: 1. Jury required. 2. Justice engaged in other official business. 3. Upon the sworn statement of the party asking it, if required by the adverse party. And that Sec. 6606 Rev. Stat. extends no additional power or discretion to the Justice, but is simply a limitation upon Sec's. 6535 and 6536, that when the showing has been made under oath for continuance as provided by those Sections, the adjournment shall be for the time mentioned therein, provided the action be not forcible entry and detention, but if so, Sec. 6606 steps in and says only eight days and not for thirty or ninety days, unless you give an undertaking for accruing rent.

The opinion of the Justice would make Sec. 6606 modify Sec's. 6535—6 and repeal Sec. 6534 at least as to actions of forcible detainer, which is scarcely possible, the sections were all enacted at the same Session of the Legislature in 1853, and are harmonious.

T. H. R.

Columbus, O., 19th June, '82.

[If our correspondent would attempt to seek a justification for the multifarious and bewildering orders and decisions of Justices of the Peace, we fear he would lose both heart and mind and in the end meet with the inevitable—utter failure.—EDS. LAW JOURNAL.]

MUTUAL LIFE ASSOCIATIONS.

SUPREME COURT OF OHIO.

THE STATE OF OHIO, ex rel., THE ATTORNEY GENERAL.

v.

THE STANDARD LIFE ASSOCIATION OF AMERICA.

1. Corporations organized under the laws of Ohio, are of two classes: 1st. Those organized

for profit, which must have a capital stock owned by stockholders. 2nd. Those organized for purposes other than for profit, consisting of members associated together for a lawful purpose. To the second class belong corporations formed under the provisions of Section 3630 of the Revised Statutes for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the family or heirs of deceased members.

2. Corporations formed for this purpose, though not subject to the provisions of Chap. 10, Title II of the Revised Statutes, relating to Life Insurance Companies, on the mutual or stock plan, are subject to all the general provisions of Chap. 1 Title II, which apply to corporations formed for purposes other than profit.

3. After such a company or association has been organized and incorporated, the members thereof are those mutually engaged in promoting the purposes of the organization, and who, by virtue of their relation to the corporation are entitled to the mutual protection and relief provided, or whose family or heirs are, in case of his death, entitled to the specific relief provided for them.

4. The members of such a corporation are the elective and controlling body, authorized to elect trustees and prescribe regulations for the government of the same, not inconsistent with the laws of the State. Neither the incorporators nor the trustees first elected are authorized to adopt a by-law or regulation providing that they shall hold office during life, and in case of vacancy, to fill the same by appointment.

5. Trustees are charged with the duty of faithfully executing the trust which the law and regulations impose on them. They are entitled to a reasonable compensation for the service rendered; but any plan or scheme by which money is collected from members by assessment or otherwise, with a view to their individual profit, and beyond what is necessary to defray the reasonable expenses of executing the trust, is a breach of trust.

6. A certificate of membership in such a corporation by which the member in consideration of his payment of a membership fee, annual dues and a pro rata assessment with his fellow members to pay a sum of money to the family or heirs of a deceased member, in consideration of which the association at his death stipulates to pay to his family or heirs a sum of money, graduated by the number of members in his class, is a contract of life insurance.

7. Such a contract of insurance to pay in case of a member's death "to himself or assignee" "to his estate," "to his executors or administrator," or to any person, whether a relation or not, who is not of his family or heirs, is against public policy, and void.

Quo warranto.

The object of this action is, to oust the defendant, a corporation organized under section 3630 of the Revised Statutes, from its franchise to do business, as an insurance company, on the co-

operative or assessment plan as authorized by said section. The ground alleged is, misuse of its corporate privileges, and the exercise of rights and privileges not conferred by law. Among other things it is specified as grounds for the judgment of ouster, that this company has issued certificates of membership for the payment of stipulated sums of money for members' benefit, instead of the benefit of his family or heirs, as the law authorizes; that it has issued such certificates to very aged and infirm persons without regard to their prospects of life; that it has issued them for the benefit of cousins, sons-in-law, and other relatives who are not of the family or heirs of such member; that it has delayed the approval of proofs of death, and making the proper assessments to pay in case of death; and that it has treated others than the family or heirs as beneficiaries, making assessments against them, and looking to them, and not to the members, for payment. The answer puts in issue these allegations, and avers that the defendant is doing a business authorized by law, upon the following plan:

"The Standard Life Association of America, having been duly organized under the stringent laws of Ohio, invites special attention to the following plan of insurance:

DIVISIONS.

There are four separate and distinct divisions, and two classes in each division, one insuring for \$2,000 and one for \$3,000 each, on a basis of one thousand members, and the return of all assessments paid up to the time the certificate becomes a claim. Not more than \$5,000 will be issued on any one life, and to secure this amount two applications will be required.

MEDICAL EXAMINATION.

Applicants for membership in the preferred division will be required to pass a thorough medical examination by some competent physician, and none but good risks will be accepted under any circumstances. All applications must be signed by the applicant, endorsed by the agent, and will undergo a careful examination by the medical director.

MEMBERSHIP FEE.

The membership fee, as per table of rates, is paid but once, and must accompany the application, and will be returned if the applicant is rejected.

ASSESSMENT FOR EXPENSES.

An assessment for expenses, not to exceed amount named in table of rates, will be made annually, on the first day of January or July, as indicated by the certificate of membership.

ASSESSMENTS.

Upon the death of a member, the surviving members in his class, whose certificates are in force at date of such death, will be required to pay an assessment, as per table rates, which remains the same through life.

TABLE OF RATES.

PREFERRED DIVISION.

Membership Fee, \$15 00.				Expense Assessment, \$5 00			
Age.	Ass.	Age.	Ass.	Age.	Ass.	Age.	Ass.
20.....	\$3 00	30.....	\$3 50	40.....	\$4 00	50.....	\$5 00
21.....	3 05	31.....	3 55	41.....	4 10	51.....	5 10
22.....	3 10	32.....	3 60	42.....	4 20	52.....	5 20
23.....	3 15	33.....	3 65	43.....	4 30	53.....	5 30
24.....	3 20	34.....	3 70	44.....	4 40	54.....	5 40
25.....	3 25	35.....	3 75	45.....	4 50	55.....	5 50
26.....	3 30	36.....	3 80	46.....	4 60	56.....	5 60
27.....	3 35	37.....	3 85	47.....	4 70	57.....	5 70
28.....	3 40	38.....	3 90	48.....	4 80	58.....	5 80
29.....	3 45	39.....	3 95	49.....	4 90	59.....	5 90
30.....	3 50	40.....	4 00	50.....	5 00	60.....	6 00

In this division there is only one class, which is for \$3,000.

HAZARDOUS DIVISION.—FOR AGED PEOPLE ONLY.

For \$2,000.				For \$3,000.			
Membership Fee, \$12 00.				Membership Fee, \$15 00			
Expense Assessment, \$4 00.				Expense Assessment, \$5 00			
Age.	Assessment.	Age.	Assessment.	Age.	Assessment.	Age.	Assessment.
61.....	\$2 00	61.....	\$3 00	61.....	\$2 00	61.....	\$3 00
62.....	2 15	62.....	3 20	62.....	2 15	62.....	3 20
63.....	2 35	63.....	3 50	63.....	2 35	63.....	3 50
64.....	2 50	64.....	3 75	64.....	2 50	64.....	3 75
65.....	2 75	65.....	4 00	65.....	2 75	65.....	4 00
66.....	2 90	66.....	4 25	66.....	2 90	66.....	4 25
67.....	3 00	67.....	4 50	67.....	3 00	67.....	4 50
68.....	3 35	68.....	5 00	68.....	3 35	68.....	5 00
69.....	3 75	69.....	5 50	69.....	3 75	69.....	5 50
70.....	4 00	70.....	6 00	70.....	4 00	70.....	6 00

EXTRA HAZARDOUS DIVISION.

For \$2,000.				For \$3,000.			
Membership Fee, \$12 00.				Membership Fee, \$15 00			
Expense Assessment, 4 00.				Expense Assessment, \$5 00			
Age.	Assessment.	Age.	Assessment.	Age.	Assessment.	Age.	Assessment.
71.....	\$2 00	71.....	\$3 00	71.....	\$2 00	71.....	\$3 00
72.....	2 15	72.....	3 20	72.....	2 15	72.....	3 20
73.....	2 35	73.....	3 50	73.....	2 35	73.....	3 50
74.....	2 50	74.....	3 75	74.....	2 50	74.....	3 75
75.....	2 75	75.....	4 00	75.....	2 75	75.....	4 00
76.....	2 90	76.....	4 25	76.....	2 90	76.....	4 25
77.....	3 00	77.....	4 50	77.....	3 00	77.....	4 50
78.....	3 35	78.....	5 00	78.....	3 35	78.....	5 00
79.....	3 75	79.....	5 50	79.....	3 75	79.....	5 50
80.....	4 00	80.....	6 00	80.....	4 00	80.....	6 00

SPECIAL HAZARDOUS DIVISION.

For \$2,000.				For \$3,000.			
Membership Fee, \$15 00.				Membership Fee, \$25 00			
Expense Assessment, \$5 00.				Expense Assessment, \$5 00			
Age.	Assessment.	Age.	Assessment.	Age.	Assessment.	Age.	Assessment.
81.....	\$2 35	81.....	\$3 50	81.....	\$2 35	81.....	\$3 50
82.....	2 75	82.....	4 00	82.....	2 75	82.....	4 00
83.....	3 00	83.....	4 50	83.....	3 00	83.....	4 50
84.....	3 35	84.....	5 00	84.....	3 35	84.....	5 00
85.....	3 75	85.....	5 50	85.....	3 75	85.....	5 50
86.....	4 00	86.....	6 00	86.....	4 00	86.....	6 00

The Association claims the right to do business on this plan, and denies that it has misused its corporate power in any of the particulars named.

The facts developed by the evidence on the hearing and from the books of the company, so far as necessary to be stated, will be found in the opinion in connection with the several points considered.

JOHNSON, J.

1. This association was incorporated September 1, 1880. The record of the company shows that seven persons, to wit: D. R. Johnson, W. H. Carter, J. B. Netscher, Jerry Shank, Geo. W.

Cole, S. W. Anderson and John F. Wood, met on that day in Mansfield for the purpose, as is stated, of organizing an association "to furnish mutual protection and relief to its members," under Sec. 3630 of the Revised Statutes. Mr. Anderson was made chairman of the meeting, and he thereupon presented a plan of operations, which was unanimously adopted.

What that plan was does not appear from the record of the company, but is subsequently disclosed in the proceedings and acts of the association.

At the same meeting, those present, drew up, and five of them executed, Articles of Incorporation, which were subsequently authenticated and filed with the Secretary of State, under which they became a body corporate.

Before adjourning and of course before they had become incorporated, these seven persons, proceeded to elect themselves "officers and trustees" of the association for one year, giving to each, an office, and also appointed an Executive Committee from among themselves.

It appears that by-laws, were also adopted, but the record of the trustees is silent as to their provisions.

This record and the books of the association show they proceeded to transact business as a corporation soon after.

The certificate of incorporation after stating the name and place of business, states the purpose of the association to be "to receive money, either by voluntary donation, or contribution, or to collect the same by assessment of its members, and to distribute and appropriate the same to the families or heirs of its deceased members, in such manner as may be prescribed by the rules and regulations of the association, not inconsistent with the laws of Ohio, and so as to carry out the objects and purposes of the association as above expressed." The Section of the Revised Statutes authorizing such a corporation is as follows:

"Sec. 3630. A company or association may be organized for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of such company or association, and may receive money, either by voluntary donation or contribution, or collect the same by assessment on its members, and may distribute, invest and appropriate the same in such manner as it may deem proper; but the aggregate sum stipulated to be paid to the family or heirs of any member at his decease shall in no case exceed seven thousand dollars, nor shall any assessment on account of the death of any member be made against any surviving member exceeding one-fifth of one per centum stipulated to be paid to such survivor at his decease, and such association shall not be subject to the preceding section of this chapter."

It will be noticed that this section authorizes such corporation for mutual protection and relief of its members, and also for the payment of stipulated sums of money to the family or heirs

of deceased members. The certificate of incorporation is silent as to furnishing mutual protection and relief to members. It limits the scheme, so far as relief is concerned, to the distribution of its funds to the family or heirs of deceased members. It does not purport, therefore, to afford any relief or protection to its members, but only to provide for their family or heirs, after their decease. It is in no sense therefore, according to the charter, a mutual aid association to members, but a mutual insurance company, of members for the benefit of the family or heirs of members. It has issued, what are termed certificates of membership, but the real nature of the contract is that of insurance. The so-called member for in fact he is not treated as a member of the corporate body, contracts to pay an admission fee and annual dues of specified amounts, and a stated assessment, for each death in the class to which he belongs, in consideration of which, the company agree to pay his beneficiary named, the assessment collected, (less the deductions stated hereafter), not exceeding the amount of insurance named in the certificate which is either \$2,000, or \$3,000.

In *Commonwealth v Wetherbe* 105 Mass. 149, it was held, that such a contract was one of insurance, whatever be the terms of payment of the consideration by the assured, or the mode of payment of the sum to be paid in the event of loss, and although the object of the insurer, in making the contract is benevolent and not speculative.

It was further held in that case that it was none the less a contract of mutual insurance because the amount to be paid is not a gross sum, but one graduated by the number of members, not because a portion of the premiums are to be paid, upon uncertain periods of the death of members, nor because in case of non-payment of assessments, the contract provides no mode of enforcing payment thereof, but merely declares the contract forfeited.

From the specific term, of the character, as well as from the tenor of certificates of membership, the contract entered into, is one of insurance, on the lives of members and not one for the mutual protection and relief of its members.

Whether it is competent to become a corporation for that single purpose, when the statute authorizes such corporations for the double purpose of mutual protection and relief of its members, and also for life insurance for the benefit of the family or heirs of such members, is a question, we need not now stop to answer, as the petition admits that the association was duly incorporated.

Section 3630, provides however, that these corporations shall not be subject to the preceding sections of the chapter, relating to life insurance companies "on the mutual or stock plan" (chap. 10 sec's 3587 to 3629 Rev. Stat.).

This leads to the inquiry, to what extent, they are regulated by law, and to what extent such

associations may adopt their own rules and regulations?

Though not subject to the provisions relating to life insurance in chap. 10, they are subject to the general provisions relating to corporations found in chapter 1 of title 11 of the Revised Statutes. That chapter provides for two classes of corporations, (1), those for profit which must have a capital stock, and (2), those not for profit which need not have such capital stock.

If it is of the first kind, its name must begin with "The" and end with "Company" and in such kind, the place of business and purpose for which it is formed must be stated in the certificate. R. S. Sec. 3226.

By sec. 3240 a majority of the subscribers to the articles of incorporation of a corporation, other than for profit, may elect not less than five trustees, who shall hold their offices till the next election, or until their successors are elected and qualified. In the case at bar, the incorporation elected seven trustees for one year.

By section 3246, unless the regulations otherwise provide the annual election for trustees or directors, (this section applies as well to corporations not for profit as those for profit), on the first Monday in January of each year. It further contemplates, that the elective body consists of the "members" of this corporation in those not for profit, and the "stockholders" in those for profit.

Section 3249 provides that every corporation may adopt a code of regulations for its government, not inconsistent with the laws of this state.

Section 3250 authorizes the trustees, or directors of a corporation, to adopt a code of by-laws for their government, not inconsistent with the regulations of the corporation, or the constitution and laws of the state, and may change them at pleasure; but section 3251, requires that regulations may be adopted or changed by the assent in writing of two-thirds of the stockholders or if there is no capital stock, of the members, or by a majority of the stockholders or members at a meeting held for that purpose, of which due notice is given.

By section 3252, a corporation, by its regulations, when no other provision is specially made in this title may provide, 1st for the time, place, &c. of meetings; 2nd the number of stockholders or members, to make a quorum; 3d the time for the election of trustees or directors; 4th, the duties and compensation of officers; 5th, the mode of filling, and tenure of office of all offices, other than trustees or directors; and 6th the qualification of members, when the corporation is not for profit.

By section 3261, the trustees of corporations, other than for profit, are made personally liable for all debts by them contracted.

These are the chief provisions of the statute, relating to corporations other than for profit.

We are of opinion; 1st, that associations incorporated for the purpose named in section 3630, are corporations other than for profit, and

hence any plan or scheme, which is intended to earn profits for its trustees, managers or agents, is in violation of law.

2nd. That the members of such a corporation, and not the incorporation nor the first board of trustees, elected by them, are the elective body. These members' and not the trustees or incorporators, are authorized to elect trustees, and adopt regulations for the government of the corporation in the transaction of its business. Hence the trustees are the chosen agents of the members. They have no authority to adopt or alter regulations, nor to prescribe their terms of office, though they may make by-laws for their government and change them at pleasure.

The fact in this case show, that this association has been organized, and is doing business in direct violation of these provisions of law.

1st. The members of the corporation have had no voice in the election of trustees or in the management of its affairs. The incorporators at the first meeting to organize elected themselves trustees for one year. At the end of that year these same trustees re-elected themselves. The meeting as the record shows was the annual meeting of the trustees, and all being present.

On the 25th of January, 1882, they adopted a new code of: "By-Laws Rules and Regulations" by which they provided, that they should hold office *during life*, and in case of vacancy by death or resignation, or removal for good cause, which could be done by a majority vote, such vacancy should be filled by the remaining trustees. Thus they arrogated to themselves all authority. They made regulations, and conducted the whole business, on the theory that the members had no voice. They were under no obligations to become members, and most of them were not.

They thus became a perpetual body invested with all the rights, franchises and powers, which the statute vested in the members.

II. The plan upon which the business has been done, was to make money for these trustees and their agents.

These self-constituted trustees, clothed themselves with supreme and perpetual power, and then proceeded to manage their self imposed trust for their own interest, and at the expense of their over confiding members or their speculative beneficiaries. I am aware this is a serious charge, but it is not made without the most convincing evidence, taken from the books and papers of the company.

The statute contemplates the organization of associations for mutual protection and relief of members, and for the payment of stipulated sums to the family or heirs of its deceased members. They are authorized to receive donations and voluntary contributions for such relief and protection, also to raise by assessment of its members sums of money to be appropriated to the family or heirs of a deceased member. By the table of rates and under the pretense that they were providing for the necessary and reasonable expenses of administering the trust, they have collected from the so-called members

by assessment and otherwise, or quite as often, from some beneficiary, having no insurable interest in such member, but who is induced by speculation, large sums of money, beyond the amount that was paid to the family or heirs, or that is required to pay the expenses of the trust. From the date of organization, September 1st, 1880, to April 15th, 1882, the association received the following sums from members, or speculative beneficiaries:

Admission fees.....	\$11,829.26
Annual dues, "expense fund".....	12,035.00
Death assessments collected.....	75,928.05
Weekly benefit fund.....	90.00

Total receipts.....\$99,882.31

From this there has been paid to beneficiaries.....	29,289.56
Add assessments, not due, to be paid beneficiaries.....	24,439.00
Amount of assessments returned to members.....	1,457.20

Total disbursed to members and beneficiaries out of assessments.....\$55,185.76

Leaving a balance for "expenses"....\$44,696.55

The above \$99,882.31, paid by members, is exclusive of amounts which they paid to agents as admission fees, and which they retained as commissions. These admission or membership fees, as appears by the table of rates, were from \$12.00 to \$25.00, according to age and amount of insurance. From a statement taken from the books of the company, it appears that 5,552 members have been admitted, classified thus:

Preferred Division, age 20 to 60, \$3,000 policy,.....	259
1st Class Hazardous, " 61 to 70, 2,000 ".....	301
2d " " " 61 to 70, 2,000 ".....	827
1st " Extra " " 71 to 80, 2,000 ".....	1020
2d " " " " 71 to 80, 2,000 ".....	2082
1st " Spec'l " " 81 to 88, 2,000 ".....	510
2d " " " " 81 to 88, 2,000 ".....	565

Assuming that the agents collected the full amount of membership fee authorized in each case, it amounts to.....\$84,955.00

From this deduct the amount paid the company as per above statement... 11,829.26

Amount paid by members and retained by agents.....\$73,125.74

Add amount received by the company as above..... 99,882.31

Total amount paid by members.....\$173,008.05

Thus the \$55,185.76 which was appropriated as contemplated by the statute, cost the members, or their speculative beneficiaries,

\$173,008.05

Of the \$44,696.55, which came into the hands of the association, there was:

Expenses.....	\$7,662.53
Paid for collections.....	7,712.75
To J. B. Netscher, President.....	2,188.49
Jerry Shank, Treas'r, (resigned),	140.00
Geo. W. Cole, " successor to	
Shank.....	1,938.49
J. W. Craig, Medical Examiner...	2,291.49
W. H. Carter, Secretary.....	7,173.49
S. W. Anderson, Managing Ag't..	7,173.49
Other salaries.....	3,025.50

Total salaries.....\$23,931.15

That these so-called salaries were only so in name, and a mere device, in lieu of profits, is plain.

There is a by-law which provides that the "expense fund" shall be created by the payment of membership fees, annual dues, and "any residue left of an assessment after the payment of beneficiary claims," and that it shall be used in defraying expenses and salaries of officers, and, "any other claim that shall receive the approval of the executive committee."

The temptation to increase the residue of an assessment by settling with the beneficiary at the lowest possible figure, is very great, and the power of the executive committee over this fund to pay "any other claim" than "expenses and salaries," (what other legitimate claim there could be is hard to imagine), is too great to secure the faithful administration of a trust, and so the sequel proves.

Another device to create an expense fund appears from the books.

The certificates of membership, as they were originally issued, expressed on their face that 20 per cent. collected on death assessments was to be deducted to pay the expense of collection. This caused complaint, owing, as the minutes show, "to a wrong construction," so it was struck out, and the by-law was so amended as to provide that the beneficiary should receive three dollars for each member that paid his assessment, not exceeding the amount of the policy. New certificates, with the 20 per cent. clause struck out, were ordered to be issued in lieu of the old ones. How this change served to allay complaints and increase the expense fund at the same time, appears from two cases, taken at random from the books, one before and one after the change, February 8, 1881. A certificate of membership on the life of Hannah Lowe for \$3,000 in the extra hazardous class was issued, loss payable to her nephew by name. She died within thirty days. The death assessment realized.....\$397.25

20 per cent. was deducted for the expense fund..... 79.45

Balance paid to nephew.....\$317.80

After this change in the by-laws Sarah Getz, a member, died. The death assessment realized.....\$1,616.90

Per centage deducted, over 30 per cent., was..... 488.90

Balance paid to beneficiary.....\$1,128.00

I have examined numerous entries on the books, showing that *over thirty per cent.* has been deducted from the death assessments, which was collected of members. It is no surprise, therefore, that about 45 per cent. of the amount received by the company went to other purposes than for the benefit of the family and heirs of members, or that \$55,000 of insurance received by members cost them \$173,000.

As before stated, the sum collected on death assessments was.....\$75,928.05

The amount paid to beneficiary and members..... 55,185.76

Excess of assessments collected over amount paid.....\$20,742.29

When we remember that there had been collected from admission fees \$11,829.66, from annual dues \$12,035.00, making an aggregate \$23,054.16, to the credit of "expense fund," a sum surely large enough to defray the expenses of this association, if the trust had been faithfully and economically managed, we can but declare that this deduction of thirty per cent. to increase that fund was a gross breach of trust.

That the exorbitant sums which the trustees voted to themselves, with such unanimity as the record shows, were not, in fact, by way of compensation for services rendered, but rather as a division of this illegal gain, appears from the books and records of the association. The compensation or salary of the trustees was not prescribed by any by-law or regulation, but was left to be fixed by themselves from time to time.

The ledger shows the salaries paid up to Sept. 1, 1881, at a much lower rate than afterwards. In January, 1882, the following salaries, from September, 1881, to February 1, 1882, were allowed and paid:

J. B. Netscher, Pres't, 5 mos. @ \$100.....	\$500
G. W. Cole, Treasurer, 5 mos. @ 50.....	250
J. W. Craig, Med. Ex., 5 mos. @ \$25.....	\$125.00
2822 examin's of app. @ 10c.....	282.20
	<hr/> \$407.20
W. H. Carter, Sec'y, 5 mos. @ \$300.....	\$1,500.00
S. W. Anderson, 5 mos. @ 300.....	1,500.00
	<hr/>
Total.....	\$4,157.20

At the same time they unanimously voted themselves \$873.49 each as "additional salaries for services rendered,".....\$4,367.45

Their respective salaries for the remaining 7 months of the year was fixed at \$100 per month for the president, vice president and treasurer, an increase of 100 per cent. over preceding five months, and \$300 per month for the secretary and general manager. They were paid at these rates for February and March, and on the 30th of March, 1882, they again voted themselves an addition thereto of *six hundred dollars each*, which was paid as follows:

J. B. Netscher, Prest., 2 mos. salary, \$200,	
additional salary, \$600.....	\$800
G. W. Cole, Treas., 2 mos. salary, \$200,	
additional salary, \$600.....	\$800
J. W. Craig, Med. Ex., 2 mos. salary, \$200,	
additional salary, \$600.....	\$800
S. W. Anderson, Manager, 2 mos. salary,	
\$600, additional salary, \$600	\$1200
W. H. Carter, Sec'y, 2 mos. salary, \$600,	
additional salary, \$600.....	\$1200

Am't for 2 mos. services, (or \$28,800 per year),.....\$4,800

These "additional salaries" above amounted to \$1,473.49 for seven months, and the aggregate for these seven months was \$13,324.65. As these "additional salaries" are voted equally to each trustee, without regard to regular salaries, or to apparent services rendered, the conclusion is irresistible that it was a division of profits.

Thus in the form of "salaries," or "additional salaries," these trustees were exacting from the members or beneficiaries to pay themselves at the rate of \$22,842.24 per annum for the whole board, and at the rate of \$5,440 per annum to the secretary and general manager.

III. The plan upon which this association is conducted, is against public policy, leads to speculation or gambling on the lives of aged and infirm people and is a deception and a fraud on those for whose benefit it is intended.

Although it was held in *The State ex. rel v. Central Ohio Mutual Relief Association* 29 O. St. 399, that such associations were not authorized to issue certificates providing for the payment of money in case of death of a member, to others than the family or heirs; yet this association has been continuously engaged in such transactions, as the following statement will show.

In 236 cases "children;" were named as beneficiaries; in 1998 cases "sons;" in 967, "daughters;" in thirty-three, "brothers;" in 22, "sisters;" in 60, "grand-children;" in 146, "nieces;" in 375, "nephews;" in 313, "sons-in-law;" in 45, "heirs" in 23, "estate;" in 167, "self;" in 2, "father;" in 42, "cousins;" in 37, "daughters-in-law;" in 27, "step-sons;" in 59, no relation in others to brothers-in-law, sisters-in-law, executor, &c.

Again the statute gives the right to assess members to raise the money to pay to the family or heirs, of deceased members.

In a large majority of cases, the beneficiaries or others were recognized by the company, as the persons to pay such assessments, indeed it is not certain but that in some cases, the member had no knowledge of the application made in his or her behalf. Memberships were issued indiscriminately without regard to age, or prospects of life. It is published in the circulars or "leaflets," which are distributed to the public, that; "applicants for membership in the *Preferred Division*," (that is between 20 and 60 years of age) "will be required to pass a *thorough medical examination* by some competent physician, and none

but good risks will be accepted under any circumstances."

Why no medical examination is required or was had in case of people, over 60 years of age is easy to understand in view of the scheme as carried out.

Yet the by-laws provide, that applicants must be of "sound mind and body."

The sincerity of this rule may well be doubted when a medical examination is dispensed with. Memberships were issued to persons between 20 and 60 years of age inclusive 259; from 60 to 70, 1128; from 71 to 80, 3091; from 81. to 86, 1074; thus only 259 out of 5552 members accepted, were subjected to any medical examination.

The applications on file show, that some if not many of them were at the time and had been for years, not of sound body, and some died shortly after they were insured for the benefit of others than heirs or members of the family.

As a fact the agents of the company, the medical examiners of applications, the trustees and the beneficiaries, were each and all, under the plan adopted, directly interested in obtaining the worst risks, possible to secure. An old and decrepit person, "with one foot in the grave" and the other soon to follow, was a much more profitable member than a sound one.

In such a case, at least eighty per cent. of the admission fee, went to the agent who could more readily earn it, when no examination was required, and the balance went to the "expense fund." The sure prospect of an early death, stimulated the affectionate regard of "sons-in-law" and others, not members of the family or heirs, to advance this fee and assume the risk of paying death assessments that might happen before the subject of their insurance should die, when they would receive in the shape of an assessment, their reward for having selected the most dangerous risk. The more risks of this kind, the more assessments, out of which the trustees deducted from 20 to 30 per cent. to pay themselves large salaries, and additional salaries. This is in violation of all sound principles of life insurance, the two material factors of which are, the rates of mortality of its risks and the expenses of management. It is essential to the success of a life insurance and to the value of insurance to the policy holder, that these factors be reduced to the minimum by care in selecting risks, and by economy of management, but in such a company as this, the nearer the grave the better the risk. Those having a reasonable prospect of an early demise alone are wanted. As is said in a recent Report of the Commissioner of Insurance of Pennsylvania: "This is worse than lotteries, faro tables, and other forms of gambling denounced as immoral, and punished by fine and imprisonment. It is gambling in human life and furnishes strong incentives to worse crime. It is using the name of life insurance as a convenient cloak for lotteries, in which greedy gamblers cheat one another, with stakes upon the lives of venerable paupers."

It does not fall within the province of the court to discuss the relative merits of the different plans of life insurance, as between the old line systems, and those formed on the co-operative or mutual assessment plan. It is enough to know that the Statutes of Ohio authorize each plan, and each doubtless has its merits if properly administered, and demerits if not. Whatever be the system, it is the highest duty of the court to see that the trust is faithfully administered.

This is especially true in the co-operative or mutual assessment plan, where there is no reserve or surplus fund, and where the assessments to pay benefits are collected directly from the members, who generally do not understand the mysteries of life insurance management.

These associations doubtless had their origin in the friendly and benevolent organizations and fraternities claiming like affiliation and purpose. There are other organizations having for their object the mutual aid benefit and relief of their members, or their families or heirs, when honestly and economically administered as a sacred trust, and not with a view to profit, are worthy the protection of law.

Benevolence and charity are justly claimed as cardinal graces, and should be fostered and encouraged, but the protection of the people from fraud and imposture, acting under the name of these virtues, should meet with special condemnation.

Counsel for the corporation make an appeal to the court, in behalf, it is said, of the 4295 members, to spare the corporate life of the association, and simply oust it of certain franchises which it has abused. In support of this it is said that these members have paid in their money, all of which they will lose, if judgment of ouster, as prayed for, is entered. This assumes, among other things, that there is no individual liability of the trustees for their unauthorized acts. How this is, we have not now to determine.

This is not the case of exceptional excess of corporate power. The whole plan of operations and their practical exemplifications, manifest a carefully formed scheme to make money for the trustees. It is a speculative insurance company in a most objectionable form. To prolong its existence, and thus enable the trustees to continue in such business, would be a failure of duty on the part of the court.

Judgment of ouster.

OKEY, C. J., took no part in the decision of this case.

The State ex rel., Attorney General, }
v.
The Middletown Mutual Aid & Life Ass'n. }

Quo warranto.

This case presents the same questions as that of *The State, ex rel., v. The Standard Life Association, just decided*. The relation charges the same acts of misuser, except, perhaps, more spe-

cifically. The truth established that the corporation is formed on the same plan, and is doing the same kind of business. The only difference that is worthy of note is, that the trustees called the profits realized from death assessments and regularly distributed, to themselves by that name, and did not attempt to disguise the same, under the name of "salaries," or "additional salaries."

Judgment of ouster.

OKEY, J. C., took no part in the decision of this case.

CORPORATION—STOCKHOLDERS—PAYMENTS OF STOCK SUBSCRIPTIONS.

SUPREME COURT OF OHIO.

CHARLES W. ROWLAND

v.

THE MEADER FURNITURE COMPANY.

June 13, 1882.

1. Where a corporation *de facto*, in a proceeding in quo warranto, has been ousted from the franchise of being a corporation, such ouster is no defense to a suit by a creditor against stockholders, to enforce payment of their stock subscriptions. *Gaff v. Fleisher*, decided by the Commission, (33 Ohio S. 115, 453), approved and followed.

2. The act of Feb. 27, 1840, "regulating suits by and against companies and partners," (S. & C. 1138), applies only to unincorporated companies. Neither corporations *de jure* nor *de facto* are within its provisions; and an action cannot be maintained under the act, to charge the stockholders with the payment of a judgment against the corporation.

3. Corporations *de facto* and *de jure* stand on the same footing as respects their liability to creditors; and the liability of the stockholders of the former, whether arising by statute or on stock-subscription, may be enforced for the benefit of creditors, the same as the liability of the latter.

Error to the Superior Court of Cincinnati.

The facts are stated in the opinion.

Hoadly, Johnson & Colston, and Storer & Harrison for plaintiff in error.

The plaintiffs in error were not liable as partners; *in re Mendenhall*, 9 Nat'l Bank Reg., 497; *Medill v. Collier*, 16 Ohio St., 599; *Fay v. Noble*, 7 Cush., 188; *Bigelow on Corp.*, 194; *Trowbridge v. Scudder*, 11 Cush., 83; *Blanchard v. Kaull*, 44 Cal., 440. And the action was improperly brought under Section 632 S. & C., 1139.

J. R. Challon for defendant in error claimed that the plaintiffs in error were liable as partners, and cited *Ridenour v. Mays*, 29 Ohio St., 138; *Wells v. Gates*, 18 Barb., 554; *Keasley v. Codd*, 2 Carr & Payne, 409; *Fuller v. Rowe*, 57 N. Y., 23; *Cutler v. Thomas*, 25 Vt. 73.

WHITE, J.

The Southwestern Transportation and Wharf Boat Company was organized in May, 1871, and engaged in business as a corporation under the Act of May 6, 1869. 66 O. L. 127.

On December 11, 1873, in a proceeding in quo warranto in this court, the company was ousted from the franchise of being a corporation.

On March 12, 1873, the company in its corporate name executed its promissory note to one of

its officers in payment of salary, which the payee endorsed to the defendant in error, the Meader Furniture Company. Prior to the judgment of ouster, the Meader Furniture Company recovered judgment on the note against the maker in its corporate name of the Southwestern Transportation and Wharf Boat Company. The assets of the company proving insufficient to satisfy the judgment, the present action was instituted by the judgment creditor, in the Superior Court, against Charles W. Rowland and others, plaintiffs in error, who were stockholders in the company, to charge them as partners, with the payment of the balance due on the judgment.

The action was brought under the Act of Feb. 27, 1846, "regulating suits by and against companies and partners." S. & C., 1138. The first section is as follows: "That any company or association of persons for the purpose of carrying on any trade or business, or for the purpose of holding any species of property within the State of Ohio, and not incorporated as such, may sue or be sued in any of the courts of this State, by usual or ordinary name as such company, partnership or association may have assumed to itself, or be known by; and it shall not be necessary in such case to set forth in the process and pleadings, or to prove at the trial the name, of the persons comprising such company."

The fourth section provides: "That the plaintiff in any judgment so recovered against a company or partnership, shall seek to charge the individual property of the persons composing such company or firm, it shall be lawful for him to file a petition against the several members thereof, setting forth his judgment and the insufficiency of the partnership property to satisfy the same; and to have a decree for the debt, and an award of execution against all such persons, or any of them as may appear to have been members of such company, association or firm."

This statute applies only to *unincorporated* companies. Neither corporations *de jure* nor *de facto* are within its provisions. That the Southwestern Transportation and Wharf Boat Company was, prior to the judgment of ouster, a corporation *de facto* was held by the Commission in *Gaff v. Fleisher*, 33 Ohio S., 115, 453.

The facts in relation to the organization of the company, and of the proceedings in quo warranto whereby it was ousted from being a corporation, were fully stated in the opinions in that case, hence they need not here be re-stated. It is sufficient to say that we are satisfied with the judgment rendered in that case.

The rights of the creditors of the company, and the liabilities of the stockholders in respect to the payment of the creditors, were not affected by the judgment of ouster. These rights and liabilities would have been the same if the proceedings in quo warranto had not been instituted. The fact that their enforcement is sought after, instead of before the judgment of ouster, does not affect their adjudication on the merits.

Corporations *de facto* and *de jure* stand on the same footing, as respects their liability to credit-

ors; and the liability of the stockholders of the former, whether arising by statute or on stock subscriptions may be enforced for the benefit of creditors, the same as the liability of the stockholders of the latter. *McCarthy v. Lavasche*, 89 Ill., 270.

Judgment reversed and petition dismissed.
[This case will appear in 38 O. S.]

CONTRACTS—DEBT RELEASED—SUBSEQUENT PAYMENT.

COURT OF APPEALS OF MARYLAND.

INGERSOLL v. MARTIN.

October Term, 1881.

A promise to pay a debt, made after a voluntary release under seal has been executed and delivered by the creditor, is void; it is not supported by a sufficient legal consideration, the debt having been released.

Action on two promissory notes made by appellant to the order of appellee. The pleas were non-assumpsit, payment and release. It appears that appellant was in January, 1880, indebted to appellee in \$840. He paid \$336 on condition that he should be released from the whole sum, and a release under seal was accordingly given him. At the same time he executed to appellee a note for \$255 44; the notes in suit were renewals of the note given.

ALVEY, J.

As between the immediate parties to a negotiable promissory note, as in this case, while the note itself is *prima facie* evidence of the consideration, the question of consideration is always open; and it is competent to the defendant to show, by parol, that there was no sufficient consideration, or that the consideration had failed, or that the paper had been given for accommodation merely. This is a settled principle in the law of evidence in relation to negotiable instruments. 1 Parsons on N. & B., 176-194. This being clear, the next general principle involved is that the payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt. If, therefore, a debtor, by paying part of his admitted debt, obtains from his creditor an agreement to discharge the residue, such an agreement is *nudum pactum*, and inoperative, for the simple reason that the debtor is under a legal obligation to pay the whole debt. This proposition has often been decided, both by the courts of England and of this State. *Fitch v. Sutton*, 5 East 232, approved and followed in *Geiser v. Kershner*, 4 G. & J., 305. And to these many other cases might be added. But a release under seal imports consideration, and such a release of an existing debt is a sufficient discharge without anything more. Such has been the law from an early time. *Co. Litt. 212 b. v. Gott*, 44 Md., 341, 347. The question then is, whether, notwithstanding the release under seal, the former debt could constitute a sufficient legal consideration for the promise in the notes sued on in this case.

It may be conceded that there was a moral obligation to pay the debt in full, notwithstanding the technical release; and yet a mere moral obligation simply would not be a sufficient legal foundation for the promise. It was said by Lord Mansfield, in *Hawkes v. Saunders*, Cowp. 289, that "where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. *A fortiori*, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration." This general statement of the principle stood for some time as an authoritative enunciation of the law; but more recent decisions have considerably qualified the latter part of the statement. It is now understood, both in England and in this State, as being so restricted as not to apply or extend to that class of cases which arise out of the moral duties or affections alone. There must be something more to support an express promise to pay. *Ellicott v. Turner*, 4 Md., 476, 492; *Eastwood v. Kenyon*, 11 Ad. & E., 438. But while such limitation upon the general principle has been established, it is perfectly well settled that where there is a pre-existing obligation to pay, either legal or equitable, which cannot be enforced, and the party promises, notwithstanding he may be exempt from all liability by operation of law, the former liability, in connection with the honesty and rectitude of the thing forms sufficient consideration to support the promise. *Ellicott v. Turner*, *supra*. And as familiar illustrations of this principle and its application, the cases of promises to pay debts barred by the statute of limitations and those to revive debts discharged by the operation of bankrupt or insolvent laws may be cited. *Yates v. Hollingsworth*, 5 H. & J., 216.

There is, however, a distinction taken in the decided cases between the case of an exemption or discharge from liability by the ordinary act of the creditor himself. In the former case it is held by all the authorities that the pre-existing obligation, though fully and completely discharged by operation of law, is, nevertheless a sufficient foundation for a new promise to pay; as in cases before referred to of a debt barred by the statute of limitations, or where the debtor has been discharged therefrom under a bankrupt or insolvent law; while in the latter case, that is, by act of the creditor, it has been held by what would appear to be a preponderance of authority that the pre-existing liability that has been so released does not form a sufficient consideration for a new promise to pay. The distinction certainly is not very broad; but still it has obtained the sanction of several courts of high authority, and we are not disposed to disregard it. It was upon this distinction that the case of *Stafford v. Bacon*, 1 Hill, 532, was decided. There a debt had been discharged by accord and satisfaction for less than the amount due, and it was held that there remained no such moral ob-

ligation to pay the balance as would support a subsequent promise to pay, though it would have been otherwise, as declared by the court, if the discharge had been by mere operation of law. So in *Warren v. Whitney*, 24 Me., 561, it was held that a promise to pay a debt that had been voluntarily released by the creditor was not binding for want of a sufficient legal consideration,—proceeding upon the distinction that we have just stated. And the same principle, founded upon this same distinction, was held and applied in *Montgomery v. Lampton*, 3 Met. (Ky.), 519, and also in *Shepard v. Rhodes*, 7 R. I. Rep., 470. In *Willing v. Peters*, 12 S. & R., 179, it was thought that the distinction was not substantial and well founded, and it was there held that a promise by a debtor to pay a balance of a debt after it had been voluntarily released by the creditor was good and binding, though it would appear the courts have not been inclined to follow that decision. Taking, then, the distinction to be established, and that a promise to pay a debt, after it had been voluntarily released by the creditor, is not supported by a sufficient legal consideration to make it binding, it follows that there was error in the ruling of the court below in respect to instructions asked by the respective parties.

Reversed, and a new trial ordered.

MURDER—EVIDENCE—PRACTICE.

NEW YORK COURT OF APPEALS.

SINDRAM v. THE PEOPLE.

Feb. 28, 1882.

Where it does not appear that the homicide was committed under the influence of provocation or sudden anger, evidence that the prisoner was irascible and subject to fits of passion from slight causes is inadmissible. Proof of such fact by itself will not authorize the inference that he committed the act under a sudden impulse attributable to the eccentricities of his character.

The theory that eccentricities of character and inordinate passion can render a sane man incapable of committing an offense which involves deliberation is wholly inadmissible.

Comments upon testimony by a judge in his charge, so long as he leaves all the questions of fact to the jury and instructs them that they are the sole judges of matters of fact, are not the subject of exception.

The plaintiff in error, S. was convicted of murder in the first degree. Upon the trial his counsel offered to prove that for a number of years past he had been characterized by peculiarities and eccentricities of conduct which had caused criticism with reference to his mental capacity; that he was known to be the victim of inordinate passion, giving expression to it in various ways and at various times. This offer was stated to be more to enable the jury to consider the character and mental condition of S. prior to and in view of the circumstances of the killing, in order that they might be enabled to pass upon the grade of homicide, whether murder in the first degree or manslaughter in the third degree. This evidence was claimed to be admissible as bearing upon the question

whether the act of S. was the result of impulse and anger, or of a deliberate and premeditated design to effect death, and whether S. had a mind which, under the circumstances detailed in the case, could have formed a deliberate and premeditated design to inflict death, it being at the same time avowed that the evidence offered did not amount to proof of insanity.

Held, That if the evidence disclosed no circumstance indicating that the homicide was committed under the influence of provocation at the time or sudden anger, evidently that S. was irascible and subject to fits of passion from slight causes was not admissible. Such proof would not of itself have authorized an inference that he committed the act under a sudden impulse, attributable to the eccentricities of his character, in the absence of any circumstances occurring at the time which tended to excite his passion.

At the time the evidence was offered the prosecution had just closed its testimony. They had shown that on the day preceding the killing, S., who had up to that time been a lodger in the house of the deceased and her husband, had received notice to quit, and had left in the evening using angry expressions concerning the deceased and threatening to return the next day and make a bloody row. About two o'clock the following morning S. came to the house, entered with a pass key and was accosted by H., a step-daughter of the deceased. H. testified that S. then appeared angry and excited. He said he wanted to see her mother, and when asked what for, replied "Never mind, I want to see your mother." Her mother, who was up stairs, heard the noise and asked who was there and witness told her. The deceased asked what he wanted and said he had no right there. S. said, come down here and I will show you what I want, speaking, as H. expressed herself, very saucy, crossly, angrily. Witness then went part of the way up stairs and looking back saw S. pulling out a pistol from his pocket slowly. She called out, mama, run, he has got a pistol, he is going to kill you. The deceased opened a window on the landing at the head of the first flight and called, watch, police. S. ran up the stairs, pushed the witness one side and fired at the deceased as she was calling out of the window. The ball went through one of the panes of glass; deceased then crouched in the corner and S. advanced upon her, putting the muzzle of the pistol within three inches of her head fired another shot which was fatal. On cross-examination the witness testified that no words passed between the deceased and S. except as above stated, and that when she called to the deceased that S. had a pistol and was going to kill her, deceased said to him, what do you want to kill me for, I never did anything to you. E., another witness, testified that she was up stairs and heard the conversation in the hall between H. and the prisoner, and that all she heard the deceased say was "what do you want with me," she did not hear the prisoner say anything in reply.

Held, That there was no legitimate connection between the eccentricities and peculiarities of character sought to be shown and the deed of the prisoner.

Also held, That the theory that eccentricities of character and inordinate passion can render a sane man incapable of committing an offence which involves deliberation is wholly inadmissible.

Comments upon testimony by a judge in his charge, so long as he leaves all questions of fact to the jury and instructs them that they are the sole judges of matters of fact, are not the subject of legal exception. It is desirable that the court should refrain so far as possible from saying anything to the jury which may influence them either way in passing upon the controverted questions of fact, and perhaps comments on the evidence might be carried so far as to afford ground for assigning error.

Judgment of General Term, affirming judgment of conviction, affirmed.

Opinion by *Rapallo, J.* All concur.

TRoubles innumerable beset the path of voters in petticoats on every hand. A bill recently introduced in the New York legislature providing that "every woman shall be free to vote under the qualifications required of men" had lived long enough to reach a third reading, and now the attorney-general has crushed the hearts and blighted the hopes of its friends by declaring the measure unconstitutional as being in conflict with the provision in the constitution that "every male citizen of twenty-one years * * * shall be entitled to vote," etc. The attorney-general holds that the fact that women are not expressly prohibited does not bring the measure in harmony with this provision of the constitution, which is to be construed that only male citizen shall the right therein conferred be given.

SUPREME COURT OF OHIO.

JANUARY TERM, 1882.

Hon. JOHN W. OKEY, Chief Justice; Hon. WILLIAM WHITE, Hon. W. W. JOHNSON, Hon. GEO. W. McILVAINE, Hon. NICHOLAS LONGWORTH, Judges.

Friday, June, 30, 1882.

GENERAL DOCKET.

96. John Grady v. Joseph B. Sharpe. Error to the District Court of Delaware County. Dismissed for want of prosecution.

98. Solomon Bobout v. Phebe S. Bodle. Error to the District Court of Knox County. Judgment affirmed without penalty. To be reported hereafter.

99. Springfield, Jackson & Pomeroy Railroad Co. v. Owen Richards. Error to the District Court of Jackson County. Dismissed for want of preparation.

512. Pittsburgh, Cincinnati & St. Louis Railway Co. v.

DeWitt C. Jones, administrator, &c. Error to the District Court of Franklin County. Settled and dismissed by the parties.

975. James T. Warder et al., v. The Board of Commissioners of Clark County. Appeal from the Court of Common Pleas of Clark County. Reserved in the District Court. Demurrer sustained and petition dismissed. To be reported hereafter.

1057. Joseph J. Dresbach v. The State of Ohio. Error to the Court of Common Pleas of Fairfield County. Judgment reversed and new trial granted, for error in excluding evidence offered as shown by bill of exceptions No. 21; also, on the ground that the charge as applied to the case, was misleading as to the duty of the jury in respect to their finding as to the degrees of homicide. To be reported hereafter.

1137. Robert C. Lindsay v. The State of Ohio. Error to the District Court of Jefferson County. Judgment affirmed. To be reported hereafter.

1155. William F. Brown v. The State of Ohio. Error to the District Court of Ashtabula County. Judgment affirmed. To be reported hereafter.

1183. H. C. Rutter, Superintendent, et al., v. The State of Ohio, on relation of James Catrol. Error to the District Court of Franklin County. Judgment reversed and petition dismissed. To be reported hereafter.

1191. The State ex rel., the Attorney General, v. The Pioneer Live Stock Company. Quo warranto. Judgment of ouster. To be reported hereafter.

MOTION DOCKET.

82. J. L. Wilcox v. James McNally. Motion to dismiss cause No. 691 on the General Docket for want of printed record. Motion granted.

93. Theophilus P. Brown v. The Merchants' National Bank of Toledo. Motion for injunction in cause No. 1164 on the General Docket. Motion overruled.

95. Pittsburgh, Cincinnati & St. Louis Railway v. George Leathley. Motion for a stay of execution in cause 1174 on the General Docket. Motion overruled.

118. Norman Eckel v. Joseph Renner. Motion to dispense with the printing of certain exhibits in cause No. 1178 on the General Docket. Motion granted.

119. James King v. the Incorporated Village of St. Paris. Motion for leave to file a petition in error to the District Court of Champaign County, and to take same out of its order for hearing. Motion granted and execution suspended as per entry.

120. Ohio ex rel John H. Meyer v. Edward Henderson, City Clerk, etc. Motion for an alternative writ of mandamus, and to take same out of order. Motion overruled on the ground that relief should be sought in a court below.

121. James N. Stark v. James Lytle. Motion to dismiss cause No. 378 on the general docket for want of printing, etc., and to assess penalty. Motion to dismiss granted and motion to assess penalty overruled.

123. Jefferson W. Davis v. Phillip Bauer. Motion for leave to file printed record in cause No. 988 on the General Docket. Motion granted.

124. Ohio ex rel. Phillip Rising v. Commissioners of Fayette County. Motion for a peremptory mandamus. Motion granted.

125. Ohio ex rel. James Good v. Commissioners of Fayette County. Motion for a peremptory mandamus. Motion granted.

126. Austin Davis v. The State of Ohio. Motion for leave to file a petition in error to the Court of Common Pleas of Morgan County. Motion overruled.

127. City of Youngstown v. James E. Montgomery. Motion to re-instate cause No. 906 on the General Docket. Motion granted.

128. Adelbert Post v. The State. Motion for leave to file a petition in error to the Court of Common Pleas of Lucas County. Motion granted.

129. James Coleman v. The State. Motion for leave to file a petition in error to the District Court of Hamilton County. Motion held under advisement.

Saturday, July 1st, 1882.

92. Mary Ann Huston et al. v. Thomas Crooks, executor, &c. Error to the District Court of Montgomery County. Judgment of the District Court reversed and that of the Common Pleas modified. To be reported hereafter.

The Court adjourned to September 25th.

Ohio Law Journal.

COLUMBUS, OHIO, : : JULY 13, 1882.

THE KAHN KIDNAPPING CASE.

Some months ago an officer from Philadelphia, Penn., appeared in this state armed with a requisition upon Governor Foster for the body of one Moses Kahn, a resident and business man of Cincinnati. Kahn was charged with having disposed of his property for the purpose of defrauding creditors while a citizen of Pennsylvania, and the papers being in proper form, the man was surrendered and taken back to Pennsylvania. He paid the claim held by the creditors who had instituted the proceeding and was released.

Within a few weeks past another requisition came, and it being shown that the former one had been used to extort money from the victim, the Governor very properly refused to surrender him. But the officers, in violation of all law and decency, successfully kidnapped Mr. Kahn and took him to Philadelphia.

There has been a general outburst of indignation throughout the State, caused by this high-handed villainy, and a great variety of opinions expressed as to the real extent of the outrage. Judges and lawyers have been interviewed and opinions pumped out concerning the legality of the proceeding, and the power of officers and the interpretation of extradition laws; and the quantity of nonsense given as law is positively startling.

It transpires upon investigation that Kahn was arrested in Philadelphia and gave bail for his appearance in the Quarter Sessions, for trial upon the offense charged, to-wit: disposing of his property to defraud creditors; that he did not appear and his bail was forfeited; that a "bail piece" was issued by his bondsmen and placed in the hands of the officer and upon that a requisition was obtained, which not being honored, the man was kidnapped as stated above.

Many newspapers have been interviewing lawyers upon the subject of bail pieces and

the powers of officers thereunder, and the views taken are various and conflicting.

The gentlemen who have given opinions are generally agreed that if the officer had a genuine bail piece that he had an undoubted right to take the man whether the Pennsylvania requisition was honored by Governor Foster or not.

Various authorities are even cited in support of this ridiculous doctrine, among which a case in Yeates' Reports (Pa.) and 3rd Connecticut are considered conclusive. As usual the most important link in the chain is overlooked; and much foolish theorizing the result.

When a person charged with crime or arrested upon civil process is admitted to bail, the acceptance of such bail is simply, as the name implies, a delivery of the defendant to the person who becomes surety for his appearance or the payment of the debt. This control over the person of the defendant by the bondsman is as absolute as that of the sheriff, except where the sheriff is also the gaoler. The bondsman cannot confine the defendant longer than necessary to surrender him to the sheriff or other officer.

In criminal cases the State accepts the undertaking of the bondsman to present the defendant at the proper time and place for trial, in lieu of the person of the defendant, and until that time arrives, the bondsman may at any time surrender him to the custody of the State. To effect this surrender the power of the bondsman is even greater than that of an officer who effects an arrest. He may go out of the jurisdiction of the court where he executed the undertaking, if armed with a bail piece and even out of the State. (1 Bald. C. C. 578. 8 Pick. 138, 7 Johns, N. Y. 145.) And the cases cited from Connecticut and Pennsylvania also apply to and support this proposition. He may take him while attending court as a suitor, or at any time, even on Sunday; 4 Yeates, Pa. 123. 4 Conn. 170; may break open doors if necessary, 7 Johns, N. Y. 144½; 4 Conn. 166; may command the assistance of the sheriff and his officers, 8 Pick. 138; and

may depute his power to others, 3 Harr. N. J. 568.

The bail piece of the common law was simply a certificate that the defendant had been admitted to bail upon the account of the bondsman.

This far it looks very much as though the kidnapper of Kahn, if in the possession of a bail piece, was not a kidnapper after all. Under the statutes of Pennsylvania, when bail is taken for the appearance of a person charged with a crime or misdemeanor, it must be for his appearance at the *next term*, which in no case can be more than three months distant, in point of time, as the quarter sessions are of course held *quarterly*. Kahn, then, must have been admitted to bail several months, probably a year or more ago. At the term to which he was recognized to appear, the bail bond must have been declared forfeited. The moment the forfeiture of the bond takes place the power of the bondsman ceases and the efficacy of his bail piece is terminated. Thenceforth he can have no power whatever over the person of the defendant. He may bring his action and recover whatever damages he may have sustained by the forfeiture of the bond, but his power over the *person* is irrecoverably lost. The court when declaring the recognizance forfeited may direct a *capias* to issue for the defendant and he may be again arrested and tried and convicted; but with that the former bondsman has nothing to do. Were it otherwise, the admission to bail would be but a mortgage on the body of the defendant which the bondsman might at any time after default, foreclose and make into a title absolute. If this were true, the right to the body of the defendant, after forfeiture of the recognizance, would exclude the power of the State to take, or try or punish him for the offense committed. The mere fact that the State may rearrest, is conclusive as to the correctness of the proposition that the bondsman has no power over the party recognized, *after* the forfeiture of the bond. The conclusion is inevitable that the kidnappers of Kahn were without any warrant of law and were guilty of an outrage which should be promptly punished.

They should be promptly indicted for the offence, a requisition made upon the Governor of Pennsylvania and the parties brought back for trial and punishment.

Since writing the above the report comes that Mr. Kahn was not only outrageously abused but that the whole scheme was one of levying black-mail, and that upon his steadfast refusal to pay tribute, he was discharged and returned to his home. His captors probably happened on some lawyer with sense enough to advise them that they had most wantonly exceeded their power; and that after the forfeiture of bail in a criminal case, no bail piece can ever live for a moment.

THE SUPREME COURT.

With the adjournment of this court there usually springs up a course of strictures upon the work performed during the session, and censure because more was not accomplished. It is a fact that our Supreme Court has come to be regarded as a sort of circumlocution office through which matters never finally pass, except by miracle or accident. This belief obtains with the people who take for granted the standing jokes of small lawyers that a case once buried in the Supreme Court is permanently interred. That there are more cases being filed than disposed of, is true enough; but that this is the fault of the court, directly, is not true. The modes of relief from this overwhelming array of cases constantly confronting the court, have been so often discussed by us, as well as by the State and County Bar Associations, and are so plain and simple that they need not be repeated here. The difficulty now existing seems to be the absolute imbecility of a majority of the wise men sent here annually to make laws. It has been fondly hoped that they would contrive some measure of relief, or in default of such contrivance, would adopt the plan recommended by the State Bar Association; but these hopes will never be realized until some special Moses is created for that purpose and sent to the legislature—a conjunction of events most dismally uncertain. Temporary relief might be found in the creation of a Supreme Court Commission which is within the power of the legislature, if the Supreme Court itself would give it life by a request; but the adoption of temporary measures of relief always postpones indefinitely those

for permanent effect and therefore nothing has been done.

During its past session two hundred and forty-one cases on the general docket have been considered and disposed of by the court. Reports have been prepared, and opinions written in one hundred and twenty cases. Two hundred and eight cases on the motion docket have also been considered, and forty cases taken out of their order. These simple figures convey no idea whatever of the labor performed by the court. In every case considered and disposed of, there is such a mass of testimony and argument, of obscure pleading and citation of authorities, that the wonder is, that a decision could be reached in one tenth as many. The writing of the opinions and the consultation which must precede and follow such writing, the changes in logic and conclusion, to make the opinion suit all concurring judges, is a matter of time and labor not well understood by members of the bar, even, and not at all by those outside. The motion docket compels the examination and determination of many fine points of law, and indeed many of the severest and most difficult questions arise upon motions. The figures we have given show that the court, to have accomplished so much must have been unremitting in its labor and at the same time capable of performing a wonderful amount of work.

The large number of cases taken out of their order and disposed of indicates great capability and industry. All these involve the most intricate and trying questions of law, and of the construction of statutes, wills, etc., and require long close study and extensive examination of authorities. The following are some of these cases with the questions involved:

Treasurer of Cuyahoga County against the Northern Transportation Company, involving a question as to the residence of a corporation for taxation.

Coan against Flagg, from Scioto County, involving the extent of the grant of lands by the Government to the Ohio Agricultural and Mechanical College.

The State ex rel. against the Commissioners of Fayette County, involving the validity of county bonds issued to raise money for a road improvement.

The State ex rel. against Powers, holding that local laws regulating the organization and management of common schools are unconstitutional.

The State ex rel. against the Treasurer of Hamilton County, involving the duty of State Auditor and County Treasurer as to settlements of the latter with the State.

Millikin against Welliver, and Cracraft

against Smith, from Butler County, involving a construction of the will of John D. Smith, and the settlement of the estate of Smith and his widow.

Wagner against the New York, Chicago and St. Louis Railroad Company, from Cuyahoga County, involving the power of a railroad company, after a verdict in appropriation proceedings, and before judgment thereon, to possession of the premises upon a deposit of money.

The State ex rel. against the Standard Life Association of America, involving a construction of the statutes relating to insurance on the mutual protection and relief plan.

The State ex rel. against Charles H. Moore, Superintendent of Insurance, involving the right of such associations organized in another State to do business in this State.

Shorten against Drake, from Hamilton County, involving the priority of liens between mortgagees and execution and attaching creditors on lands conveyed to defraud creditors.

Ohio Railroad Company against Hugh J. Jewett, involving the power of a court to appoint a Receiver for a railroad company.

C. W. Rowland against Meader Furniture Company, from Hamilton County, involving the liability of corporations de facto and the stockholders thereof.

The State ex rel. against Vanderbilt, involving the power of railroad companies to consolidate.

Pitts against Foglesong, from Fairfield County, involving the liability of an accommodation indorser of a promissory note, where such note is deposited by the maker as collateral security.

The State against Hipp, and Catoir against Waterson, involving the constitutionality of the Pond Liquor Law, and the right to recover back money under the law.

[COMMUNICATED.]

EDITORS OHIO LAW JOURNAL.

Your issue of July 6, '82, contains an article relative to a proceeding had recently before a Justice of this city, in which the writer appeared for the plaintiff, and among others Ex-Mayor Collins appeared for the defendants. Mr. Ricketts is much disturbed about the manner in which the cause was conducted, the preliminary proceedings had before the actual trial began, and the final result and conclusion of the trial.

Mr. Editor, it is neither my wish nor desire to consume space in your good JOURNAL discussing a matter that ought never have been commenced at all, and one especially involving little or nothing that will benefit any one in particular unless it be the author of the communication dated June 19, '82, but since he has occupied considerable space and written and expressed himself freely and at length, I propose to exercise the same right in reply to

his article. The statement of facts in the cause from which this discussion springs, is about as follows: The summons was returnable June 12, '82; Mr. Collins, who was then the attorney for defendants, appeared and informed the court that he was not ready for trial and could not possibly go to trial that week. The Justice thereupon postponed the hearing to Friday, June 16, adding that if the attorney for the defendants could not get ready for trial at that date he would grant further time. No one will dispute the right of the court to grant an eight day continuance. The continuance did not exceed the time specified in Section 6606 and was therefore legal and just. Nor was an affidavit necessary for a continuance under the Section above cited. The time was extended from Friday to Monday by the Justice at the request of defendant's counsel. There seemed to be a misunderstanding as to the hour set for hearing, plaintiffs thinking the time was six o'clock P. M. and defendant labored under the impression that the hour fixed for trial was seven o'clock, P. M. of same day. At six o'clock P. M. plaintiffs took a default judgment. At seven o'clock, Allen Miller and myself appeared ready for trial, when the court informed us that we were "too late." "Default judgment was taken an hour ago." Thereupon the judgment was set aside and the proper reasons for such action were embodied in affidavits filed for that purpose, in accordance with Section 6578. The Justice held defendants for the accrued costs which was proper and compelled us to give security for the rent before we could go on with the trial; all of which was complied with. With this statement of facts will T. H. R. or his client point out wherein they were injured? Dare *he* or *either* of them complain of partiality shown, either by the court or counsel of the other side?

On the other hand will T. H. R. deny that the court allowed him abundance of time and the broadest liberality possible to make a good case?

Hence why all this complaint? There is certainly no reason why criticism should be unjustly heaped on a distinguished and well-known citizen of this city. T. H. R. went into the case (as he supposed) a winning horse, and came out the loser, and that is where the shoe pinches.

F. SIEGEL JR.

Columbus, July 10, 1882.

PARTIES—WITNESS—PROMISSORY NOTE.

SUPREME COURT OF IOWA.

CONGER, ADM'R, ETC. v. BEAN AND OTHERS.

April 22, 1882.

Where an action was brought by an administrator against several defendants on a promissory note made to the intestate, and after one of the defendants had answered he entered into a stipulation with the plaintiff and withdrew his answer, plaintiff to have the right to take judgment against him for a certain amount, *Acid*, that he was no longer a party to the action, and that his deposition was admissible in evidence.

Where a defendant examined as a witness in behalf of himself stated that he signed the note in his own house, the allowance of his answer as to who was in his house at that time is not objectionable as being testimony in respect to a personal transaction between the witness and plaintiff's intestate.

Where defendants read in evidence portions of the testimony of the plaintiff's intestate as his admissions given on a former trial, and the court admitted only a portion of the remainder which was offered by plaintiff, *Acid*, not error, if the testimony excluded would have had no tendency to explain or modify the part produced.

Where the maker of a note refused to sign with a certain other party as surety, and the holder of the note afterwards went and procured the signature thereto of such party as surety, the simple concealment from him of what he was entitled to know without proof that he was induced to sign by fraudulent representations will enable him to escape liability.

Instructions asked, if based upon evidence which in no proper sense was in the case, are properly refused.

Action upon a promissory note executed to the plaintiff's intestate, H. M. Conger, by the defendants, Jame M. and Charles C. Bean, and James Patterson. After the defendant, James M. Bean had answered, a stipulation was entered into between him and the plaintiff, whereby Bean withdrew his answer, and plaintiff was to have the right to take judgment against him for a certain amount, being less than the amount claimed and less than the face of the note.

Charles C. Bean, for answer, admitted the execution of the note, but averred that he signed it as surety, and that after the delivery of the note to the plaintiff's intestate the payee of the note, without his knowledge or consent, caused the note to be materially altered by obtaining the signature thereto of James Patterson, and by reason of which he, the said Charles C. Bean, became discharged.

James Patterson, for answer, admitted the execution of the note, but averred that he signed the note as surety; that he was induced to do so by the supposition that the principal maker, James M. Bean, desired him to sign it; that in fact James M. Bean did not desire him to sign it, and so informed plaintiff's intestate; that the plaintiff's intestate fraudulently concealed the fact from the defendant, and thereby misled the defendant; that at the time he signed the note it had been fully executed and delivered, and his signature was procured to it without consideration. The issues formed, as between the plaintiff and the defendants, Charles C. Bean and James Patterson, were tried to a jury, and verdict and judg-

ment were rendered for the defendants. The plaintiff appeals.

ADAMS, J.

1. Upon the trial the deposition of James M. Bean was read in evidence by defendants. The plaintiff objected to its being read upon the ground that the action was being prosecuted by an administrator, and the testimony pertained to a personal transaction between the plaintiff's intestate and the witness, and the witness was a party to the action. The admission of the deposition against the plaintiff's objection is assigned as error. If James M. Bean was a party to the action within the meaning of the statute, (section 3639 of the code,) his deposition was improperly admitted. That he was technically a party cannot be denied. But after the filing of the stipulation referred to, his rights were virtually concluded. It is true, judgment does not appear to have been rendered against him as the stipulation provided, but it could have been rendered. After the filing of the stipulation the rendition of judgment was a mere formality. It appears to us that the case was not essentially different from what it would have been if judgment had already been rendered. Now, if it had been rendered, the action from that time would have been simply an action against the other defendants. It would have been no more an action against James M. Bean than if it had been dismissed as to him. In our opinion he was not a party within the meaning of the statute, and the court did not err in admitting his deposition.

2. Charles C. Bean was examined as a witness in behalf of himself. After having stated that he signed the note in his own house, he was asked and allowed to state who were in the house at that time. This was objected to by the plaintiff as calling for testimony in respect to a personal transaction between the witness and the plaintiff's intestate; but in our opinion it could not properly be so regarded.

3. The defendants read in evidence portions of the testimony of the plaintiff's intestate as his admissions given upon the former trial. The plaintiff then offered the remainder of the testimony of his intestate. The court admitted only a portion of the remainder. The plaintiff claims that the court erred in not admitting the whole. Section 3650 of the code provides that when part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other party. But we are unable to see that the testimony excluded would, if it had been admitted, have had any tendency to explain or modify the part introduced. It could not, we think, be said to be upon the same subject.

4. The plaintiff asked the court to instruct the jury that unless Patterson was induced to sign the note by fraudulent representations made to him by H. M. Conger for the purpose of inducing him to sign the note, he could not escape liability. The court refused to so instruct, and instructed in substance, that Patterson could not escape liability unless he was induced to sign

the note by fraudulent representations or concealment of the true facts. There was evidence tending to show that the intestate asked James M. Bean to give a note with Patterson as surety; that Bean refused to do so, and refused to ask Patterson to sign it, and agreed only to give a note with his brother, Charles C. Bean, as surety; that the intestate, immediately upon receiving the note, proceeded to obtain not only Charles C. Bean's signature, but also Patterson's signature; that he did so in the absence of James M. Bean, and without informing Patterson that the principal, Bean, had refused to give a note with him as surety. If the fact was as testified to by the principal, then the effect of obtaining Patterson's signature was to release the principal, and to prevent Patterson, if he was compelled to pay the note, from looking to the principal. It was clearly the intestate's duty, if the principal refused to give a note with Patterson as surety, not to go to Patterson and ask him for his signature, or, if he did so, to disclose fully to Patterson the fact that the principal had refused to give a note with him as surety. In our opinion it was not necessary for Patterson to show that he was induced to sign the note by fraudulent representations. It was sufficient, we think, if the intestate, at the time he obtained Patterson's signature, acted in bad faith in concealing from him what he was entitled to know, and what, if he had known, would probably have prevented him from signing the note. We see no error in the ruling of the court upon this point.

5. The plaintiff asked an instruction in these words: "If you find that Charles C. Bean knew, or had been informed that Patterson was to sign the note as surety, and that after having received such knowledge or information he signed said note without objection on his part to Patterson's signing the same, such fact—that is the signing of the note with such knowledge, and without objection—will in law amount to a consent on the part of Charles C. Bean that Patterson should sign the note as surety, and said Charles C. Bean is liable thereon." The court refused the instruction and gave an instruction in these words: "The liability of the defendant, Charles C. Bean depends upon the simple question of fact as to whether or not the signature of James Patterson was obtained to the note without said knowledge and consent of Charles C. Bean; and if you find, by a preponderance of credible testimony, that the signature of Patterson was obtained without the knowledge and consent of Charles C. Bean, then said Bean is not liable; but if the evidence fails to establish said alleged fact, then said Charles C. Bean is liable for the amount due on the note." The plaintiff insists that the instruction asked by him is not fully covered by the instruction given. He insists that he was entitled to have the attention of the jury called specifically to the fact that if Charles C. had knowledge that Patterson was to sign the note, and did not object, he must be deemed to have consented to Patterson signing it. Possibly we might conclude that the plaintiff's position is correct if

there was any evidence that Charles C. had knowledge that Patterson was to sign the note.

The evidence relied upon by the plaintiff is a portion of the intestate's testimony given upon a former trial, and which was to the effect that he told Charles C. that Patterson was to sign the note, and that Charles C. did not object. That portion of the intestate's testimony upon the former trial was read in evidence by the plaintiff, against the defendants' objection upon the trial from the rulings in which the appeal was taken. The defendants had, as they were entitled to do, read certain portions of the intestate's testimony as his admissions. The admissions, as claimed by the defendants, were to the effect that the intestate, when he obtained Patterson's signature, did not inform him that the principal, Bean, had declined to give a note with him as surety. After the defendants had read so much of the intestate's testimony as they desired to read as admissions, the plaintiff insisted upon reading the rest, and the court allowed him to read a certain portion but under the express ruling that it should be considered by the jury only as far as it had the effect to explain or modify the intestate's admissions. In the portion thus read by the plaintiff appears the statement made by the intestate upon the former trial, that he told Charles C. that Patterson was to sign the note, and Charles C. did not object. Now it is very clear that we have no evidence of what the intestate told Charles C., if anything. What was admitted only purports to be evidence of what the intestate testified to upon the former trial. As evidence of the fact sought to be established, it was inadmissible. As evidence of such fact it was not admitted.

The instruction asked, then, was based upon evidence which in no proper sense was in the case. It was, we think, properly refused.

Affirmed.

EVIDENCE—PRACTICE.

NEW YORK COURT OF APPEALS.

PINNEY, ADM'RX V. ORTH ET AL.

April 11, 1882.

One S., a witness, having testified to certain conversations between defendant O. and plaintiff's testator, at which he was present, O. was called and asked if he ever had any conversation with testator at which S. was present, and in which defendant made certain statements testified to by S. *Held*, That the questions were properly excluded under § 829, as they related to what was said between O. and testator, and not merely to the presence of S. at the interview.

A surviving party is not precluded by § 829 from testifying to extraneous facts and circumstances which tend to show that a witness who has testified to a transaction or communication between the survivor and the deceased has testified falsely, or that it is impossible that his statement can be true; and so long as he refrains from testifying as to anything that passed or did not pass personally between himself and the deceased, it is not a valid objection that the facts which he states bear on the issue whether the transaction in question took place, or upon the truth of the testimony given to prove it.

The appellate court attempted to cure an error in the rejection of evidence offered to contradict the evidence of a

witness as to a certain item by requiring plaintiff, as a condition of affirmance, to deduct the amount allowed for such item. The evidence sought to be contradicted was only a portion of the witness' testimony. *Held*, error; such course is only proper where the evidence of the witness relates solely to the item rejected, and his whole testimony can be stricken out without affecting the residue of the recovery.

This action was brought by P., plaintiff's intestate, to recover for professional services as attorney for defendants. On the trial one S., a witness for plaintiff, and formerly managing clerk for P., who was then dead, testified to certain conversations between P. and the defendant O., which were material to the issues, at which conversations S. stated that he was present and that they took place at the office of P. O. was called as a witness on his own behalf, but the referee refused to allow him to testify as to what was said or what was not said between him and P. at those conversations. O. was then asked whether he ever had any conversation with P. at his office at which S. was present, and at which O. made certain statements to P., to which S. had testified. These questions were excluded.

Held, No error; as the questions excluded related to what was said between O. and the deceased, and not merely to the fact of S.' presence at an interview between them.

The primary intent of § 829 of the code, prohibiting the examination of a party as a witness in his own behalf against the executor, etc., of a deceased person, "concerning a personal transaction or communication between the witness and the deceased person," is to prevent a surviving party from proving by his own testimony a personal transaction or communication between himself and a deceased person, but it does not preclude the survivor from testifying to extraneous facts or circumstances which tend to show that a witness who has testified affirmatively to such a transaction or communication has testified falsely or that it is impossible that his statement can be true, as for instance, that the survivor was at the time absent from the country where the transaction is stated to have occurred, and that so long as the survivor refrains from testifying as to anything that passed or did not pass personally between himself and the deceased, it is not a valid objection to his testimony that the facts which he states bear upon the issue whether or not the personal transaction in question took place, or upon the truth of the testimony by which said transaction is sought to be proved against him.

Certain questions were asked defendant O., touching what the deceased did in a certain case; whether he put in an appearance, drew an answer, as testified to by S. These questions were excluded. The general term held that such exclusion was erroneous, as the questions did not relate to personal transactions with the deceased. The court attempted to cure this error by requiring plaintiff, as a condition upon which the judgment should be affirmed, to deduct from the recovery the amount allowed for services in that suit.

Held, Error; as this ruling deprived the defendants of any advantage they might have from a material contradiction of the plaintiff's witness. Such a course would be proper only in case the evidence of the witness related solely to the item rejected, and his whole testimony could be stricken out without affecting the residue of the recovery.

Judgment of general term, modifying and affirming as modified judgment for plaintiff, reversed and new trial ordered.

Opinion by RAFFALO, J. All concur, except EARL and DANFORTH, J. J., dissenting.

RAILROAD—ACCIDENT—DAMAGES.

SUPREME COURT OF PENNSYLVANIA.

PATTON ET AL.,

v.

PITTSBURGH, CINCINNATI & ST. LOUIS R. W. Co.

In an action brought by the widow and minor children to recover damages for the death of an employee of a railroad company who was killed in West Virginia, the court, in answer to plaintiffs point, instructed the jury, unqualifiedly, in the language of the point, that the action could be maintained if the statute in force in West Virginia, relating to cases of death caused by negligence was similar to or substantially the same as the statute on the same subject in Pennsylvania, and added, at the close of the charge, "The question of law as to the effect of the statute of West Virginia we will reserve for further consideration." The verdict of the jury, after considering the facts, was for plaintiff, "subject to the opinion of the court on a question of law reserved."

After verdict and before judgment the plaintiffs moved to amend the record by adding the name of the legal plaintiff, which motion was refused. *Held*, to have been error. Under the Act of 1852 the courts have power, in any stage of the proceedings, to change or add the names of parties so as to make the record conform to the issue that was tried, and no verdict ought to be set aside where there has been a full trial upon the merits and the formal addition of a party will cure the defect of the record.

TRUNKEY, J.

In answer to the plaintiffs' third point the jury were unqualifiedly instructed that this action can be maintained if the statute in force in West Virginia, relating to cases of death caused by negligence, was similar to or substantially the same as the statute on the same subject in Pennsylvania. The only statute of West Virginia, given in evidence, is the fifth and sixth sections of an Act relating to actions where death of a person was caused by wrongful act, neglect or default, which provides among other things, that "every such action shall be brought by and in the name of the personal representative of such deceased persons and the amount recovered in every such action shall be distributed to the parties, and in the proportions provided by law in relation to the distribution of personal estates left by persons dying intestate." What the law provides in relation to said distribution was not proved. The learned judge in the charge said it was his impression that the statute in West Virginia was so different from the statute in this State, that the action would not lie, but instructed the jury that the fact of Mr. Patton having been killed in West Virginia

made no difference so far as they were concerned.

At the close of the charge he adds these words: "The question of law, as to the effect of the statute of West Virginia, we will reserve for further consideration." The verdict was for the plaintiffs for \$4,900, "subject to the opinion of the court on a question of law reserved." In an opinion subsequently filed, two questions of law are considered as having been reserved:—1. "Can the plaintiffs recover under the West Virginia Statute; and 2. Is there sufficient evidence of negligence to justify a verdict against the defendant?" Neither of these are shown by the record. Of the first it is said: "I do not think the statutes are substantially alike. In this State the right of action by our statute is in the widow and children, or parents. In the West Virginia Statute the right of action is in the administrator. We think this is decisive of the question; and as the action is by the widow and children, it cannot be maintained."

Before the argument of the question a motion had been made for amendment by adding the name of the administratrix a legal plaintiff, for use, in writ, record and pleadings, and at the present will be considered as having been allowed. If it was material to determine whether the statutes were substantially alike, it was for the court; but it was submitted to the jury to determine, and if they were, it was ruled that the action could be maintained. Neither the fact nor question of law set forth in plaintiffs' third point was reserved. The verdict was as indefinite as the remark at the close of the charge.

Every reservation of a question should place distinctly upon the record what the point is which is reserved, and the state of facts out of which it arises: *Ferguson v. Wright*, 11 P. F. Smith. 258; *Wilde v. Trainor*, 9 Ibid, 439. All the legal propositions had been absolutely ruled; and what was distinctly stated in the so called reservation? It may be conceded that the court intended the precise question substantially stated in the opinion, but the record does not show that. On the contrary, it shows that question was affirmed, if the jury found the two statutes substantially of the same import. Judgment might be entered upon the verdict, but most cases which have been reviewed in this court where the point was not well reserved, the cause has been sent back for another trial. A judgment upon this verdict for the reason that the record shows no definite point on which the verdict depends, is not what was intended.

The record reveals nothing of what is called the second reserved question. It is error to submit a fact to the jury and after its finding enter judgment for the defendant on the ground that the evidence was insufficient to establish it: *North America Oil Co. v. Forsyth*, 12 Wright, 291.

After verdict and before judgment the plaintiffs moved to amend by adding the name of the legal plaintiff, which was refused. The cause had been tried, and the evidence, under the instructions, warranted the verdict. In all actions, in

any stage of the proceedings, the courts have power to permit amendments by changing or adding the name or names of any party, plaintiff or defendant, whenever it shall appear to them that a mistake or omission has been made in the name or names of any such party: Act of 1852, P. L. 574, § 2. It very clearly appeared there was a mistake in omitting the name of the administratrix of William Patton, dec'd, for the statute under which the action was brought directed it should be by and in the name of the personal representative. Legislation and adjudication have favored amendments to the end that causes may be speedily tried on the merits, or when so tried that the result shall be preserved. Thus, the Act of 1872, P. L. 25, provides that no verdict shall be set aside for defectiveness or indefiniteness in its form, or by reason of the want of a declaration or plea, but the court shall have power at any time to direct the filing of a declaration, the entering of a plea, or filing a description if in ejectment, as shall make the pleading and record conform to what was tried before the jury and found by the verdict. Under the Act of 1852 the courts have power, in any stage of the proceedings, to change or add the names of parties so as to make the record conform to the issue that was tried, and no verdict ought to be set aside where there has been a full trial upon the merits and the formal addition of a party will cure the defect in the record. When the amendment is a formal one, introducing no new or different cause of action, depriving the opposite party of no substantial right, and which ought to have been made in the court below, it will be considered in this court as having been made: *Fritz v. Heyl*, 12 Norris, 77. This case was tried just as if the legal plaintiff had brought suit and was upon the record, and the amendment ought to have been allowed. When it was moved a year had not elapsed from the date of the decedent's death. It was within the terms of the statute, prejudiced the rights of no one, and if trial was free of error, it would have saved the verdict. Where nothing else in the way of entering judgment upon the verdict we would treat the motion as having been granted, but as the cause goes back to the Common Pleas the amendment will there be made *nunc pro tunc*.

The important question to the plaintiffs, whether this action can be maintained in Pennsylvania, is not and cannot be raised by them, for decision upon the record as it comes; and we expressly exclude an inference, from the disposition of the assignments of error, that we are of opinion that the action will lie.

Judgment reserved and a *venire facias de novo* awarded.

CRIMINAL LAW—EXPERT TESTIMONY.

SUPREME COURT OF WISCONSIN.

KNOLL v. STATE OF WISCONSIN.

May 10, 1882.

1. On a trial for murder, where the evidence relied

upon by the prosecution was mainly circumstantial, a person called as an expert testified, against objection, that he had made a comparison of hair taken from the head of the deceased with hair found (together with blood) upon a wheelbarrow belonging to the accused; that such comparison was founded on his experience, he having made a very careful study of "hair; and that the hair was precisely the same in length, magnitude, and color, and in every other respect, so that any person could have told it as well as himself; and he added that, as the result of that comparison, he could say that "it was from the head of the same person." Held, that the statement last recited was improperly admitted in evidence, as it appears to have been based merely upon facts open to common observation, and undertook to determine a question which was for the jury.

2. Where a medical witness has testified as from his own knowledge and experience to a matter which is within his province as an expert, (as that blood-stains were caused by human blood corpuscles,) he cannot be impeached by reading to the jury extracts from medical books.

3. In criminal as in civil trials this court reviews the instructions given to the jury only so far as exceptions have been taken thereto.

4. The decision in *Dickinson v. State*, 48 Wis. 288, that it was not error to instruct the jury that their verdict must either be "guilty of murder in the first degree" or "not guilty," applies only to cases in which there is no evidence to sustain a conviction for any lower grade of homicide.

COLL, C. J.

The defendant, and plaintiff in error, was charged and tried for the crime of having wilfully and feloniously killed, with malice aforethought, one Charles Rohde on the fourth of March, 1879. The evidence relied upon by the state to prove the accused guilty of the crime charged against him was mainly circumstantial. It appeared that the deceased had been in the employ of the defendant for a short time, and the weight of testimony tends to show that he was last seen alive in the early part of the evening of the third of March, at the defendant's saloon. His body was found on the twenty-fifth of the same month in an unfrequented place in a swamp, about 40 rods south of a railway track, and about one-half mile south-west of the defendant's residence. There were four cuts or stabs on his left breast, and two on the front part of each leg between the knee and thigh. Medical witnesses who made a *post-mortem* examination of the body, testified that there was a fracture of the skull on the right side of the forehead extending backward and downward to about the margin of the ear; that his bowels had been severely injured from blows; and that death was probably caused by the injury to the head and bowels combined. The theory of the prosecution was that the defendant had killed Rohde on the night of March 4th in his barn, and had then taken the body to the place where it was found for the purpose of concealing the crime.

Among other evidence given to sustain this theory the state produced as a witness one John Timmens, who lived very near the railroad, and who testified that about midnight, March 3rd, he saw from the window of his house a man come along the track with a wheelbarrow and something in it. The witness described the wheelbarrow and the man. There was a wheelbarrow in the possession of the defendant answering this description, and the defendant in size was about such a man as witness saw. There were some blood and hair found upon the wheelbarrow which the defendant had. One Dr. Piper was sworn as a medical expert. He had made a microscopic examination of blood found on the barrow and on pieces of wood taken from the same; had examined pieces of cloth and hair,—hair taken from the skull of the deceased, and hair found on the wheelbarrow. This witness was permitted to state, against defendant's objection, that he had made a comparison of the hair found on the wheelbarrow and that taken from the skull, such comparison being founded on his experience, he having made as he said, a very careful study of hair. He was asked to state, and did state under objection, the result of that comparison. He said that the hair was precisely the same in every respect, in length, magnitude, color, and in every other respect, so that any person could have told it as well as himself, and he added: "As the result of the comparison, I can say that it was from the head of the same person."

We have detailed enough of the facts to show the very important bearing of this inculpatory testimony. One exception relied on for a reversal of the judgment is the admission of this testimony against the defendant's objection; and the question presented for decision is, was it competent and proper testimony under the circumstances? The objection to its admission is that the witness was permitted to state or give his opinion upon a vital fact in the case, which it was the province of the jury to determine from the evidence given. The witness said that the hair which he had examined found on the wheelbarrow and that taken from the skull of the deceased was from the head of the same person. The witness reached this conclusion, as we understand his testimony, not from any scientific tests or peculiarities in the structure of the hair which an examination by a microscope would disclose, but from the length, magnitude, and color, or those obvious marks and resemblances which one person of good vision would observe as readily as another. The comparison made required no peculiar skill nor scientific knowledge. It was no more in the province of an expert than of an ordinary person to make it. It related to a matter of common observation. The jury were as competent to make the comparison from the description given of the hair, and draw the conclusion whether it came from the head of the same person, as was the witness. The opinion of the witness as to the fact that the hair came from the head of the same person was not admissible on the ground that the inquiry related to a scientific subject—one which required peculiar knowledge or previous study and experience to give information about. But it related to a matter within the observation, judgment and knowledge of any ordinary man; for the resemblances relied upon in making the comparison, as the length, magnitude and color of the hair, were as open to the observation of the jury, or the jury could draw their inference from these resemblances as well as any one. The witness, then, could not testify to his opinion on the ground that the subject-matter of the inquiry related to a scientific subject, and was expert testimony.

Is there any other principle upon which the testimony would be admissible? At first we had some doubt whether it should not be received on the ground that the witness was merely stating his opinion as to the identity of the hair, and that it was admissible upon the same principle as an opinion in respect to the value of property, or damage done to it, or the identity of a chattel or person, or facts of that nature. In regard to this class of facts a witness can only testify by using language which amounts to little more than giving his opinion about them. But this kind of evidence is admitted in that class of cases from necessity, because it is impossible, by any mere words of description, to give the jury a proper understanding of the facts. But, of course, the general rule is that a witness cannot testify as to his opinion, but is limited to stating facts. Respectable authorities may be found which go nearly, if not quite, the length of sustaining the admission of the testimony which we are considering. See *Com. v. Dorsey*, 103 Mass. 412; *Com. v. Sturdevant*, 117 Mass. 122. But it seems to us such evidence is of a most dangerous character, especially when a witness is allowed to testify, as Dr. Piper did, that in his opinion the hair found on the wheelbarrow and that removed from the skull of the deceased was from the head of the same person. The witness had stated without objection that the hair found on the wheelbarrow was human hair. Possibly this might be said to involve a question of special knowledge, learning, or experience. But the witness then described the hair, and said that from comparison of its length, magnitude and color it must, in his opinion, all have come from the same head. That conclusion was the precise fact which the jury were called upon to determine. It is not entirely clear from the record whether the hair taken from the skull and that found on the wheelbarrow were before the court and jury, though we infer such to be the case. If so, it is obvious the jury could make the comparison for themselves, for the resemblance or marks of similarity were obvious. But, if we are mistaken in this supposition, the hair in both instances had been so fully described—the points of resemblance or identity had been so fully given—that the jury could draw their own conclusion as to whether it came from the head of the same person or not.

In a number of cases which will be found in our reports the rule had been laid down as to when and upon

what questions a witness may testify to his opinion as a conclusion of fact. *Lanning v. State*, 2 Pin. 284; *Burnham v. Mitchell*, 34 Wis. 133; *Olson v. Telford*, 37 Wis. 337; *Benedict v. Fond du Lac*, 44 Wis. 495; *Mellor v. Town of Utica*, 48 Wis. 457; *Yauke v. State*, 51 Wis. 404; *Norman v. State*, post. But none of these cases go to the length of sanctioning the admission of such testimony as that given by Dr. Piper. We think it was clearly incompetent, and must work a reversal of the judgment.

While this result disposes of the case, it may be proper to make a few further remarks on one or two other points which were much discussed by counsel. Dr. Piper also testified as an expert in regard to examinations made by him with a microscope of certain blood-stains found upon pieces of cloth and wood. He gave it as his opinion, founded upon such examination, that some of these stains were caused by human blood corpuscles. For the purpose of discrediting the witness it was proposed on the part of the defence to read opinions stated in certain medical works on this subject. The court would not permit this to be done, holding in effect as Dr. Piper had not referred to any medical work, and did not rely upon the authority of medical writers to support his views, but testified from his own knowledge and experience, it was not proper to read from medical works to contradict him. There can be no doubt of the correctness of this decision, which is sustained by the authorities referred to by Mr. Justice Cassody in *Stilling v. Town of Thorp*, 11 N. W. Rep. 90.

A number of objections are taken to the charge of the court given on the trial. It is perhaps sufficient to say, in answer to all of them, that the accused does not present a single exception to the charge, nor is it pretended that any was ever taken to it. But, notwithstanding this, the learned counsel for the defendant insisted that it was the duty of this court to review the charge, even though it was not excepted to, and if found incorrect in the propositions of law laid down for the guidance of the jury to reverse on that ground. That would be contrary to the uniform practice of this court since its organization. In no case, civil or criminal, has this court reviewed the charge of the trial court where no exception was taken to it. In the absence of all legislation on the subject we do not consider it to be our duty to change a rule of practice so long established in this and other courts. In this case the defendant was assisted by able and intelligent counsel, abundantly competent to protect his rights and secure for him a fair trial. If they did not see anything in the charge of the court which they deemed unfavorable to their client, or objectionable in law, why should this court be called upon to review it? Counsel says that it is a humane principle recognized in criminal law, especially in a case of murder, that the accused stands upon all his rights, waiving nothing which can possibly prejudice him. In the sense in which this principle is sought to be applied it is not strictly correct. For example: an objection to the admission of improper testimony must be taken in time to be available; so must an exception to the charge. There are many things in the conduct of the case which the accused loses the right to object to unless he takes the objection at the proper time. It is needless to mention them, for they will readily occur to every intelligent lawyer. The claim, therefore, that the accused waives nothing, or that he can always insist and take advantage of any error in the proceedings, cannot be maintained. Often a plea of guilty is entered by the accused and acted upon by the court. In that case the party waives his right to a trial. We have said this much in reply to the argument which was so seriously pressed upon us that we could review the charge though no exception was taken to it. But no inference must be made from this that we consider the charge erroneous in any material point. We simply decline to review it.

To guard against any possible misapprehension we deem it proper to say a word on a remark in the charge. The circuit court, among other things, told the jury that their verdict must be simply murder in the first degree, or not guilty, according as they should find the fact. This same charge was given in the case of *Dickinson v. State*, 48 Wis. 228, and held by this court not to be error. Of course what is there said in the opinion had reference to the facts and circumstances of that particular case. There it was plain, from all the evidence, if the accused was guilty of the commission of any offence whatever it was of the crime of murder in the first degree. The charge was considered

with reference to that state of facts. But whether the charge would have been sustained had there been evidence in the case which would support a conviction of a lesser grade of homicide is a question not decided in the Dickinson Case. This observation, it must be understood, has no reference to the facts or circumstances of the case before us. It would be very improper for us to indicate any impression as to the guilt of the defendant, which we may have derived from an examination of the evidence, and we do not do so. The Dickinson Case was commented on in the argument at the bar, and hence this explanatory remark as to what was intended to be decided in that case.

The judgment of the circuit court is reversed, and the cause remanded for a new trial. The warden of the state prison will surrender the plaintiff in error to the sheriff of Outagamie county, who will hold him in custody until he shall be discharged or his custody changed by due course of law.—[*N. W. Reporter*, Vol. 12, No. 5.]

COUNTER-CLAIM ON COUNTER-CLAIM.

A main portion of the science of procedure resolves itself into the problem where to draw the line. A proceeding may seem from many points of view to be reasonable and just, and yet it may not be permissible as a rule of procedure, which must be governed by rules at once the strictest, and framed according to the most general consideration. We are inclined to think that the necessity for drawing the line so as to run in a manner most convenient to the average of cases has not been sufficiently dwelt upon in the decision of *Toke v. Andrews*, reported in the May number of the *Law Journal Reports*. The action was for rent due at Midsummer, 1881. The writ was issued on August 26, the statement of claim delivered on November 29, and the statement of defense on December 22. The tenancy subsisted until Michaelmas Day, and the defendant alleged that he was entitled to an outgoing valuation, which he accordingly claimed by way of counter-claim, although it had accrued since the issuing of the writ. On the same day, however, the plaintiff would be entitled to another installment of rent. He accordingly proceeded to claim this sum by means of a counter-claim to the defendant's counter-claim—a new and hitherto unheard-of proceeding, which, however, has now received the sanction of Mr. Justice Field and Baron Huddleston. If this decision be right, there is no end to the vitality of an action under reasonably favorable circumstances. There is, let us suppose, a twenty-one years' lease subsisting between plaintiff as landlord and defendant as tenant, who is sued for his first quarter's rent. The defendant sets up a counter-claim that the plaintiff covenanted to put a new roof on the house. The plaintiff does not deliver his reply until a second quarter's rent is due, when he counter-claims in respect of that amount. By the time the defendant delivers his rejoinder a fresh grievance of his is ripe, possibly that the plaintiff undertook to paint in the first six months. The action is now ready for trial; but before it is reached another quarter-day passes, and the plaintiff adds a fresh counter-claim. It will go hard if the defendant does not cap the effort, and if, under the rather exasperating circumstances of the

case, the monotony of the proceedings is not relieved by a counter-claim or two for assault and battery, to which possibly the wife of one or other of the parties is made third party. There is, in fact, no reason why the litigation should not go on for one-and-twenty years, and such time afterwards as judges and jurymen can be made to understand the case. This picture may seem extravagant. It is enough if it is a possible picture, unless some limit be placed on the right to counter-claim. The decision in *Toke v. Andrews* allows an unlimited right to counter-claim in either plaintiff or defendant. With this must be contrasted the decision of the Master of the Rolls in *The Original Hartlepool Company v. Gibb*, 46 Law J. Rep. Chanc., 311, which drew so strict a limit to counter-claims as to exclude damages suffered by a defendant since the date of the writ. On the general principle we prefer the decision of the Master of the Rolls to the present; that is, so far as the Master of the Rolls held that a limit must exist. We, on a previous occasion, expressed disapproval of the actual limit placed by the learned judge. His mistake, which is now generally admitted, proceeded apparently from a want of experience in cases in which damages were claimed, the Master of the Rolls being under the impression that damages since the date of the writ could not be recovered by a plaintiff, and, therefore, holding that they could not be recovered by a defendant on a counter-claim. Mr. Justice Fry, in *Beddall v. Maitland*, 50 Law J. Rep. Chanc., 401, declined to follow the Master of the Rolls, and held that a cause of action arising since the writ may be the subject of counter-claim. These two cases are far from standing and falling together. It does not follow, because damages since the writ may be recovered on a counter-claim, that a cause of action arising since the writ may be the subject of a counter-claim. The state of facts which arose in *Toke v. Andrews*, in so far as they throw light on *Beddall v. Maitland*, tend rather to throw doubt on the principle there laid down. The defendant's counter-claim in *Toke v. Andrews* arose since the date of the writ, and the plaintiff's counter-claim arose at exactly the same date. To allow the defendant to set up this cause of action and to shut the plaintiff out of a cause of action arising at the same time, has the appearance of inequality. It may well be said that, in order to prevent a confused pile of counter-claims, the line ought to be drawn at the date of the writ. We do not think this is necessarily so, because the Judicature Acts speak of a counter-claim as a cross-action; and if the plaintiff is so backward in pressing forward his claim as to give time for a counter-claim to issue against him, he has only himself to blame. The proposition at present in question is, whether the plaintiff can be allowed a counter-claim. The foundation of the law of counter-claim is to be found in subsection 3 of section 24 of the Judicature Act, 1873, and in Order XIX, Rule 3. Neither in the act nor in the rule is to be found anything to suggest that

a counter-claim is an instrument which may be used by a plaintiff against a defendant. The act refers to relief being given by this means "to any defendant against any plaintiff," and the rule refers to "the defendant setting up claims against the claim of the plaintiff." Order XX provides for pleading *purs darrein continuance*, but applies only to "grounds of defense," between which and counter-claims a broad distinction is drawn. There can be little doubt that the draftsmen of the acts and rules had in their minds only causes of action accrued at the time of the issuing of the writ, but it is still possible that room may be left for claims accruing since. If this be so, the question arises whether such a claim accruing to the plaintiff can be introduced by way of counter-claim, or whether it should not be made by way of amendment? It seems to have been assumed, in *Toke v. Andrews*, that the writ could not be amended so as to allow the rent accruing subsequently to be claimed. But is this clear?

The date of the writ must, of course, remain as originally given; but there seems no reason why it should not be stated that by amendment dated subsequently a further claim was added.

If the true reading of the rules is that subsequent claims by a plaintiff may be introduced by amendment of the writ, there is a substantial difference between the right practice and that laid down in *Toke v. Andrews*. Under Order XXVII, Rule 2, an order must be obtained to amend the writ, whereas *Toke v. Andrews* permits a plaintiff to counter-claim as a matter of right. It must be remembered that a plaintiff, by issuing his writ, elects to sue on the causes of action then existing. If there are other causes of action in prospect, he has only to wait, when he can combine both. The whole subject, especially considering the view taken by the Master of the Rolls, requires investigation before the Court of Appeal, which was invited by Mr. Justice Fry in the case before him, and is more than ever necessary since *Toke v. Andrews*.

As the law at present stands interpreted, the pleadings in the action seem capable of becoming very inconvenient and perplexing in their character, and extending to a length compared with which a surrebutter was a moderate limit.

—*The Law Journal*.

MORTGAGES.

An exchange pays its respects to mortgages and mortgagors in the following strain:

In the whole range of sacred and profane literature, perhaps, there is nothing recorded which has such staying properties as a good healthy mortgage.

A mortgage can be depended on to stick closer than a brother. It has a mission to perform which never lets up. Day after day it is right there, nor does the slightest tendency to slumber impair its vigor in the least. Night and day, and at holiday times, without a moment's rest for sickness or

recreation, the biting offspring of its existence goes on.

The seasons may change, days run into weeks, weeks into months, and months be swallowed up into the gray man of advancing years, but that mortgage stands up in sleepless vigilance, with the interest of a perennial stream ceaselessly running on.

Like a huge nightmare eating out the sleep of some restless slumberer, the unpaid mortgage rears up its gaunt front in perpetual torment to the miserable wight who is held within its clutch. It holds the poor victim with the relentless grasp of a giant; not one hour of recreation, not a moment's evasion of its hideous presence. A genial savage of mollifying aspect, while the interest is paid; a very devil of hopeless destruction when the payments fail.

Our liabilities may be evaded or smoothed aside, but a mortgage hangs on with the pertinacity of a bull dog or the grip of a blacksmith's vise. If the interest is not paid it is added to swell its grim parent, the principal, and hold up its horrible front with a harder seeming than before. It will have the pound of flesh which is nominated in the bond; and more terrible than the fearful witches of Macbeth, the threatening fiend, Foreclosure, rears up its dreadful menace with the crushing weight of despair.

Pity for the poor man who has the grim fiend in his household. Every hour of his life is fraught with one intact endurance of misery and dread, embittered with a grievous load he is powerless to shake away.

COPYRIGHT.

In the United States District Court for the Southern district of New York a case has just been decided (*Youngling v. Schiel*) which settles many doubtful and disputed questions in relation to copyrights.

The action was brought for an injunction to restrain the defendant from an alleged infringement of a copyright, where it appeared that the plaintiff had imported copies of a chromo designed and printed in Europe by a foreign artist, and that the plaintiff had copyrighted the chromo by depositing two of his imported copies with the Librarian of Congress.

It further appeared that the defendant had never known of such chromo having been copyrighted, had never seen any copyright impression, and had made a new chromo of some material portions of the same design as plaintiff's chromo, which the defendant took from a copy independently imported from Europe. A nice point in the litigation was that it did not appear whether the design of the plaintiff's chromo was old or new, or whether the plaintiff had ever acquired exclusive right from the artist. The court held that no copyright upon a chromo designed by a foreign artist abroad can be acquired by his representative resident here as proprietor.

Digest of Decisions.

MICHIGAN.

(*Supreme Court.*)

PEOPLE v. CRAWFORD. June 14, 1882.

Respondent in a criminal prosecution cannot complain of the admission for the prosecution of facts which the defence proved at a later stage of the case.

The defence in a criminal case cannot insist that the judge shall charge the jury argumentatively or comment on the evidence or point out the weak points in the case for the prosecution so far as they involve questions of fact and not of law. It can only demand that the instructions on the legal points shall be correct, and that the evidence shall not be commented upon or presented in an incorrect or unfair way.

SCOTT v. PALMS. June 14, 1882.

A widow had a dower interest in the west half of a brick building consisting of four stories and a basement, and standing in a wholesaling neighborhood. The owner of the east half also owned the reversion in her portion. There was no communication between the two parts below the second story, and there was only one set of staircases, which was on the east side. The owner of the east half proposed to take out the stairway and completely close all communication between the two halves of the building. The widow sought a perpetual injunction against these changes on the ground that she had an easement in the stairway appurtenant to her life estate. *Held* that the injunction would not lie. The changes tended to increase the value of the building; the stairway was not a way of necessity, nor was it shown to be intended as a permanent appurtenance to the life estate, and its removal would benefit defendant more than it would injure complainant.

A tenant for life is left to making the property available to his profit at his own expense.

WISCONSIN.

(*Supreme Court*)

FERGUSON v. HILLMAN. May 10, 1882.

Chattel Mortgage.—This court will not set aside a finding of the lower court of a fact, unless it be against the clear preponderance of the evidence.

A grantee of real or personal estate, when it is shown that the purchase was made with the intent to defraud or to hinder and delay creditors, has no equity as against such creditors to be protected for the amount which he actually paid on such purchase.

So, the fraudulent grantee in possession of the property of the debtor cannot be protected for the money or other consideration he may have given for the transfer as against the creditors of

such debtor; nor can he be protected in the possession of the proceeds of such property received by him on a sale thereof.

Where a chattel mortgage is fraudulent and void as to creditors, the holder thereof cannot be credited with any sums which he may have paid as the consideration of such mortgage as a set-off against what he has received upon such mortgage.

Where a debtor in insolvent circumstances gave a warranty deed for his lands, and chattel mortgages on his personal property exempt from execution, for the purpose of defrauding, delaying and hindering his creditors, a personal judgment may be entered against the vendee and mortgagee for an amount of money over and above what he had applied to the payment of the debts of the vendor and mortgagor.

COLORADO.

(*Supreme Court.*)

UNITED STATES v. TAYLOR.

1. *Trial by Jury in Criminal Case—Jury must Deliberate and Decide.*—Under the sixth amendment to the constitution, which guarantees to every accused person the right to a speedy and public trial by an impartial jury, etc., there must be a submission of the case to the jury for their consideration and decision, and the jury must deliberate upon and determine it.

2. *Same—To what Extent the Jury may Judge of both Law and Fact.*—The right of the jury in criminal cases to pass upon questions both of law and fact, is the necessary result of the jury system, so long as the right of the jury to find a general verdict remains; for a general verdict necessarily covers both the law and the fact, and embodies a decision based upon and growing out of both.

3. *Same—Same—Duty of the Jury to Receive the Law from the Court.*—While the Court is the judge of the law, and may instruct the jury upon the law, and while it is the duty of the jury to receive the law from the Court, it is still within the power of the jury to render a general verdict, and thereby to decide on the law as well as the facts.

4. *Same—Same.*—Ruling of Justice Hunt in *The United States v. Anthony*, 11 Blatchford, 200, considered and dissented from.

5. *Same—Same—Right of Jury to Disbelieve Witnesses.*—Although the defendant in a criminal case calls no witness to contradict the witness for the prosecution, yet the jury may still judge of the credibility of those witnesses, and may consider whether, upon applying all the tests of manner, clear or confused statement, prejudice, and accuracy of memory, they are to be believed.

6. *Same—Same—Charge to Find Verdict of Guilty.*—It is error for the Court to charge the jury to find a verdict of guilty even in a case where, in the opinion of the Court, guilt is established beyond dispute.

STILES v. MCCLELLAN et al.

1. *Contract—Consideration—Promise.*—The second paragraph of a complaint is as follows: "Plaintiff further alleges that before he made said purchase of a ranch from a third party he had the positive promise of the defendants that the said ranch should be made, and so long as they continued to operate said line of stage coaches, should remain the eating station for all passengers, both for breakfast and dinner, carried by said defendants; that the plaintiff was induced by these promises to make the purchase of the ranch; and to expend a large sum of money, not less than \$1,000, in improving, furnishing and supplying said ranch for the purposes aforesaid, and that but for these promises of the defendants he never would have made the purchase or the aforesaid expenditures," and alleges withdrawal of the patronage of the passengers carried by defendants as a breach—laying damages at \$2,000. *Held:* Bad on demurrer, as stating no cause of action. The facts stated do not come within the rule that a promise is a good consideration for a promise—there being no mutuality of engagement. Unless each party may have an action on a promise or agreement, neither is bound.

Ohio Law Journal.

COLUMBUS, OHIO, : : JULY 20, 1882.

During the vacation of the Supreme Court we shall be specially obliged if judges and attorneys will send us reports of novel and important cases from District, Superior and Common Pleas Courts. Make a note of it.

JUDGE COWAN, of the Common Pleas bench, made a decision recently in Clermont County that has created considerable commotion among the school teachers of the State. The custom of county examiners has been to divide their work, each member of a board preparing a list of questions, the answers to which are examined and passed upon by such member separately. The Judge decided that certificates issued to teachers are illegal unless the manuscript is examined and passed upon by each member of the board.

THE right of railroad companies to compel passengers to stand and deliver at the command of a (too often) impertinent boor in uniform—to stop and tumble down grip-sack and packages; to halt a tired wife and weary little folks; to deposit on the dirty floor a baby in pure white and fumble through pockets and purses searching for tickets, while the blear-eyed gate keeper regards the party as intruders whom he ought to kill—this right of the railroad company to thus crucify the traveling public is to be settled in an Ohio court.

A prominent attorney of Zanesville, Chas. A. Beard, Esq., after being subjected to this ordeal until patience got tired sitting on a monument smiling at the grief engendered by the insolence of a railway gate keeper, refused to show his ticket—was refused admittance to the train upon which he had paid his gold to ride, and missed the same and suffered loss and damage.

We do not desire to forestall a verdict in this case, but it seems that after a man has paid his fare he is entitled to a seat in the train; and a rule that can subject the traveler to the annoyance outlined above is certainly unnecessary, unreasonable and unlawful. We advise the plaintiff to remember two things: 1st, Travel hereafter, if possible, by decent lines of railway—the Bee Line, the B. & O.,—or some other line where snobbery and insolence are not tolerated. 2nd, Before going to trial search the judge's pockets and remove the pass sent him by the railroad company you are after, as a bribe to lean "jest a leetle" toward the side of said company.

IMPORTANT INSURANCE DECISION.

An important insurance case, involving the National Aid Association of this city, was decided by the District Court of Holmes County, at Millersburg, last week. The following were the facts in the case:

William Rebaugh, a resident of Millersburg, took out a policy on himself in the above company, and made a will, willing the policy and all benefits arising therefrom to A. B. Gouser. Rebaugh died and the company refused to pay the certificate. Suit was brought in the Common Pleas Court of Holmes County, and a demurrer was interposed to the petition and overruled by the presiding Judge, C. F. Voorhes, and exceptions taken, on which the case was brought into the District Court. Hon. Dan. H. Uhl represented the case for the plaintiff and Hon. M. A. Daugherty, of this city, for the company. The defense set up that the certificate issued to Rebaugh contained provisions which the Supreme Court had lately decided was unlawful, and therefore void, and no court could enforce it. The language in the certificate referred to was regarding the payment of the policy to others than the immediate heirs of the deceased.

On the other hand it was claimed by the plaintiff that where there was ignorance on the part of either of the contracting parties, the burden should be borne by the party within whose scope it was most likely to be thrown and not by the party who could not have known it.

The Court sustained the Common Pleas Court in overruling the demurrer.

It is by no means an uncommon occurrence nowadays, for parties to an action to conduct their cases in person and the practice is by no means confined to male litigants. In a recent instance, where an action was brought by a lady against the Right Hon. W. H. Smith, the First Lord of the Admiralty in the last Conservative Administration, for alleged improper detention of certain securities and documents referring to her income and sanity, for not handing them back to her, on his going out of office, and for libel, the plaintiff had apparently prepared the pleadings herself, in addition to coming into court to support them in person. Her claim was certainly unique. It ran as follows: "The plaintiff claims 40,000£, and all legal expenses and outstanding debts paid and pawn-tickets redeemed, a public apology, and all libels contradicted in all the public newspapers, foreign, domestic and English, and the committal of those who slandered and libeled her, and forged and lithographed her name, to Newgate for life, with twenty strokes from the cat-o'-nine tails on the back of each person." Does not the fact that it is

possible for a litigant to pursue a claim such as this, to the Court of Appeals, suggest that there is no sufficient check upon the early stages of frivolous actions?—*London Law Times*.

A PECULIAR CASE.

A case possessing some peculiarity was disposed of in the Court of Common Pleas at Dayton, Thursday, by Judge Elliott. Two or three years ago Alonzo Stonebarger, of Massachusetts, was sent west by his friends with the hope of improving his mind, he having exhibited signs of insanity. He stopped at Osborn, a few miles south of Springfield on the Bee Line, and soon fell in love with and married a young widow, daughter-in-law of Dr. Hoover, of that place. Directly after the marriage he became very insane and was removed to an asylum in Massachusetts. His wife was possessed of considerable real estate in her own name, which she was unable to dispose of with satisfactory title by reason of her husband being unable to join in the conveyance. In order to relieve her it became necessary to dissolve the marriage contract; but insanity is not a sufficient ground for divorce under the laws of Ohio. Proceedings, however, were instituted in chancery to declare her an unmarried woman on the ground that Stonebarger, being a lunatic, a fact she did not know at the time, was unable to contract, and that such contract was not only voidable by reason thereof, but void *ab initio*. This view of the case was taken by the court, and the plaintiff was restored to, or rather authorized to assume her former name of Rosanna Hoover. This is said to be the second case of the kind in the practice in Ohio.—*Springfield (O.) Republic*.

NEW BOOKS.

POMEROY'S EQUITY JURISPRUDENCE

By JOHN NORTON POMEROY, L. L. D., IN THREE VOLUMES. VOLUME II. SAN FRANCISCO, 1882. A. L. BANCROFT & CO.

We have just received the second volume of this learned and comprehensive work. It is the work of an educated lawyer, and when finished it will be a monument to his talent, learning and industry. Mr. Pomeroy's talent as a law-writer is no more a subject of debate, and his other works are a pledge of the usefulness of his last production, and that he was abundantly qualified for his task. From a full and careful examination of the first volume, and after a cursory examination of the second volume, we are convinced that this work will redound more to his credit and fame than any of his others. Indeed, it is not extravagant to say, that it is the greatest law book that has been published within

the past twenty years. It is not a digest masquerading as a treatise; it is not made up of a string of sentences without joints to connect them, and containing the substance of the authorities without explanation or comment, as are many of our law books. It is in the most exact sense a treatise. The account of how much of our equity law is borrowed from the Roman Law, and of the development and growth of equity jurisprudence in England, in defiance of English prejudice and the hostility of Norman kings and barons, is fresh and compact, yet clear and exhaustive.

The subjects and topics are logically and ingeniously arranged and treated; classes of cases are distinguished; differences between the English and American courts and the courts of the different States, on the most important questions are clearly exhibited and classified; errors of doctrine, some of which are hoary with age, and others still in infancy, are fearlessly attacked; many apparent conflicts are reconciled, and the influence of the reformed procedure, in force in many of the States and England, upon equitable law, for the first time, in a text book, is pointed out. How few the instances are in which there is an antagonism between law and equity, a condition brought about by both judicial and statutory legislation, is clearly shown by the author. The expansion of equity so as to meet by its principles and analogies, if not by its literal rules, new conditions which are continually arising in human affairs, and so as to solve the new legal problems arising therefrom, is very fully explained. Modern equity is defined as a system founded "upon the eternal verities of right and justice, resting upon the truths of morality, and emancipated from the 'arbitrary customs, rigid dogmas' and technical fictions which still, to some extent, characterize the common law.

The author elaborates many important distinctions in trying to reach the sources of equity jurisdiction, and in applying rules to cases, and some few of these perhaps he subtilizes, and there is a freedom and frequency of criticism and comment; but if these are defects then Bishop's Marriage and Divorce and the first five editions of his Criminal Law should, upon a parity of reasoning, be condemned. He becomes very metaphysical in his mode of treatment and in the discussion of some questions, and in his style, but if this is a fault then Stephen's Pleading and Fearn's Remainders have had, and the former

still has, an undeserved popularity. Principles are defined and doctrines stated, not in the stereotyped diction of law writers, but in new and original expressions. What is substantially said in praise of Lord Westbury by the author [Section 742] might be said very justly of himself—His grasp of principles is remarkable, his power of generalization wonderful, and faculty of analysis great.

The list of the subjects of the second volume indicate their importance. The author's exposition of the ingredients of the representation which constitutes fraud in equity [pp. 357-386] is most full and instructive. The doctrines of constructive fraud are set out with exceeding clearness of statement; new views of these doctrines are presented, and new illustrations are given. The law of Notice is so fully explained in one hundred and twelve pages that there will be no need for a lawyer, who has this, to buy Wade's new book on that subject. In section 601, *et seq.* there is discussed the question of how far a purchaser or mortgagee, for example, who is dealing, touching property with one who is owner, grantor or mortgagor, may be affected by notice of an outstanding claim, right or equity, such as a prior unrecorded mortgage. After showing what actual notice is, how it may be proved, that rumors do not make it, the kind and amount of information necessary and what circumstances are sufficient, he shows how the notice may be neutralized by information explaining or contradicting the notice. If the contradictory or explanatory information are communicated by a third person to the purchaser or mortgagee he will not be chargeable with notice, but if they are received from the owner or mortgagor he is bound to inquire elsewhere. As a prudent man he is not allowed to shelter himself behind the contradictory or explanatory information derived from such a person, for the obvious reason that the latter is "under a strong personal interest to misrepresent or conceal the facts." But, again, if both the notice and contradictory or explanatory information are obtained from him "who holds or asserts the conflicting interest, claim or right," or if such person upon being questioned "either keeps silence or denies the existence of any claim, or affirmatively declares it to be of any certain kind and amount," the subsequent pur-

chaser or mortgagee is not bound by notice. We refer thus, at some length, to this subject to illustrate the fullness with which every subject is discussed.

This work should be in every good lawyer's library. When completed it will be a library in itself on equity jurisprudence, and will supersede the older works. Story's work was always objectionable, because it was too pedantic in Latin quotations, and because too few American authorities were cited to exemplify the text, although this fault perhaps could not have been avoided in the first editions. Pomeroy's book is not amenable to either of these objections. And, moreover, his precise habits of thought easily supplied him with equivalents for the technical terms—a good feature in the book.

If this work serves at all to promote the study of equity law by lawyers, the author will have rendered no small service. It was said by Rufus Choate: "A charm of the study of law is the sensation of advance * * * or being in a progression towards a complete apprehension of a *distinct department and body of knowledge.*" To those who choose to study this work this charm will be furnished in a large measure.

THE AMERICAN DECISIONS.

Volume thirty-five of this valuable series has been received. All that has been said of the excellence of preceding volumes applies equally well to this. We add, however, the remark that we have recently, upon business or pleasure, made calls at the offices of hundreds of the leading attorneys in this and other States. In every one of these offices we meet the familiar and friendly "American Decisions" and hear only words of praise in their behalf. We find many young attorneys who, with rare good judgment, begin their life work with the text books, the reports of their own States and the American Decisions, and are fully fortified for almost any legal battle.

RIGHT OF BAIL TO ARREST PRINCIPAL.

Editors Ohio Law Journal.—

A question of considerable interest has been under discussion in the daily papers in regard to the capture and removal of one Kahn from Cincinnati to Philadelphia, under the alleged sanction of a bail-piece from one of the Pennsylvania courts; and the press, with great unanimity, have been asking the authorities to vindicate

the majesty of the law in the protection of parties in Ohio from seizures of this character.

The infrequency of arrests of this kind may have induced people to jump at the conclusion that they are illegal, without a careful examination of the authorities bearing upon the case. Because the Constitution of the United States and the acts of congress and of the legislature of Ohio, in reference to the surrender of criminals who fly from justice from one state to another, provide for the observance of certain forms to secure the extradition of fugitives from justice, it is assumed that something like this is necessary, where the party has been bailed, and his bail in another state, seek to take him into custody here; and as there is no statute regulating such matters where the arrest was made, and bail taken in another state, it is supposed that a party cannot be arrested here by his bail from another state without a violation of the criminal statutes of this state.

The statutes of Ohio, Rev. Stat., Tit. 1, Div. 6, Chap. 1, provide for the arrest of parties in civil suits, and for holding them to bail, and by section 5,513 the bail is authorized *at any time before he is finally charged*, to arrest the defendant for the purpose of surrendering him *at any time or place*, or he may authorize such taking by any person of suitable age and discretion by a written authority endorsed on a certified copy of the undertaking. Thus the right of bail to arrest his principal without any process where the suit is in this state, is expressly granted by statute; and in the case of *Whetstone v. Riley*, 7 O. S. 514, where it is shown that the bail had gone to Maryland and arrested the defendant and brought him to this state, there was no intimation that there was anything wrong in this method of proceeding, nor is anything of this kind intimated in the case of *Wright v. Collier*, 35 O. S., 131, where questions of the liability of bail and the effect of the surrender were discussed.

The Supreme Court has repeatedly decided that the principles of the common law are recognized in this state where they are not in conflict or inconsistent with the genius and spirit of our institutions or opposed to the settled habits, customs and policy of the people of this state. 3 O. S. 172. *Ib.* 201, 2 O. S. 387.

The enactment of the above cited section of the statute, which was section 167 of the old code, indicates that there is nothing contrary to the genius of the institutions of this state in the right of bail to protect himself by arresting his principal without warrant *at any place*; and the Supreme Court has, by silence, when it ought to have spoken, if such act is unconstitutional, admitted that the law is a valid one, and if a person who had been held to bail here should be arrested in another state and brought here by his principal, he would stand a very poor show of release if he claimed it because he had been arrested out of the state.

An examination of the English authorities shows clearly that the bail had a right at com-

mon law to take his principal into custody for the purpose of surrendering him.

Blackstone, [3 Com. 290], says: "For the intent of the court being only to compel an appearance in court at the return of the writ, that purpose is legally answered whether the sheriff detains his person, 'receives a deposit of the amount claimed by plaintiff, or takes sufficient surety for his appearance called *bail*, (from the French word *bailler*, to deliver), because the defendant is bailed or delivered to his sureties upon their giving security for his appearance, and is supposed to continue in their friendly custody instead of going to jail."

In *ex parte*, *Gibbons*, 1st Atk. 238, the Lord Chancellor says: "The bail-piece is: such a one defendant, *traditur in ballium super cepi corpus*, &c., so that in the constant language of that court, (King's Bench), the bail are his jailors, and it is upon this notion that the bail have an authority to take the principal, and he may be arrested on Sunday, for, as he is only at liberty by the permission and indulgence of the bail, they may take him up at any time;" and this seems to be the recognized doctrine of the English courts.

The question has been presented to the courts of a number of states in various ways, and the decisions are uniform on the subject so far as I have been able to observe.

The case of *Respublica v. Gaoler*, etc., 2 Yeates (Penn.) 263, was up upon a *habeas corpus* and it was shown that the petitioner had been arrested by the bail in a civil suit in Virginia, but that after coming into Pennsylvania he had been arrested and held to bail in a Pennsylvania court, and while the court clearly recognized the right of the bail in the Virginia court to arrest the principal, yet it further held that this right would not take precedence of the right of a resident of Pennsylvania to arrest him, and he was remanded to the custody of the Pennsylvania bail.

In the case of *Sharpless v. Knowles*, 2d Cranch C. C., 129, the same question was raised in the the Circuit Court for the District of Columbia. In that case one Okely had been held to bail in Pennsylvania, and had gone to the District of Columbia. His bail had arrested him, but permitted him to remain at large upon a promise to satisfy the debt. He had been arrested afterward and bailed by Knowles in the District, and finding that his Pennsylvania bail was about to rearrest him he procured a bail-piece in the other suit, placed it in the hands of his bail, and was taken into the custody of the marshal. Upon submitting the case to the court the question was decided in favor of the Pennsylvania bail, but Cranch, C. J., dissented upon the ground taken by the Pennsylvania court in the case in 2 Yeates *supra*.

The question as to the liability of the bail in a civil action for false imprisonment, has been passed upon by the Supreme Court of Connecticut in *Parker v. Bidwell*, 3d Conn. 84. This case was for an arrest in Connecticut by bail from New York, and the arrest was held legal. Hosmer, C. J., says: "The law supposes the principal

to be in the custody of the bail, and the bail may take him when he pleases and deliver him; and in *Ruggles v. Casey*, 3 Conn. 419, the same judge says: "On principles of common law the bail may take his principal when and where he pleases, and this is not considered a new arrest, but a continuation of the former imprisonment. He has the principal always on a string, and though extended to the remotest part of the earth he may pull it when he pleases."

In legal contemplation the principal is in the custody of his bail, who is viewed as his gaoler *pro tempore*, and the latter may always take the former and confine him."

The same question was decided in the same way by the old Supreme Court of New York in the case of *Nichols v. Ingersoll*, where the defendant was an agent of bail for the plaintiff in a civil suit in Connecticut, and the question of the right of bail to go out of the jurisdiction of the court and arrest his principal, and to appoint an agent to do the same without liability to be civilly sued, was expressly upheld.

The court said that it did not pass upon the question as to whether the government would have a right to consider its peace disturbed, or whether a *habeas corpus* would not lie if a citizen of the state was about to be carried to another country.

The first of these questions was directly passed upon in the case of *The State v. Mahon*, 3 Harrington (Del.) 568. This was an action of assault and battery, and was argued for the State by the Attorney General. Booth, C. J., said: "Special bail has the right to arrest his principal any where and at any time to render him in discharge of the bail. The principal is in the custody of his bail instead of being sent to prison and the bail has always the right to surrender him."

The question of the right of a principal to be discharged on *habeas corpus* when arrested by his bail in a suit in another state, was decided in the negative in the case of the *Commonwealth v. Brickell*, 8 Pick., 138. Counsel for petitioner cited the *habeas corpus* act of that state, which forbade the transporting of any citizen out of the state against his will, or without his voluntary agreement, and made such removal a penal offense; and it was argued that the attempt to commit the act was a misdemeanor. The bail was given in a suit in Vermont, and the point was made that the court of Vermont had no jurisdiction in Massachusetts, and that the courts of Massachusetts had no power to enforce the laws of Vermont.

The court in an opinion by Putnam, Justice, held that the removal contemplated in the act must have been an unlawful one. That the principal had consented to be taken when necessary by entering into the relation of principal and bail, and the petitioner was remanded to the custody of his bail.

Parker, C. J., added, that this decision has reference only to the relation subsisting between the United States, and that it was not necessary

to determine whether it would hold if the parties came here from a foreign nation.

From these decisions, and I have not been able to find any opposing ones, it would seem clear where a party is arrested and held to bail in a suit in one state, that at any time before the bail is fixed, or at any time when bail would be exonerated by the surrender, the bail may take the principal in any other state without becoming liable to either a civil or criminal prosecution unless there should be some statute expressly forbidding such act, and that even upon *habeas corpus* he might hold his prisoner.

It would, however, seem to be unquestionably true, if the liability of bail had become fixed so he could not be discharged by surrender of the principal, or if he had paid or discharged the judgment, that if he attempted the arrest he would be liable civilly. This question was made in the case of *Nichols v. Ingersoll*, supra, and the language of the court would intimate that had the plaintiff proved that the bail had discharged the debt before his arrest the case of the plaintiff would have been legal, yet they say that the evidence failed the plaintiff on that point.

The liability of the principal to be arrested having determined whenever the liability of the bail has become fixed, or where the bail was discharged the judgment, he would have no right to make the arrest, and the fact of his using a bail-piece which had expired would not seem to be any defense in a criminal proceeding, but upon this question I have not been able to find any authorities.

Another question is suggested by the decision in the case of the *Commonwealth v. Howard*, recently decided by the Supreme Court of Penn., reported in the *Chicago Legal News* of July 15th, 1882.

In this case an action had been brought for malicious prosecution against one Young, and Howard was one of the sureties on the bail bond. A judgment was rendered against Young, a *ca sa* and a *fi fa* were issued; the first was returned *non est inventus*, and the latter *nulla bona*.

The sureties having failed to surrender the principal by June 16th, 1879, their liability became fixed, but in Sept., 1879, upon information given by the sureties, plaintiff had an alias *ca sa* issued, and the principal was arrested and confined in jail until discharged under the insolvent laws. In May, 1880, a rule was taken to show cause why a judgment by default should not be set aside and an *exonerator* entered on the bond, and the rule was made absolute, and upon error the decision was affirmed by the Supreme Court.

This was based upon the act of the plaintiff, which constituted a waiver of his right to hold the bail, by imprisoning the defendant at the request of the sureties.

In this State, the statute gives the court in which the bail was taken, power to extend the time in which to surrender the principal, and the question suggested is, what effect has the discretion of the plaintiff to receive the principal and discharge bail after the liability has become

fixed, or the discretion of the court to extend the time beyond the limit otherwise fixed by the statute, upon the right of the bail to arrest the principal. That in this state the bail may arrest the principal after an order has been entered extending the time for his surrender is decided in the case of *Wright v. Collier*, 35 O. S., 131, sup.; but there is another question as to the right to arrest before such an extension is granted, if the extension is afterwards granted.

There would seem little room for doubt that upon a *habeas corpus* the principal would be discharged if arrested after the bail has become fixed, even though the court had the power to grant an extension of time afterward.

But suppose the arrest is made after the bail is fixed, and the principal is not allowed an opportunity to sue out a writ, and afterwards sues his bail for false imprisonment, where an order is made after the arrest extending the time of surrender. The question may be said to be a very doubtful one. If the principal had been permitted to go at large purposely, it would hardly seem as though the subsequent order would be a good defense for the bail in a civil suit, but if the principal had absconded or concealed himself so that the surrender could not be made, it would seem probable that he might be estopped by his own wilful and wrongful act from recovering damages for an arrest, by which he was only compelled to do what was right, and what he was in duty bound to do by the relation of bail and principal. But in the absence of express decisions upon these questions, one can hardly do more than speculate as to the law governing them.

O. W. A.

DAMAGES—BREACH OF CONTRACT.

SUPREME COURT OF MICHIGAN.

ALLIS v. McLEAN and others.

June 14, 1882.

Damages for breach of contract cannot be measured by the loss of expected profits where the latter are uncertain and speculative and depend on so many contingencies that their loss cannot be traced to the breach with reasonable certainty. But profits are the best possible measure of damages where their loss is indisputable and the amount can be estimated with almost absolute certainty; as in the case of advances on the contract price of wheat or other articles which have ready sale at a current market price; or where the breach of contract results in the failure of another contract which would have produced fixed and definite profits.

One who seeks to recover for a breach of contract, the profits of which would be wholly uncertain, must point out elements of damage more certain and more directly traceable to the injury than prospective profits can be.

The owner of a saw-mill contracted for "wrought feed friction works" to be placed in the mill early in March, and notified the other party that for every day's delay in putting them in he would suffer \$150 damages. The works were not put in until July, though frequently promised, but the mill was furnished with other works which enabled it to be operated, except for 16½ working days during which it lay idle. Held that the loss of profits from the inability to manufacture lumber for that time was too uncertain to permit a measure of

damages for the breach of contract. Nor could the rental value be made a measure of damages, especially if it did not appear that the owner would have leased or that anybody would have rented the mill.

Case made from Bay.

COOLEY, J.

The question in this case is one of damages for the non-performance of a contract within the agreed time. The facts are found by the circuit judge. From the finding it appears that in January, 1880, the defendants were proprietors of a saw-mill in general good order and condition at Bay City, and on the tenth day of that month made an agreement with the plaintiff, a manufacturer of mill machinery, whose place of business was at Milwaukee, in the state of Wisconsin, for the manufacture by him for use in their mill of a piece of machinery known as a "wrought feed friction works," to be shipped on board cars at Milwaukee on or before March 1, 1880, so that it would reach Bay City within two or three days of that date. The contract on behalf of plaintiff was made by one Hinckley as his agent, who was notified by defendants at the time, of the following facts:

(1) That the saw-mill of defendants had therein at that time a feed works which worked fairly well, but which defendants thought of changing, and which were not as good as the feed works contracted to be furnished by plaintiff as aforesaid, were by both parties believed to be. (2) That in order to use the feed works of plaintiff's manufacture, the defendants would be compelled to take out the feed works then in their mill, and adapt their mill and machinery for the use of the feed works of plaintiff's manufacture. (3) That without a feed works the mill of defendants could not be operated, and could not saw and manufacture lumber; and that to make the change necessary to put in said new feed works it would take considerable time and expense, and when said mill and machinery were adapted to the feed works of plaintiff's manufacture, the same could not be changed so as to use another kind without great expense and loss of time. (4) That it was necessary that said feed works should be in Bay City as soon as it could be by being shipped from Milwaukee on or before March 1, 1880, which would be in two or three days from that time, to enable defendants to place the same in their mill and commence the manufacture of lumber at the commencement of the sawing season; and that unless plaintiff would agree to have the same shipped at said time so as to get to Bay City as aforesaid, the defendants would not purchase the same; and that the defendants stated to said Hinckley that for every day's delay of the feed works the mill in consequence would be delayed, and that for every day's delay of the mill the defendants would be damaged \$150.

Shortly prior to March 1, 1880, defendants were informed by plaintiff that the machinery would be shipped as agreed, and during the month of March they were repeatedly notified that the feed works would be shipped from Milwaukee in a few days from each of such notices

but it was not finally completed and shipped until in July following. On April 5, 1880, plaintiff supplied the defendant with feed works like that contracted for except that the main part or friction of the same was cast instead of wrought iron, and with this the defendants were enabled to start up and use their mill until the works contracted for were received in July.

For want of the feed works the mill of defendants, without any fault, negligence or waiver on their part, lay idle through March and until the fifth of April, though they had in their mill booms stock for manufacture, and they actually lost the use of the mill for at least 16½ working days. During the said 16½ days, when said defendants were deprived of the use of their mill in consequence of the failure of plaintiff to furnish said feed works in accordance with his agreement, the said defendants could and would, if the same had been furnished, have used and operated their mill, and could and would, in the usual way of operating the same, have manufactured therein at least 75,000 feet of lumber per day, the sawing of which would have yielded them a profit, over and above the ordinary expenses of running said mill, of \$93.75 per day, and which the defendants have lost by reason of such failure on the part of said plaintiff, and the fair rental value of the mill would have been \$75 per day during the time last above mentioned.

On this finding, there being no other showing of damages on the part of defendants, the circuit judge decided that the plaintiff was entitled to recover the contract price of the feed works without reduction, and gave judgment accordingly. The defendants brought the case to this court.

We had occasion in *McEwen v. McKinnon*, 11 N. W. REP. 828, decided at the last term, to pass upon a question much like the one which arises here. In that case as in this, a mill-owner had contracted for machinery to be furnished by a specified day, and he sought to recover profits lost by reason of his mill lying idle, as damages for the failure to perform the contract in time. It seems reasonable that where profits are thus lost the defaulting party should make them good, for the machinery is purchased with a view to the profits, and the contract would not be entered into if the profits were not expected and counted upon. But the difficulty in measuring damages by profits is that they are commonly uncertain and speculative, and depend upon so many contingencies that their loss cannot be traced with reasonable certainty to the breach of contract. When that is the case they are said to be too remote; and the damages must be estimated on a consideration of such elements of injury as are more directly and certainly the result of the failure in performance.

But in some cases profits are the best possible measure of damage, for the very reason that the loss is indisputable, and the amount can be estimated with almost absolute certainty. The case of a contract for the delivery of grain or any other article which at all times finds a ready sale at a current market price is an instance: if the

contract is not performed, the purchaser may recover the advance beyond the purchase price; and this, though not recovered under the name of profits, is really nothing else. It often happens also that one contract, the performance of which will result in certain and definite profits, will be dependent upon the performance of another; and if the second contract is broken, the loss of definite and fixed profits under the other is a necessary and immediate consequence. There is no difficulty in saying in some such cases that profits lost are the proper measure of damages. *Houd v. Campbell*, 26 Mich. 229; *Booth v. Rolling Mill Co.* 60 N. Y. 487; *Salvo v. Duncan*, 49 Wis. 151; *Hitchcock v. Galveston*, 3 Wood, C. C. 287; *Fingal v. Latours*, 81 Pa. St. 448; *Jones v. Adams*, 8 W. Va. 568; *Waters v. Towers*, 8 Exch. 401. But the profits of running a saw-mill are proverbially uncertain, indefinite and contingent. They depend on many circumstances, among which are capital, skill, supply of logs, supply and steadiness of labor; and one man may fail while another prospers, and the same man may fail at one time and prosper at another, though the prospective outlook seems equally favorable at both times. Estimates of profits seldom take all contingencies into the account, and are therefore seldom realized; and if damages for breach of contract were to be determined on estimates of probable profits, no man could know in advance the extent of his responsibility. It is therefore very properly held in cases like the present that the party complaining of a breach of contract must point out elements of damage more certain and more directly traceable to the injury than prospective profits can be. *Fleming v. Peck*, 48 Pa. St. 309; *Pittsburgh Coal Co. v. Foster*, 59 Pa. St. 365; *Steaven v. Cogswell*, 28 Ill. 457; *Frazer v. Smith*, 60 Ill. 145; *Howe Machine Co. v. Bryson*, 44 Iowa, 159.

But this case is thought to be different because here the fair rental value of the mill is proved, and it is said that this was certainly lost. But we do not know that that was the case. If the mill had been in condition to rent at that time, there may have been no customer for it on terms the owner would have consented to grant; and if customers were abundant and satisfactory, it cannot be assumed that the whole rental value is lost when a mill stands idle. The wear and tear of machinery and buildings in use is something, and it is not improbable that the landlord would take this among other things into account in determining what should be the rent. But in this case it does not appear that rent was lost or could have been lost, for it is not shown that defendants desired to rent or would have consented to do so if a customer had offered. In fact the contrary is clearly inferable.

The judgment must be affirmed with costs.
CAMPBELL and MARSTON, JJ., concurred.
GRAVES, C. J., did not sit in this case.

PARTNERSHIP—DEBT—EVIDENCE—EX-
CHANGING CHECKS.

SUPREME COURT OF PENNSYLVANIA

ALBRECHT v. BREDER.

April 10, 1882.

As a defense to an action by a firm the defendant gave in evidence two checks drawn by him for which he had not received credit upon the firm's books. In rebuttal the plaintiffs showed that S., a member of the firm who had charge of the financial matters, was also in business for himself; that he kept but one bank account and that in his own name, and that he was in the habit of exchanging checks with the defendant; and they offered in evidence two checks drawn by S. in favor of defendant, and two letters of the defendant requesting an exchange; the checks were of dates very close to those of the defendant and for the same amounts, and the letters were of dates connecting them with the checks. *Held*, the letters and checks should have been admitted to show that the defendant's checks were exchange checks with S.

Assumpsit by the surviving partners of the firm of Albrecht, Riekes & Schmidt upon the promissory note of the defendant, in their favor, for \$300.00, dated July 17, 1874. The plaintiffs having given in evidence, the note, the defendant gave in evidence two checks, each for \$300, dated April 11th and 16th, 1874, and evidence to show that he had not been credited with these checks on the firm's books, and asked that they be set off. In rebuttal the plaintiffs showed that Schmidt, the deceased partner, was also in business on his own account; that he attended to the financial matters of the firm; that he kept but one bank account, and that in his own name, and that he was in the habit of exchanging checks with the defendant. To show that the two checks given in evidence by the defendant were exchange checks, the plaintiffs offered in evidence two letters of the defendant to Schmidt dated April 10th and 14th, 1874, each referring to a check for \$300, and asking one of like amount in return; and also two checks, each of \$300, signed by Schmidt, and dated April 11th and 16th, 1874. *Yerkes, J.* excluded the letters and checks as not sufficiently connected with the defendant's checks, and directed a verdict and certificate for the defendant. The plaintiffs took this writ.

PAXSON, J.

We are of opinion that the letters and checks referred to in the first four assignments of error should have been admitted. It is true they do not bear evidence upon their face that they had any connection with the firm of Albrecht, Riekes & Schmidt. The letters are signed by the defendant and addressed to Richard T. Schmidt, one of the plaintiff's firm, while the checks are the individual checks of Schmidt in favor of the defendant. If this were all there would be nothing to connect them with the defendant's two checks of April 11th and 16th, 1874, for \$300 each. Before, however, the plaintiffs offered the letters and checks in evidence they had proved that Richard T. Schmidt, the deceased partner, was not only a member of the firm of Albrecht,

Riekes & Schmidt, but that he was also engaged in and carried on the musical instrument business upon his own account; and that he attended to the financial affairs of the said firm of Albrecht, Riekes & Schmidt; that he kept but one bank account and that in his own name, and that he was in the habit of exchanging checks with the defendant. There was the further fact put in evidence by the defendant, that a certain check drawn by him in favor of Richard T. Schmidt for \$33.50 was properly credited to him in the merchandise account of the said firm. These circumstances considered in connection with the letters and checks excluded, and their near correspondence in dates and amounts, might well lead a jury to the belief that the two checks of Richard T. Schmidt for \$300 each were drawn against the firm money, and were sent in response to defendant's letters of April 10th and 14th, and were exchange checks. If Mr. Schmidt kept the bank account of the firm in his own name, it is difficult to see how he could have drawn out its money except upon his individual check. It was certainly a question for the jury, and the evidence was improperly rejected.

Judgment reversed and *venire facias de novo* awarded.

DOWER—WIDOW'S ALLOWANCE—HOMESTEAD.

IN PROBATE COURT OF ERIE COUNTY,
OHIO.

IN THE MATTER OF THE ESTATE OF RICHARD
MARTIN, DECEASED.

Motion by widow for allowance of \$300 in lieu of Homestead.

The facts in this case are as follows:

Richard Martin died intestate Sept. 17th 1880 leaving Kate Martin his widow, Maud Martin a minor daughter and several other heirs, all of full age. W. H. H. Sherman was appointed administrator Sept. 25th 1880; inventory and appraisal, was duly made and returned; the legal statutory allowances were made for the widow, and an allowance of \$450.00 was made for the support of the widow and minor child for one year, and the same has been paid. On the 7th day of February, 1881 the administrator instituted proceedings for the sale of the real estate of the decedent for the payment of his debts; in due time the prayer of the petition was granted, and the administrator ordered to sell sufficient to pay the debts of the estate.

The administrator under this order sold the homestead consisting of about 54 acres, the same having been occupied by the decedent and his family as a homestead at the time of his death. These premises were charged with liens which precluded the assignment of dower by metes and bounds free of dower.

This sale was made on the 13th of May, confirmed and a deed ordered on the 20th of May

1882; and the widow consented to take and was paid in money the value of her dower interest in the amount remaining after the payment of mortgage liens. The premises were sold for \$3,824.80, and after payment of preferred liens, dower and costs, there remains about \$1,000.00 of the proceeds of the sale, and the widow on the 17th of June 1882, files herein her motion asking that she may be allowed the sum of \$500.00 out of the proceeds of said sale in lieu of a homestead.

The claim of the plaintiff herein is based upon Sections 5440, Revised Statute which provides that: "When a homestead is charged with liens, some of which as against the head of the family, or the wife, preclude the allowance of a homestead to either of them, and other of such liens do not preclude such allowance, and a sale of such homestead is had, then, after the payment, out of the proceeds of such sale, of the liens so precluding such allowance, the balance, not exceeding five hundred dollars, shall be awarded to the head of the family, or the wife, as the case may be, in lieu of such homestead, upon his or her application, in person, or by agent or attorney."

It is further claimed by the plaintiff that under Section 5435, Revised Statute she is the head of a family and as such entitled to a homestead exemption. This section provides that: "Husband and wife living together, a widow or a widower living with an unmarried daughter, or an unmarried minor son, may hold exempt from sale, on judgment or order, a family homestead not exceeding one thousand dollars in value; and the husband, or, in case of his refusal, the wife, shall have the right to make the demand therefor; but neither can make such demand if the other has a homestead."

The rights of the parties in interest in this case have not been made perfectly clear by the Statutes referred to, nor by any precedents that have been established by decision of the higher courts, that I have been able to find, and it seems to be necessary to interpret this and other parts of the statutes relating to homesteads as they apply to the particular case on hearing. It would seem that Section 5435 was designed particularly for the families of judgment debtors, and to preserve for them a home, and that any such debtor might assert this claim whether the debtor was the head of a family, or a widow or widower with unmarried daughter or minor son, as against the claim of their creditors, on judgment or order against their own property, and in accordance with Section 5440 might claim the \$500 out of the proceeds of such a sale if the homestead could not be set off by metes and bounds, and from the particular manner in which these sections are drawn I am led to think they apply only to judgment debtors, and their own property. I am still further confirmed in this opinion from the fact that the statutes make special provision for a widow and minor children (Sec. 6038 R. S.) exempting for their benefit all articles necessary for housekeeping furniture, books, wearing apparel, one cow or money to buy one with, and further [Sec. 4188 R. S.] gives her the use of the

Mansion House for one year and provides [Sec. 6040-41] for an allowance for the support of the widow for one year: an allowance which is usually a very liberal one; The widow is further entitled to her dower in all the realty a right from which she cannot be debarred but by her own act and in which she is fully protected as against the creditors of her deceased husband.

But the Statutes go further and make a provision especially for such a case as this one [Sec. 5437 - 38] [a provision that would be entirely unnecessary if the Statutes upon which this claim is based were applicable and give the right of homestead exemption to a widow.] It is in these Sections provided that, "on petition of executors or administrators to sell to pay the debts, the lands of a decedent who has left a widow and a minor child unmarried and composing part of the decedent's family at the time of his death, the appraiser shall proceed to set apart a homestead as provided in the next section etc." Sec. 5438 provides that "on application of the debtor, his wife, agent, or attorney" [and I presume in this case the widow] *at any time before sale*, the officer, executing any suit founded on judgment or order shall cause the appraiser to set off by metes and bounds a homestead not exceeding \$1000 in value" etc.

Under this provision the family get the use of the homestead for a limited period, until the minor was either married, dead, or of age, and under the present law (79 O. L. 107) during the life time of the widow or unmarried minor, and the decisions are positive that at the expiration of this time the property reverts to the heirs. I believe the only right to such a homestead is given by the two sections referred to, and can only be given to widows upon demand before sale, and in the manner prescribed therein.

That the only rights a widow has in the estate of her deceased husband, are the statutory allowances, her years support, her distributive share of his personalty the use of the mansion house for a year, a homestead as prescribed in section 5437 if it can be had, and her dower interest in his realty; that she then as a widow would be entitled to the benefits arising from her own property to be derived from section 5435-40. Further that if the homestead was charged with liens which precluded the assignment of a homestead in the manner prescribed by section 5437-38 she would not be entitled to anything in lieu of it. It cannot be claimed that a widow would be entitled to the benefits to be derived from the provisions of both of the sections referred to (5435 and 5437) and it would seem that the latter was enacted expressly to provide for cases not covered by the former, and that the claim of a widow to a homestead out of her husband's estate, depends upon that section alone.

The decision referred to by counsel in O. S. R. vol. 29 page 569 although not just such a case as this, covers points that are applicable to this case, and confirms the opinion of this court in the interpretation of section 5435.

Now had it been possible under section 5437-38

to have assigned to the widow of Richard Martin a homestead not exceeding in value \$1000 out of the premises sold, it would have been unquestionably their right to have had it so assigned. Owing to certain mortgage liens this could not be done, and the widow loses this right.

She has had all her statutory rights, her \$450 for one year's support, her dower interest in this property sold and there not having been a possibility of assigning her by metes and bounds the homestead of \$1000, the court is of the opinion that she cannot require it by any other method or means, than those specially presented by the statutes; that her homestead claim is of very different character and not so valuable as that claimed under the section of the statutes upon which the motion is based, this being the use only for a period of years, and in the case of a judgment debtor the \$500 becoming absolutely her property; that the widow having received her dower has been paid all her interest in this property and that she is not entitled to \$500,00 exemption in lieu of a homestead.

Motion overruled.

LIMITATIONS—COMPETENT WITNESS,
—MORAL CHARACTER.

SUPREME COURT OF IOWA.

STATE OF IOWA v. MCINTIRE.

June 9, 1882.

The statute of limitations must be specially pleaded.

That clause of the statute of limitations in relation to criminal offenses which reads, "and no period during which the party charged was not usually and publicly resident within the state is a part of the limitation," applies equally to all cases.

The wife of a convict serving out his period of imprisonment in the penitentiary is not from this circumstance alone incompetent as a witness to corroborate the evidence of an accomplice. Her connection with the convict is a matter for the consideration of the jury as to whether she was worthy of belief.

The moral character of a criminal of long criminal practice is not essentially different from that of a new beginner in crime.

Where there is no material difference between the instructions given and those offered, the refusal to give the instruction offered is not error.

The indictment was found and presented in September, 1881, and charged that defendant and another person, on the thirtieth day of August, 1877, did steal, take, and carry away two horses, "and that said defendants have been non-residents of Iowa over two years since said taking." A demurrer to the indictment, on the ground the offence charged was barred by the statute, was overruled. There was a plea of not guilty; verdict, guilty; judgment; and the defendant appeals:

SEEVERS, C. J.

1. It has been held the defence of the statute of limitations cannot be raised by demurrer, instructions, or motion for a new trial, but that the same must be specially pleaded. *State v. Hussey*, 7 Iowa, 409; *State v. Groom*, 10 Iowa, 308. As, however, the case seems to have been

tried in the court below upon the theory it could be thus raised, for the purposes of the case it will be conceded. The statute provides as to offences of this character that an indictment must be found within three years after the commission of the offence, and not afterwards. Code, § 4167. "If, when the offence is committed, the defendant is out of the state, the indictment or prosecution may be found or commenced within the time herein limited after his coming into the state, and no period during which the party charged was not usually and publicly resident within the state is a part of the limitation." Code, § 4169. It is insisted the last clause of the section just quoted must be restricted to the offence contemplated in the first part of said section. But the language used is general and applies equally to all cases. We therefore see no reason why it should be limited to any particular class of cases.

2. The principal evidence relied on by the state was that of an accomplice; and it is urged he was not corroborated as required by statute. The evidence of Mary Stevens, if believed by the jury, was clearly sufficient. Counsel for appellant do not claim otherwise, but it is said she was also an accomplice. There is no evidence tending to show that she was. She is the wife of Frank Stevens, who is in the penitentiary, but for what crime does not appear. There is no evidence tending to show he aided or had knowledge of the crime charged in the indictment. We therefore see no reason why the evidence of his wife may not be sufficient as corroborating evidence. Her connection with the convict, Stevens, was a matter for the consideration of the jury. It was for them to say whether she was worthy of belief. If she was, the corroboration is sufficient.

3. The accomplice, when on the stand as a witness, admitted he had been engaged in horse stealing, whereupon counsel for the defendant asked the witness, "How long have you been engaged in horse stealing?" An objection to the question was sustained. It is urged this was error, because the proposed evidence was competent as tending to show the moral character of the witness. We are not prepared to admit the moral character of a person who has been engaged in stealing for years is any worse than that of the beginner. The former may be more expert and have greater knowledge of the profession; but there is no essential difference in the moral character of each. The defendant was not prejudiced by the action of the court.

4. Complaint is made of the refusal to give two instructions asked by defendant. We have carefully compared the instructions refused, with those given, and we are unable to discover any material difference between them. Nor has counsel for appellant called our attention to any substantial difference. It was not error, therefore, to refuse the instructions asked. Complaint is made in a general way of the instructions of the court. We are united in the opin-

ion the charge of the court is clearly correct. The evidence sustains the verdict. Affirmed.

Digest of Decisions.

MICHIGAN.

(Supreme Court.)

TWIST v. BABCOCK. June 14, 1882.

A transfer of personalty in the nature of a bequest cannot be set aside merely because it shows an unnatural disposition on the donor's part and is wrong in morals, so long as there is no evidence that it was brought about by fraud or undue influence and that the grantor was of a sufficiently sound mind to dispose of his property.

An heir at law has a right to know what disposition has been made of the estate and is justified in filing a bill to set aside deeds and transfers made by the ancestor where there is good reason to believe that they were procured by fraud or undue influence or that he was mentally incompetent; especially where the deeds have been kept intentionally from complainant's inspection.

Costs of the trial court may be granted complainant even while denying relief in a proceeding to set aside transfers which defendant's conduct had given good reason to think had been fraudulently procured.

HOPKINS' APPEAL June 14, 1882.

Where a will is contested on the ground that there was a later will, the existence of which proponents deny, the proponents can hardly object to parol evidence of its contents on the ground that the alleged will itself is the best evidence.

Judgments cannot be reversed for errors that have not been excepted to.

Evidence of declarations made by a decedent and tending to show a change of mind in regard to the disposal of his property and an actual alteration therefor are admissible, in proceedings to contest his will, to corroborate the testimony of a witness as to the existence and contents of a later will; and the rejection of such evidence is irreconcilable with the admission of evidence offered by the proponents to disprove such testimony, and is prejudicial to the contestants.

IOWA.

(Supreme Court.)

FULLER v. LENDRUM, SHERIFF, AND ANOTHER, ADM'R. APRIL 24, 1882.

Judgment Debtor—Witness—Where there was testimony that a judgment debtor had been discharged from liability on the judgment by assuming the payment of certain promissory notes due by judg-

ment creditor, and execution was issued on such judgment 18 years after its rendition, it will be assumed, upon a preponderance of the evidence, that the party was discharged from the judgment.

Where a party neither gains nor loses anything by the result of a suit, he is not disqualified as a witness on the ground of interest.

MINNESOTA.

(Supreme Court.)

MUUS v. MUUS. MAY 5, 1882.

Husband and Wife—Domicile—While a husband and wife were domiciled in this state the wife inherited property from her father in Norway, which, in form of money, was transmitted to this country. *Held*, that the rights of the husband and wife in respect to such property are determined by the laws of this state and not by those of Norway.

More than six years after the husband had, with the knowledge of the wife, received such money, she commenced action against him for an accounting and for the recovery of the money. It appeared that the husband had kept, and at all times treated and claimed, the property as his own. No other facts being shown by the plaintiff to avoid the statute of limitations, a recovery was correctly denied. A recovery by the wife of other money received by the husband less than six years before action brought, sustained.

ILLINOIS.

(Supreme Court.)

JAMES R. LOOKIE v. THE MUTUAL UNION TELEGRAPH COMPANY. June 21, 1882.

1. **Eminent Domain—Rights acquired by condemnation for telegraph purposes.**—A telegraph company, by a judgment condemning land for its use under the Eminent Domain Act, does not acquire the fee to the land, or the right to use it for any other purpose than to erect telegraph poles, and suspend wires upon them, and maintain and repair the same, and use the structure for telegraph purposes. This, of course, gives the company the right at all times, when necessary, to construct or to repair the line, to enter upon the strip condemned, doing as little damage as possible. The company can not cultivate such strip, or take exclusive possession of it, or enjoy it for any other purpose. The only exclusive right of occupation the company acquires is the ground occupied by the poles erected for telegraph purposes.

2. **Same—Width of strip that may be acquired.**—The statute does not designate the width of the strip of land that may be condemned for telegraph purposes, but only authorizes such companies to acquire such an amount of land as may be necessary; and where only one line of poles is specified in the petition, and the evidence does not show that a half a rod in width is an unreasonable amount of land, the judgment condemning that much of the land will be sustained, and will be construed not to authorize the erection of but one set of poles.

THE CHICAGO CITY RAILWAY COMPANY v. CATHARINE McMAHON. June 21, 1882.

1. **Evidence—Attempt to suppress evidence or influence a witness.**—On the trial of an action on the case brought against a city railway company to recover for a personal injury, the court allowed a witness for the plaintiff to testify that a clerk in the employ of the defendant offered him \$300, either to prevent him from appearing as a

witness against the company, or to influence his evidence in favor of the company. This was objected as no part of the *res gestae*. *Held*, that the evidence was proper though not a part of the *res gestae*.

2. On the trial of a case it may be shown that a party has destroyed or suppressed material evidence, or has fabricated such evidence, as it implies an admission that he has no right to recover, if the case is tried on the evidence as it exists.

3. *Master and Servant—Liability for wrongful act of servant in the scope of his employment.*—when a clerk of a city railway company has assigned to him the general and special duty of looking for and arranging the evidence in cases where the company is sued by persons injured or claiming to be injured by the carelessness of those intrusted with the management and operation of its street cars, and is empowered generally to perform that duty without special directions, with general authority to use his own judgment in the performance of his duties, if he, in looking up the evidence in the case, wrongfully and without authority offers money to a witness to keep him from testifying against the company, or to influence his testimony, the company must be held responsible for his act, and it is proper evidence against the company.

3. The master is liable for, not only the careless and negligent acts, but also for the willful and malicious acts of his servant while acting within the scope of his duty or employment. This rule is well recognized in this State.

CONTRACTS BY CORRESPONDENCE.

With the vast growth of the commercial interests of the country during the last fifty years the subject of contracts entered into by means of correspondence has become of very great importance. A large number of decisions, many of them conflicting, have accumulated. The difficulty in these cases appears to have grown out of an attempt to apply the old idea of mutual assent necessary to a contract to a new state of facts, arising under circumstances entirely different. It is customary to say that before there can be a contract, the minds of the parties must meet on some particular proposition with knowledge that they have met. This is true where the parties are personally present, but it can be true only in a modified sense where the parties are personally present, but resort to the mail as a means of communication. Under such circumstances a strict and literal interpretation of the maxim is impossible. We have attempted to reduce the law on the subject to three principal propositions, now so generally acknowledged that we may call them rules: (1.) As to when the contract is completed. (2.) As to the power of recall. (3.) As to what constitutes a sufficient acceptance to bind the parties.

RULE 1. *When an offer has been made, and a letter of acceptance mailed within a reasonable time the contract is complete.* The adjudications upon this question begin with the case of *Adams v. Lindsell*, 1 Barn. & Ald., 681, decided in the court of King's Bench in 1818. The defendants were dealers in wool at the town of St. Ives, and the plaintiffs were woolen manufacturers at Broomgrove. On the second day of September, 1817, the defendants wrote and sent out the following letter to the plaintiffs: "We now offer you eight hundred tods of weather fleeces of good, fair quality of our county wool, at 35s 6d per tod, to be delivered at Liecester. and to be weighed up

by our agent in fourteen days, receiving your answer in course of post." The letter, through the fault of the defendant, was misdirected, and did not reach its destination until September 5, when an answer accepting the terms was dispatched. This letter reached the defendants September 9. But on the 8th the defendants, not having received an answer on the 7th, as they should have, "in course of post," had their letter been properly directed (*Mactier v. Frith*, 6 Wend, 103,) sold the wool to another party. Upon these facts the defendants argued that there was no contract, as there could be none until the letter of acceptance was received by them. As they had received no answer in due course of post, they had the right to withdraw their offer. By the sale of the wool to other parties they evinced their intention of withdrawing the proposition made the plaintiff before they received the letter of acceptance. Hence there was no simultaneous concurrence of the wills necessary to constitute a contract. The real question to be decided was whether the acceptance was complete when the letter of acceptance was deposited in the post. In passing upon this the court said: "If this were not true, no contract could ever be completed by post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till they had received the notification that the defendants had received their answer, and assented to it. And so this might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. 1 Pick, 278. Then as to the delay in notifying the acceptance, that arises entirely from the mistakes of the defendants, and it must therefore be taken as against them."

Four years later, in 1822, the Case of *McCullough v. The Eagle Insurance Co.*, (1 Pick., 278), came before the Supreme Judicial Court of Massachusetts, and was decided directly contrary to the doctrine of *Adams v. Lindsell*. This case grew out of the following facts: On the 29th day of December, 1820, the plaintiff wrote from Kennebeck, Maine, to the defendants at Boston, asking for the terms upon which they would insure a certain brig and cargo from Martinico to the United States. On the first day of January the defendants replied, stating that they would take the risk at two and one-half per cent. This letter was received and answered by the plaintiff January 3d, accepting the offer. But on the 2nd of January the defendants dispatched a letter in which they withdrew their offer, and refused the risk at any price. But the letter of acceptance was mailed on the 3d, before the receipt of the defendant's letter of revocation.

[Concluded next week.]

Ohio Law Journal.

COLUMBUS, OHIO, : : JULY 27, 1882.

THE custom which has so long and so generally prevailed among bankers, of requiring the payee or holders of checks to endorse the same before payment, seems to be unnecessary, according to the decision of Judge Jones, of Cuyahoga County, which we publish elsewhere in this number. Checks payable to bearer are not so generally required to be endorsed, although some banks demand even this; but checks payable to order, and simply endorsed by the payee named therein, must be further endorsed by the party to whom the payment is to be made before the cash will be forthcoming. The right of the banks to impose this condition has been much questioned. No adjudication has ever hitherto been made on this subject. The question is an important one in commercial law, the banks on the one side insisting on it as a precaution necessary in their business, while customers insisted that it unduly and unnecessarily infringed on the commercial law, interfered with the negotiability of commercial paper, gave improper information as to the person through whose hands the paper passed, and exposed the holders to dangers of a suit in case of a dishonest reissue of the check, a danger which experience has shown to be real in case of notes and bills of exchange. Under these circumstances the suit referred to was brought to settle the question, and it will be found of great interest to all concerned.

THE KIDNAPPING CASE.

We have been favored with a copy of a Philadelphia paper containing a full history of the KAHN case from a Philadelphia standpoint, and must confess that they consider it entirely proper to carry off citizens of Ohio with no other warrant than force and close carriages. The statement is mainly an interview had with the attorney who planned the abduction, secured at his own request, and although it claims the sanction of "several prominent lawyers" of Philadelphia for the kidnapping, and "*all agreed that not only was it within HIGH ETHICAL PROFESSIONAL conduct, but that it was his duty, &c., &c.*" The names of these prominent lawyers are prudently withheld.

We do not care two pins for this man KAHN, and

do not in fact believe him to be much else than a first-class scoundrel—as he either lied to his champion newspaper, *The Enquirer*, upon his return from his enforced eastern trip, or that paper lied in giving an account of his escape from Philadelphia, which we do not believe; but there is a nice question of statute law involved and a fine point of extradition custom and courtesy or duty which hinges upon his case, and which should be finally set at rest.

The entire matter is properly presented in two phases:

1st. The degree of authority with which a bail-piece from another state clothes the bail or his deputies when he comes into this state to apprehend the principal.

2nd. Whether there is any case or instance wherein a resident in this state can be taken away without a requisition properly made upon our chief executive and his warrant duly issued upon the same.

After a careful examination of the authorities our conclusion is that a bail-piece is of no more potency in the arrest of a fugitive from justice found in Ohio than a simple Justice's warrant issued in some other state.

In states where no statute exists defining the *modus operandi* which must be observed in securing and surrendering fugitives from justice from other states, we admit that both custom and the current of judicial law gives to a bail-piece a wonderful latitude and authority. But in this state the provisions of the statute leave no loophole of evasion, and no proviso or exception through which a *bail-piece* can escape the necessity of strict compliance with that statute, or upon which an officer from another state can hope to arise above or beyond the plane occupied by those armed with requisitions only. It seems ridiculous in the extreme that a murderer escaping from Pennsylvania, red-handed with the blood of his victim, can retreat behind the majesty of our laws and be protected by our governor until a requisition can be obtained from the Governor of Pennsylvania; while another in the same state who has called his neighbor a liar, and has had an action of slander brought against him with damages at ten dollars, has given and "jumped" bail, may be followed and taken back with a *bail-piece*!

This may be and no doubt is true as between states where no statute weeds out such incongruities; but in this state the statute is plain and clear. The conclusion is therefore certain

that the KAHN kidnappers were open violators of law, and as such should be indicted and punished.

CONTRACTS BY CORRESPONDENCE.

[Concluded.]

The plaintiffs claimed that the contract was complete, but Chief Justice Parker, without knowledge of the decision in *Adams v. Lindsell*, held otherwise: "It is contended by the defendants," said he, "that the treaty was open until they should have received that letter, and that in the mean time they had a right to withdraw their offer. We adopt this opinion as the most reasonable. The offer did not bind the plaintiff until it was accepted; and it could not be accepted to the knowledge of the defendants, until the letter announcing the acceptance was received, or at most until the regular time for its arrival by mail had elapsed.

The conflict thus begun was continued in 1830 by conflicting decisions in two cases decided almost simultaneously, one in New York, the other in Scotland. The New York case was *Mactier v. Frith*. (6 Wend, 103.) Mactier lived in New York and Frith in St. Domingo. They were joint owners of a cargo of brandy which had been shipped on their account from France to New York. While the cargo was supposed to be at sea, Frith wrote to Mactier, proposing that he (Mactier) should take the venture solely on his own account. This offer was accepted. After the letter of acceptance was mailed, but before its arrival, Mactier died, and his administrator claimed the property. The court, following the doctrine of *Adams v. Lindsell*, held that there was a complete contract before the death of Mactier. The Scotch case (*Countess of Dunmore v. Alexander*, 9 S. & D. 190), referred to, introduced a slightly different state of facts and a new element. Here an offer was accepted and the letter mailed, but later in the day the acceptor, having changed his mind, a letter containing a refusal was also mailed. Both letters went by the same post, and were placed in the hands of the other party at the same time. The court of sessions held that the acceptance was nothing until it was delivered, and as they were delivered at the same time, they neutralized each other and no contract was made. Thus far we find the decisions quite evenly divided. But a little later in *Brisford v. Boyd*, (4 Paige 17), Chancellor Walworth held that where the subject-matter of the contract was burned after the letter of acceptance was mailed and before its delivery, the loss must fall upon the acceptor. In 1846 we again find the question before the English courts of chancery, in *Potter v. Sanders*, (6 Hare 1), where Mactier v. Frith was approved, and *McCullough v. The Eagle Ins. Co.* dissented from. On the other hand, in *Averill v. Hedge*, (12 Conn. 424), although the point did not directly arise, the court took occasion to approve of the

doctrine of *McCullough v. The Eagle Ins. Co.* In 1847 the Supreme Court of Pennsylvania (*The Hamilton v. Lycoming Ins. Co.*, 15 Barr, 339), gave its *arbitr* in favor of the doctrine in *Adams v. Lindsell*, saying: "The last case upon the point has overruled *McCullough v. The Eagle Ins. Co.*" About the same time the Supreme Court of Georgia, (*Levy v. Cohens*, 4 Ga. 1), held that where the completion of a transaction depended upon the delivery of a document, depositing it in the post was sufficient.

Next in order of time we find the important case of *Dunlap v. Higgins*, (1 House of Lords 381), decided in 1848. This was an appeal from the Scotch Court of Sessions to the House of Lords. On January 28th Dunlap wrote to Higgins, offering in terms to sell a lot of pig-iron. Higgins received the letter on the 30th of January, and on the same day wrote and posted a letter of acceptance. This letter, by mistake, was dated January 31, and through delay in the post, it was not delivered until February 1. In the meantime Dunlap, not hearing from Higgins' on the 31st, made other arrangements and upon receipt of Higgins' letter of acceptance, replied that it was too late, and there was no bargain. Dunlap thus virtually admitted that he was bound to wait until in due course of post an answer could come. He contended, however, that after having waited until that time, he was then released from all further obligation. Lord Chancellor Cottenham thought otherwise: "I cannot conceive how any doubt can exist upon the point. If a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day (*Chicago, etc., R. R. Co. v. Dane*, 43 N. S. 240. *Martin v. Black*, 21 Ala. 721. *Hugh v. Brown*, 19 N. J. 111. *Britton v. Phelps*, 21 How. (N. Y. Pr. 111,) has he not done everything he was bound to do? How can he be responsible for that over which he has no control? Common sense tells us that transactions cannot go on without such a rule."

Two years later the Supreme Court of the United States reached the same conclusion in *Taylor v. The Merchant's Fire Ins. Co.*, (9 Howard, 390.) The agent of an insurance company in a letter dated December 2, 1844, offered to insure Taylor's dwelling-house upon stated terms. Taylor did not receive the letter until the 20th, it having been misdirected. Upon its receipt an acceptance was immediately mailed. The agent received this letter of acceptance on the 30th but the building was destroyed by fire on the 22d. The company claimed that there was no insurance as the property had ceased to exist before they had acquired knowledge of the acceptance. The facts are almost identical with the Georgia case of *Levy v. Cohens*, (4 Ga. 1), and the conclusion reached was the same. Mr. Justice Nelson, in delivering the opinion of the court, said: "On the acceptance of the terms

proposed, transmitted by due course of mail to the company, the minds of the parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has the right to regard it as intended as a continuing offer, until it shall have reached him, and shall be in due time accepted or rejected."

Thompson v. James, (18 Dunlop 1), in its facts very much resembles *McCullough v. The Eagle Ins. Co.*, the defense being—1. That a letter of recall or revocation was delivered to the plaintiff before the letter of acceptance was delivered to the defendant. 2. That a letter of recall was posted not only before the letter of acceptance was received, but before it was posted. It was contended that under the state of facts this could be no contract, and an elaborate attempt was made to support the defense. Thus the whole question of contracts *inter absentes* was brought before the court, both as to the power of revocation and as to the time when an acceptance became effectual, and a contract complete. The authorities, ancient and modern, together with the *dicta* of the jurists and writers with weighty names of England, America, and continental Europe were cited and discussed. In this, as in nearly all the cases, we can detect the same underlying conviction, that the decision must be more upon a ground of convenience and necessity than principle. Neither the metaphysical requirements of the civilians nor the rigid morality of the later jurists are of any avail as against the belief that "no contract could ever be safely proposed by letter if the acceptance must arrive before the contract is completed." Upon this ground more than upon principle, it was held that the posting of the acceptance completed the contract and placed it beyond the power of either party to retract. The same was held in *Harris's case*, and may be considered as an established rule of law.

RULE 2. *The recall of an offer sent by mail, in order to be of any effect, must reach the party to whom it is addressed before an acceptance is mailed.* (Story on Contracts, § 498.) The principle we have found applying to an acceptance does not apply to a recall. Something more than a mere posting of the letter is required. The two things in their nature are different. The one consists in effectually undoing something which the party himself has done, and which binds him until it is undone; the other consists in merely accepting a proposal. By putting a letter in a post-office the acceptor has done all he was invited or required to do. (*Wheat v. Cross*, 31 Md., 99.) There is a manifest difference in principle between abstaining from and doing an act which would be necessary to be done before you could be held to have completed your act, and that which consists in a subsequent active interference for the purpose of undoing or counteracting the legal consequences of a thing you have already done. Hence it is necessary that a letter of recall in order to revoke

the previous offer must not only be mailed, but also delivered to the other party before his acceptance has been written and mailed. It has been argued against this that where the party making the offer has changed his mind and posted his letter of recall before the offer was accepted, the intention to contract cannot be held to continue until the time of acceptance, and hence at no moment of time was there *in idem placitum consensus, atque conventis*, which is said to be essential to an action; that the change of mind prevented the completion of the contract, the same as the death or the insanity of the offerer. (*Vide Thompson v. James*, 18 Dunlop, 1, argument of counsel). But death and insanity are not acts of the will and their effect does not rest upon a change of purpose. They intercept but do not revoke the transaction. The offer is considered as continuing with the letter until the time of its acceptance. The death or insanity of the party destroys the will altogether, and there plainly can be no contract. Revocation is an act of the offerer. Having communicated his offer to the other party, the offeree is entitled to regard that purpose as unchanged until the change is communicated to him. (*Rutledge v. Grant*, 4 Bing, 653. *Franklin v. Hobard*, 26 Vt., 452. *Beckwith v. Cheever*, 21 N. H., 41. *Barton v. Shotwell*, 13 Cush, 271. *Eskridge v. Glover*, 5 *Sted. & Pact.*, 464. *Honeyman v. Maryatt*, 21 Bea., 41. *D—— v. Cleavans*, 9 Shaw & Dunt., 190. In *Dickinson v. Dodds*, 2 Ch. D., 463, it was held that if the one who has made the offer disposes of the thing to which it relates, this is a withdrawal, although he does not expressly notify the other party. It is enough that the latter knows the fact). He has acquired a right which he will retain until it is actually withdrawn from him by a communication to that effect. Communicating a change of mind to a third party, or recording it in a formal writing, as a notarial instrument is of no avail as against the acceptor. In these cases a binding contract may be made without that *consensus* or *concursus* which a literal reading of the maxim would require. (Lord Hory in *Thompson v. James*.) The principle is clearly stated by the late president in *Thompson v. James*: "I hold that a simple, unconditional offer may be recalled at any time before acceptance, and that it may be so recalled by a letter transmitted 'post'; but I hold that the mere posting of a letter of recall does not make that letter effectual as a recall so as from the moment of posting to prevent the completion of the contract by acceptance. An offer is nothing until it is communicated to the party to whom it is made, and who is to decide whether he will or will not accept the offer. (*McKinley v. Watkins*, 13 Ill., 140. *Esmay v. Gowen*, 18 Ill., 483. *Brown v. Rise*, 29 Mo., 322. *Tuttle v. Love*, 7 John., 470. *Bruce v. Pearson*, 3 John., 470. *Tucher v. Wood*, 12 John., 190. *Shupe v. Galbraith*, 32 Pa. St., 10; *Eleason v. Henshaw*, 4 Wheaton, 225). In like manner I think the recall or withdrawal of an offer that has been communicated, or may be assumed to have been

communicated to the party holding the offer. An offer, pure and unconditional, puts it in the power of the party to whom it is addressed to accept the offer until by the lapse of a reasonable time, he has lost the right, or until the party who has made the offer gives notice—that is, makes it known that he withdraws it. The purpose of the recall is to prevent the party to whom the offer was made from acting upon the offer by accepting it. This necessarily implies precommunication to the party who is to be so prevented." (Ware, J., *The Palo Alto*, Davies, 343. *Vide Myers v. Smith*, 40 Barb., 614. *Frith v. Lawrence*, 1 Paige (N.Y.), 434. *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St., 339. *Wheat v. Cross*, 31 Md., 99. *Clark v. Dale*, 20 Barb. (N.Y.), 42. 1 *Parsons on Contracts*, 483. *Benjamin on Sales*, 33 and 50).

In *Byrne v. Seinhoven*, 5 C. P., Div. 344, decided in 1880, an offer was sent on the 1st of October and received on the 11th. An acceptance was immediately sent by telegram, and afterward by letter. It was held that the contract was complete and binding on both parties from the time the acceptance was sent by telegram, and that a letter of withdrawal posted by the offerer on the 8th, but which was not received by the offeree until the 20th was of no effect.

RULE 3. *An acceptance, in order to complete a contract, must be unconditional and in accordance with the terms of the offer.*

This proposition is supported by an unbroken line of decisions. The difficulty in all the cases is to determine whether certain letters form a contract. An early case of this kind was *Eliason v. Henshaw*, (—, 4 *Wheaton* 225), which was decided on the following facts: A wrote to B offering to purchase three hundred barrels of flour, to be delivered at Georgetown by the first water, stating the price he would pay, and requested an answer to be sent by the return of the wagon by which the letter was sent. The wagon was at the time in the service of B., and was used by him in carrying flour from his mills to Harper's Ferry, near which place A then was. The offer was accepted in a letter sent to Georgetown by the first mail, and was received by A at that place, but no answer was ever sent to Harper's Ferry. This offer was certainly accepted unconditionally, but not quite in the terms of the offer. The answer was sent to Georgetown by mail instead of to Harper's Ferry by the wagon. The effect was the same as A received the letter. The court held that there was not a contract. "It is an undeniable principle of the law of contracts," said Mr. Justice Washington, "that an offer of a bargain by one person to another, imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. (*Beardley v. Davis*, 52 Barb., 159. *Crook v. Cowan*, 64 N. C., 743.)

Any qualifications of, or departure from, the terms invalidates the offer—an acceptance communicated to a place different from that pointed

out, by the plaintiffs, imposes no obligation binding upon them." *Bethel v. Hawkins*, 21 La. Ann. 620.

In *Hatland v. Eyre* 2 Sim. & Stuart, 194, The Vice-chancellor said: "In order to constitute an agreement by letter, the answer to the written proposal must be a simple acceptance of the terms proposed, without the introduction of a new and different term. The defendant proposes to give the sum mentioned in the letter for the lease of the house, by which this is to be understood to mean, the lease which the plaintiff had, or was entitled to claim, from Mr. Barton (his lessor for a long term of years). The plaintiff in his answer does not consent to assign the lease from Mr. Barton on the terms proposed; but offers to grant an underlease on the same terms and clauses as the lease he holds from Mr. Barton. But the grant of an underlease is not the same thing as the assignment of an original lease; and the plaintiff's letter is not, therefore, an acceptance of the defendant's proposal, but introduces into the proposal a new and different term."

1. *Facts not constituting a contract.*—A, who was proposing to enter into the employ of B as salesman, wrote to B stating in detail the terms upon which he would be willing to contract. B answered in the following letter: "Yours of yesterday embodies the substance of our conversation. If you can define some of the terms a little clearer it might prevent mistakes, but I think we are quite agreed on all; we shall, therefore, expect you on Monday." The last sentence certainly looks like an acceptance, and, doubtless, such was B's intention at the time. But it was held not to be a contract. *Appleby v. Johnson*, L. R., 9 C. P. 158.

A wrote to B offering to take twenty guineas for a certain mare. B wrote in answer, "I will take the mare at twenty guineas, of course warranted, therefore turn her out as my mare. Meet me at West Wycombe and I will pay at once." B failed to be on hand with the money at this and two other appointments. He again wrote, "of course I mean to have the mare. My son will be at the West End on Monday and pay you for her. Say in the receipt sound, and quiet in harness." As answer to this A wrote, "I will send the mare as desired, she is warranted sound, and quiet in double harness." After a few days B returned the mare as being unsound: *Held*, That there was no contract. *Jordon v. Horbon*, 4 M. & W. 155.

consignments at that point A & Co. made an argo. B was their agent at Quincy. To secure

A & Co. were commission merchants in Chicago ranging with the bank by which the bank was to cash B's drafts on them. Thus matters continued until some difficulty arose when A. & Co. sent the following letter to the bank: "Change, January 15, 1876. Hereafter we will pay no drafts only on actual consignments. We cannot advance money a week in advance of shipment. The stock must be in transit so as to meet drafts same day, or the day after presented to us. This letter will cancel all previous

arrangements of letters of credit to B. Please acknowledge receipt of this." In reply the bank wrote: "Quincy, Jan. 17, 1876. Your favor of the 15th received. We have never knowingly advanced any money to B on stock to come in. Have always supposed it was in transit. Have always taken his word. After this we will require ship's bill." This closed the correspondence. Soon after the business of the firm of A & Co. passed into the hands of two clerks who knew of the correspondence, but was still conducted under the old name, and the bank had no knowledge of the change. (*Barnes v. Barron*, 61 N. S. 39. *Taylor v. Wetmore*, 10 Ohio, 490. *Hunt v. Smith*, 17 Wend., 179.) B finally decamped with the proceeds of a number of drafts, when it became important to ascertain whether the letter of the bank amounted to an acceptance. In order to see what these letters contain, note the following abstract: The original letter states: 1. In the future they will pay drafts only upon actual consignments of stock. 2. They would not pay money a week in advance of the shipments. 3. That the stock must be in transit. 4. That the letter was to cancel all previous letters of credit to B. 5. They ask an acknowledgment of the receipt of the letter. This was explicit enough. In reply the bank stated: 1. The letter was received. 2. Contents were noted. 3. That the bank had not knowingly advanced money to B on stock to come in. 4. That they had always taken B's word. 5. That in the future they would require "ship's bills" meaning bills of lading. Upon this state of facts the Supreme Court held that there was no contract, as the bank intended to require the "ship's bills" for its own protection and not for the protection of A & Co. *National Bank v. Hall*, 101 U. S., 43.

By the will of A, his brother was appointed executor and named as the legatee in the will after the payment of all debts. Letters testamentary were granted to B who gave bond with his two partners as sureties. B loaned \$5,000 of his brother's estate to the firm of which he was a member and the firm subsequently failed. B was removed from his trust as executor and C appointed in his stead. C, under the authority of the court, compromised with and released B as a debtor of the estate. The estate was represented as insolvent and commissioners were appointed to settle it. D, a creditor of the estate, whose claim remained unpaid, addressed a letter to B respecting it. B in his reply, after setting forth in detail the condition of the estate, said:

"And now if I should have the ability, it will be the first act I shall perform to place in their (his creditors) hands the amount which was lost by the firm of B & Co., which would have paid to them not far from two-thirds of their several claims." D brought a suit against B on this letter, alleging a promise by B to pay D's claim against the estate, and it was held that the action could not be maintained. *Tucker v. Houghton*, 9 Cush., 350.

A (October 20, 1862) wrote: "What will you

sell me 450 kegs of nails for, delivered at Bangor in the course of a month, cash down?"

B (October 23, 1862) wrote: "We will sell you 450 kegs common assorted nails, delivered on the dock at Bangor, at \$3.62 per keg of 100 pounds each, cash."

A (October 27, 1862) wrote in reply: "Nails have advanced so much I am almost afraid to buy; but you will send me as soon as possible 303 kegs and I will send you a check on Exchange Bank, Boston."

A (November 11, 1862) again wrote: "Not having heard whether you have shipped the nails ordered, I thought I would write you as we shall have but a few weeks more of navigation."

B (November 14, 1862) replied: "It will not be possible for us to get out the nails you have ordered, this month, as previous orders must take precedence. It is next to impossible for us to get out nails enough to supply our back orders, and we thought it best to write you, as navigation may be closed too soon for us to forward them this fall. We will, however, do our best to satisfy all our customers, and your order shall receive attention when we get to it." The only variance between the offer and the acceptance was in the number of kegs. This was sufficient to show that the minds of the parties did not meet. *Jennes v. Mt. Hope Iron Co.*, 53 Me., 20.

2. *Immaterial alteration.*—Where the variation between the acceptance and the offer is in regard to an immaterial matter, and will not introduce a new term into the agreement, it will not affect the contract. As for example, where a proposal by a purchaser to take the remainder of a lease was announced by a letter which, after acceding to the proposition, added: "we hope to give you possession by next half quarter day." *Cline v. Beaumont*, 1 De. G. & S., 397. So where an intended purchaser of property having made an offer for it, received an answer accepting the offer, and signifying a time for signing the contract. The purchaser's agent not having attended within the time mentioned, the vendor refused to complete the transaction. Naming a time for signing did not constitute a condition of acceptance, and hence the contract was completed. *Bonnawell v. Jenkins*, 38 L. R. (N. S.), 581. If the letters form in themselves a complete contract, they will take effect at once, notwithstanding a statement in the acceptance that a formal contract is to be drawn.

3. *Misunderstanding of the offer.*—Where there is a misunderstanding of the terms of the letter, as where there is an unconditional acceptance with an understanding different from that of the offer, in regard to a thing, or part material, there is a lack of the requisite mutuality of assent and no contract is made. There is merely a negotiation resulting in a failure to agree. *Abbott, C. J. Phillips v. Bristol*, 2 B. & C., 511, left it to the jury to find whether such a misunderstanding actually occurred, "as a test of the existence of the contract." "Conceding," said Swayne, *J. Ultey v. Donaldson*, 94 U. S., 49.

"that both parties have acted in good faith, it is clear that there was a misunderstanding between them as to the meaning and effect of the letter, and that the plaintiffs never understood and agreed to it as it is now interpreted and insisted upon by the defendants. The *aggregatis mentium* requisite to give that interpretation effect was, therefore, wanting."—*Western Jurist*.

CHAS. B. ELLIOTT.

CHECK—HOLDER OF—NEED NOT ENDORSE.

A. L. McCURDY v. THE SOCIETY FOR SAVINGS.

In Court of Common Pleas, Cuyahoga County, Ohio.

JONES, J.

In this case suit is brought by the plaintiff, A. L. McCurdy, against the Society for Savings on a check drawn by it on the National City Bank of Cleveland for the sum of \$2,000 in favor of Killian Slosser or order, and duly endorsed in blank by him. This check was duly presented by an agent of the holder for payment to said City Bank, which then and there had funds of the drawer in its hands, and the bank refused to pay the same unless the person who presented it for payment would endorse it. This, the holder refused to do, and at once caused the check to be protested for non-payment, and thereupon the plaintiff brought this suit against the Savings Bank as drawer of the check to test the question involved.

As the holder of a check has no recourse against the drawer of the same until it has been duly and properly presented for payment to the bank upon which it is drawn, and by it dishonored, the question is presented, was their such a refusal to pay, as amounted in law to a dishonor of the check, or, in other words, had the bank a right by law or usage to require the signature of the holder of such a check, or his agent, on its back as a condition of payment? We think there can be no room for doubt that when a promissory note, bill, or check is drawn payable to any named person or order, and it is endorsed in blank with the genuine endorsement of the payee of the bill, that the title of the note, bill, or check passes by delivery, it is payable to whomsoever becomes the holder of it, that he may bring suit thereon, that payment to such holder on such blank endorsement is authorized, and that such payment will exonerate the bank when made in good faith; neither is there any good reason to doubt that according to the law merchant, the rights of the holder of such a note, bill, or check so endorsed in blank, by the payee, is substantially the same, so far as the rights of the holder is concerned, as if it had been drawn payable to bearer. Says Mr. Parsons in his third volume on notes and bills, page 17, "such a note endorsed in blank is equivalent to a note payable to bearer." In each case the paper passes by delivery, in each case possession is evidence of ownership, and in each the liability of

the bank to pay does not depend at all on who is the owner or holder of it; its only concern is to satisfy itself that the check is genuine, that the signature of the drawer in the one case, and the indorser in the other, is the genuine signature of each. A bank is ordinarily presumed to know the signatures of its own customers and depositors; but it will not be seriously doubted that when a check is drawn on a bank, which is a stranger to the payee and his signature, that the bank is entitled to a reasonable time in which to ascertain the genuineness of the endorsement, before paying a check payable to his order; and, indeed, some of the authorities seem to justify a bank or banker in calling on the holder of such a bill or check, when it is reasonable to do so, to furnish proof that the endorsement is the genuine one of the payee; but in this case neither of these things was required or asked; there was no demand by the bank for proof of the signature, nor for a reasonable delay to satisfy itself of the genuineness of the endorsement, but there was simply an absolute refusal to pay, unless the person who presented the check would endorse it. That this refusal to pay without such endorsement is not justified by commercial law, is, we think, perfectly clear; it is an attempt to limit the negotiability of such paper, and to fix terms and conditions for its payment not warranted by the law or by the drawer of the check, and to which neither he nor the holder is obliged to submit. The implicit contract of a bank with its customers is to pay their checks according to the law merchant.

In 20th O. S. R. 234 it is said "The duty of a banker is to pay the bills and checks of his customers drawn payable to order to the person who becomes holder by a genuine endorsement." This was affirmed in 30th O. S. 1., and the court therein says: "We do not think that the right of the absolute owner of a fund to direct to whom a check drawn upon it shall be paid can be questioned;" and it necessarily follows that any person holding a genuine check with a genuine endorsement of the payee, is entitled to receive his money thereon without becoming an endorser thereof; and a refusal by the bank to pay without such endorsement is such a dishonor of the check as entitles the holder to bring suit against the drawer thereof, unless there is something in the usage hereinafter mentioned to modify the ancient law on this subject.

For it was alleged in this case on the part of the bank, and substantially proved in the trial, that there is now, and for many years last past has been, a local usage among banks and bankers, in all cases where the genuine signature of the payee endorsing the check is not known to the bank, to require the person presenting it, if not known, to be identified, and to endorse it before paying the check or bill to him; and it is probable from the evidence furnished in this case that the usage is broader even than this with many banks, requiring the endorsement whether the signature is known or not. To render a usage of a particular trade or business

or particular place valid and binding on the parties, it must be certain, established, uniform, reasonable, and not contrary to law.

And in harmony with these requirements we think it has been substantially settled by a strong line of decisions, that a local or general usage, at a particular place, the effect of which is to abrogate or control the settled general rules of commercial law, is inadmissible, to vary the rights of the parties to a contract. In a recent case in the Supreme Court of the United States, 10th Wallace 391, it is said "it is well settled that usage cannot be allowed to subvert the settled rules of law; whatever tends to unsettle the law, and make it different in the different communities into which the State is divided, leads to mischievous consequences, embarrasses trade, and is against public policy. In *Woodruff vs. Merchants Bank* 25th Wendell, 673, when it was sought to vary the commercial rule of three days grace, by proof of the usage of the city of New York, Judge Nelson held it inadmissible, and said "the effect of the proof of this usage, if sanctioned, would overturn the whole law on the subject of bills of exchange in the city of New York," and he added, "if the usage prevailed there it cannot be allowed to control the settled and acknowledged law of the State in respect to this description of paper."

This decision and one similar to it in "*Bowen v. Newell*," 4th Seldon, 190, was expressly approved by our own Supreme Court in "*Morrison v. Bailey*," in 5th O. S. R. page 18, in which Judge Bartley says: "It is also settled in *Woodruff v. Merchants Bank* and *Bowen v. Newell* that any supposed usage of banks in any particular place to regard drafts upon them payable at a day certain after date, as checks, and not entitled to days of grace, is inadmissible to control the rules of law in relation to such paper."

If the commercial law in regard to days of grace cannot be varied by proof of such usage, is it not quite as clear that the right of the drawer of a check to have it paid according to his order, or the right of a holder of it to be paid according to its terms without any new contract in regard to its negotiability or payment, cannot be affected or destroyed by such usage? Neither do I think it is clear that the usage is a reasonable one.

What good reason is there why a holder of such a note, bill, or a check shall be required to endorse a paper as a condition of getting his money when he is lawfully entitled to it without such endorsement?

It does not make the person's endorsement genuine if it was in fact forged, it does not increase his liability to the bank in such a case: it may cause the holder who is frequently a person who has no actual interest in the paper, to wit: an agent's attorney, trustee, etc., to run the risk of a liability by a fraudulent or improper resue of the note and bill with his endorsement on it; neither can it be fairly justified on the ground that the signature is in effect a receipt of the holder, that he has had the money. First,

for the reason that the possession of the bill or check is evidence of its payment.

Second. Because a party having the obligation of paying money cannot insist on a receipt as a condition precedent to payment. In *Longworth v. Handy*, 1st Disney, 75 Superior Court of Cincinnati, held, "it is no excuse for the refusal of attorneys to pay over money that his client refuses to give a receipt on settlement; the duty is absolute to pay on demand, and the law imposes no obligation on a party receiving money to give an acquittance."

Third. If it were reasonable to call for a receipt in all instances, it would not follow that there was a right to call for a blank indorsement.

I hold therefore that in this case there was a dishonor of the check, and that the drawer thereof is liable.

You may take a judgment against the Savings Bank for \$2,000 and interest from that time.

Mix, Noble & White appeared for the plaintiff.
I. E. Ingersoll for the defendant.

VIRGINIA MILITARY LANDS IN OHIO.

AN INFORMAL AND OPEN LETTER TO CONGRESS.

CIRCLEVILLE, PICKAWAY CO. O. JULY 10th, 1882.

Referring to Miscellaneous Document No. 42. Forty-seventh Congress, First Session, House of Representatives, June 23d, 1882, Referred to the Committee on the Judiciary and Ordered to be Printed.

This paper comes from the judiciary Committee, to whom was referred the Bill H. R., 5123, introduced by Mr. James S. Robinson, entitled, "A Bill in relation to Land Patents in the Virginia Military District of Ohio," and for which Mr. Taylor of said committee proposes the substitute, H. R., 6520, referred to the House Calendar and ordered to be printed June 16th, 1882, with the report submitted by Mr. Taylor, to accompany the said bill, pages 59 and 60 of said document.

This paper is a very full statement of the origin of the titles of those lands, by which it is clearly shown that the United States is the mere trustee of the legal estate in these lands prior to the emendation of the patent.

But many circumstances have conspired to prevent the said officers and soldiers, their heirs and assigns, whose military warrant, have been located in said district from perfecting their titles, so that it is said many tracts are still standing upon entry merely, and upon entry and survey, having never been returned to the General Land Office for patent, many perhaps from sheer dilatoriness by the confident occupant and locator or purchaser of the land, who never conceived for a moment that Congress had ever presumed to limit the time for perfecting title, and, in default, to declare their entries and surveys discharged from the satisfaction of the military warrants upon which they were founded.

But now having heard of the decisions by

Justice Matthews, as Judge of the Circuit Court of the United States for the Northern District of Ohio, W. D., August, 1881, in the case of Chamberlain vs. Marshall and others, pages 3-14, inclusive, and in the case of Fussell vs. Hughes, and same vs. Gregg, pages 15-22, inclusive, and that of the Commissioner of the General Land Office, Hon. N. C. McFarland, denying a patent on an entry and survey on a valid warrant, pages 34-39, inclusive, and the opinion of the Hon. Aaron F. Perry furnished to the Trustees of the Ohio Agricultural College, pages 39-46, all involving the validity of these locations and declaring them, under the Act of Congress of March 23d, 1804, forfeited to the Government of the United States and may be disposed of at her pleasure.

It is said that there are 130,000 acres of the best land in the Virginia Military District in Ohio falling within these decisions, worth perhaps with the improvements, \$50 per acre, and of the aggregate value of \$6,500,000.

If those decisions are the law of these locations, then the owners and occupants of them have no title, and a bill, in justice to these too confiding people, ought at once to be introduced into Congress and made a law, enabling them to perfect their titles by patent. Remember, it is here decided, that the land belongs to the United States, and it is conceded the statute of limitations does not run against the government. Neither the bill here presented as a substitute, or the bill of Mr. Robinson furnishes any relief, nor gives to the parties any title whatever in these lands.

The bill proposed as a substitute tends to befog what is already bad enough, God knows. What is wanted now, is a bill to clear up and perfect these titles and quiet them forever, and I propose the following as a bill that will cover the case:

A BILL

To give Effect to Patents Heretofore and Hereafter to be Issued for Lands in the Virginia Military District of Ohio, and to Enable the Owners of Locations to Complete their Surveys and have them Patented, and Repeal Parts of Certain Acts herein named.

Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That all patents heretofore issued, and which may be hereafter issued, for land in the Virginia Military District of Ohio, upon surveys legally made and returned to the office of the principal surveyor of the said district for record, on entries made on or before January 1st, 1852, and founded upon unsatisfied Virginia military Continental warrants are hereby declared valid, and the legal title to the land designated in such patents shall enure and become vested in the grantees therein named, their heirs or assigns forever, whether such grantees were dead or alive at the time the patents were or may be issued. Any omission heretofore to extend the time for filing plats, certificates and warrants, or certified copies of warrants, at the General Land Office to the contrary notwithstanding.

SEC. 2. That the officers and soldiers of the Virginia line on continental establishment, their heirs or assigns, entitled to bounty lands which have been entered on or before January 1st, 1852, within the tract reserved by Virginia between the Little Miami and Scioto rivers, for satisfying the legal bounties to her officers and soldiers upon continental establishment, may survey and complete the location of the same by returning them to the office of the principal surveyor of said district for record, and may file their surveys previously made as well as those made under this act, with their plats, certificates and warrants, or certified copies of warrants, at the General Land Office and receive patents for the same.

SEC. 3. That sections two and three of the Act of March 23, 1804, entitled; "An Act to ascertain the boundary of the lands reserved by the state of Virginia, north-west of the river Ohio, for the satisfaction of her officers and soldiers on continental establishment, and to limit the period for locating the said lands," and so much of any Act as Congress may have passed subsequent to said Act, limiting the time for surveying locations and returning surveys, plats, certificates and warrants, or certified copies of warrants, to the General Land Office for patent, be and the same are hereby repealed.

This bill will cover the necessity of the case, and have the effect to execute the trust confided to the United States by Virginia, do honor to Congress, and justice to the officers and soldiers their heirs and assigns, for whom the land was reserved, and who have owned, as they thought and have occupied these lands, some of them for a period of three-fourths of a century, and never suspected for a moment, until those adverse decisions, that they did not own the land on which they had spent the labors of their youth and lived to be old men and women.

All the doubt of the validity of these locations comes from the decision of a court, the opinion of a lawyer and the Commissioner of the General Land Office, construing said Act of Congress of March 23d, 1804, limiting the time to three years to complete locations, and to five years for returning them to the Secretary of the Department of War for patent; and declaring those tracts, the surveys whereof shall not have been returned within the time limited from the date of the Act, released from the claim for bounty land, as applying to locations made under the subsequent Acts, extending the time for making locations, etc., notwithstanding said Act of 1804, and as coming into force on the 1st day of January, 1852, and releasing from the the claim for

bounty land all those tracts the surveys whereof had not been returned to the General Land Office at the last-named day for patent. That those tracts had therefore lapsed, and had become a part of the public domain of the United States.

I pray you, not to accept the bill of Mr. Robinson, or the substitute of Mr. Taylor, or any other bill befogging the claim of these locators, or presuming to take from them their claim and transfer it to an intruder on a presumption of abandonment, or sale founded on the lapse of time merely, in the absence of any Act by which they could perfect their titles or, indeed, withdraw their location since May 20, 1826, (See U. S. L. L., Vol. I, p. 68, No. 112, Sec. 3; Taylor vs. Myres, 7th Wheaton, 23) and could not procure a patent because of the expiration of the time set apart for that purpose for more than a quarter of a century without the fault of the locator or his heirs or assigns.

The said Bill of Robinson and the substitute of said Taylor are both in violation of said trust, and would disgrace Congress, and do manifest injustice to the Revolutionary soldier, his heirs, etc.

JEREMIAH HALL,

Attorney for the Representatives of Aquilla Norvall and Others in interest.

CRIMINAL LAW—THREATS—SELF-DEFENSE.

KENTUCKY COURT OF APPEALS.

ALEXANDER ODER v. THE COMMONWEALTH.

June 22, 1882.

1. Mere threats furnish no legal excuse for taking life, even when such threats are made by the most lawless character.

2. A person is not bound to wait until actually assaulted, if he casually meets his enemy and has reasonable grounds to believe, and does believe, that his enemy has threatened, waylaid and attempted violence to him, and is about, then and there, to inflict on him loss of life or great bodily harm; but in such case he may lawfully use such force as shall be necessary to avert such impending danger.

"It is always a question for a jury to judge of the reasonableness of the apprehended danger, and the unforgotten belief of its existence by the person imperiled by it."

3. Such person may "carry arms openly" and keep a lookout for his enemy, or procure information of his movements in good faith, and alone for the purpose of guarding himself from surprise or being taken unawares.

4. One person has no right to seek another for the purpose of killing him, and cannot rely upon the law of self-defense to excuse his act, although he may have believed that he had been threatened, waylaid and assaulted by the deceased, who would at some future time execute his design to kill him.

5. Record cannot be amended by agreement between counsel for appellant and the Commonwealth, that certain instructions relative to reasonable doubt were given, but not embraced in the bill of exceptions.

6. Statements of accused, explanatory of certain movements and acts of his which he did shortly before the killing, were not competent.

7. Where acts are proven the jury are the judges of their meaning and object, disconnected from the explanation of them by the actor, unless they constitute part of the homicide.

The appellant, Alexander Oder, and Volney Hall were brothers-in-law, and the evidence tends to show that Hall's daughter, Mary, staid with Oder some two years.

About the time she left his house he told her father that he had discovered improper relations between her and a young man who was laboring for Oder.

Hall disbelieved the statement and imputed his daughter's misfortune to Oder if any had befallen her.

He threatened to kill Oder, waylaid him, assaulted him with a pistol, and sought an ex-convict, who testifies that he offered him \$500, which he refused to accept, to kill Oder.

The threats and lying-in-wait occurred several times, and were communicated to Oder, who armed himself with a shotgun, which he carried about with him.

He and a man by the name of Conrad came once or twice to Cynthiana together. Each time Conrad was seen at the depot. And on the morning of Tuesday, the 31st of May, 1881, Conrad went to the depot and Hall, who had been to Fayette County, got off the train. Shortly after the train arrived Oder went to a livery stable, where he had left his horse and buggy and shotgun, and got the gun. He then proceeded to Pike street. Conrad came by the stable, went on to Pike street and went down it on the opposite side from Oder, who came upon Hall in front of the postoffice, asked him "if he was ready," and while he was turning and before he got turned around, at a distance of fifteen or twenty feet, shot him through the heart, and after he fell, advanced a step or two and fired the other load of the gun into his head, tearing away the skull and leaving the brain exposed.

Conrad came across the street and said to Oder: "Come on, you have killed him." Oder immediately surrendered himself, and was subsequently indicted, and after having been tried once, which resulted in a hung jury, he was again tried, convicted and sentenced to the penitentiary for the period of fifteen years.

From that sentence he prosecutes this appeal.

On the trial the court instructed the jury, first as to murder, second as to manslaughter, third with reference to the doubt as to the degree of the offense, and fourth, in this language: "If the jury shall believe from all the evidence, that previous to the time of killing of the deceased, Volney Hall lay in wait for the defendant, and menaced and threatened to kill him and attempted violence upon his person with a deadly weapon, or did any or either of them, then he had the right to consider the same in

determining whether he was in danger of losing his life or suffering great bodily harm at the hands of Hall whenever with or near him. These alone will not excuse the killing, but the defendant had the right to bear arms openly, and when he met the deceased, if from such lying in wait, threats, menaces and attempted violence, if any, and from the circumstances attending the meeting, or if from the circumstances attending the meeting alone, he in good faith believed, and had reasonable grounds to believe, that he was there and then in danger of losing his life or of suffering great bodily harm at the hands of deceased, then he was not obliged to wait until he was actually assaulted, but he had the right to use such means as were at hand and as were necessary, or apparently necessary, to protect himself from such immediate danger, and if in doing so he shot and killed deceased, he is excusable on the ground of self-defense and should be acquitted, unless the jury shall believe from all the evidence, beyond a reasonable doubt, that at the time of the killing the defendant sought deceased, with the intention and for the purpose of killing him, in which case he is not entitled to an acquittal on the ground of self-defense."

By the terms of the instruction the appellant was excluded from considering the menaces, lying in wait and threats by Hall, unless the jury believed from the evidence, that they actually occurred.

While this proof would add weight to the claim of self-defense, yet they are not to be entirely cut out of the defense, unless shown to the jury to have existed.

The appellant had the right to consider the threats, which were heard and communicated to him by others, also the waylaying of him by Hall, which was known to others, who informed him thereof, whether he heard the threats or had personal knowledge of being waylaid by Hall or not, provided he in good faith believed, and had reasonable grounds to believe, from the circumstances as they appeared to him, that Hall had waylaid and threatened him, but in forming a belief, upon such information, the appellant must have acted at his peril and with the utmost good faith and been free from making such information a pretext to slay Hall; and the jury should have been so instructed and allowed to decide. The question is not whether the jury believed Hall threatened and waylaid the appellant, but whether the appellant believed, and had reasonable grounds to believe, he had done so.

The maintenance of self-defense in a court of justice, under such a state of facts as exhibited by this record, requires upon the part of the court the utmost care, so that the accused may not be deprived of its right, upon the one hand, and assassination excused on the other.

After a careful review of the authorities on the subject we declare the law to be this, that when a person has been merely threatened, by

even the most lawless character, it furnishes no legal excuse for taking his life.

But when a person has been threatened, waylaid, menaced and assaulted with a deadly weapon, and he afterwards casually meets his foe, if, from his character, antecedent conduct and the circumstances of the meeting and his presence, he believes, and has reasonable grounds to believe, judging thereof for himself, but at his peril, that his foe is about to inflict on him loss of life, or great bodily harm, or will then and there carry into execution his design to kill him, or do him such harm, unless prevented, he is not bound to wait until actually assaulted, but he may lawfully use such force as shall be necessary to avert such impending danger, but it is always a question for the jury to judge of the reasonableness of the apprehended danger, and the unfeigned belief of its existence by the person imperiled by it.

And in this connection, in view of the qualification added to the instruction quoted, it is necessary to determine the rights of the accused under an opposite tendency of the evidence from that contemplated by the qualification.

It must be accorded as a right, to which all citizens are entitled, that the accused "may leave his home for the transaction of his legitimate business, or for any lawful or proper purpose," and while so engaged, having reasonable grounds to believe, and in good faith believing that he had been threatened, waylaid and assaulted with a deadly weapon, he had the right to carry arms openly, and keep a look out for his enemy, or procure information of his movements in good faith, and alone for the purpose of guarding himself from surprise, or being taken unawares, and if, under such circumstances, a meeting casually occurs, then the law of self-defense applies in the same manner, under similar circumstances, as indicated where the meeting is casual, and without precautions against surprise, further than being armed for the purpose of self-protection.

But in no state of case is one person allowed by law to hunt down, or seek another for the purpose of killing him, and in pursuance of such an intention, accompanied by such an act, take his life; hence if the defendant sought the deceased with the intention of killing him, or purposely brought about the meeting between them or made his presence a mere pretext for slaying him, he cannot rely upon the law of self-defense to excuse his act, although he may have believed that he had been threatened, waylaid and assaulted by the deceased, who would, at some future time, execute his design.

It will be seen from this view of the law that the instruction was erroneous in two aspects, first, in making the right of the appellant to rely upon the threats and waylaying of him by deceased dependent on the establishment of their existence to the satisfaction of the jury by the evidence; second, in not informing the jury in connection with the qualification that the accused had the right to keep a lookout for the

deceased or procure information of his movements for the sole purpose of avoiding a surprise.

It is agreed by counsel for the appellant and the commonwealth, that certain instructions relative to reasonable doubt were given, but not embraced in the bill of exceptions, and that if they have the lawful right to consent to the amendment of the record, they will freely do so. We know no law that authorizes the record to be amended in this manner. If such a practice were adopted in cases of this character authority of counsel might be disputed by his imprisoned client after a tentative submission and hearing of his cause had proved disastrous, and in case of bad faith upon the part of counsel no protection might be in the reach of the accused until too late to save him from punishment, and thus embarrassment would be the consequence of its adoption.

The appellant objected to the testimony adduced by the commonwealth as to what Conrad did in his absence.

The objection was properly overruled because this evidence was competent as tending to show that the appellant had an opportunity to know that Hall had arrived and got off the train and was then in town. The conduct of Conrad, and the motive and purpose he had in going to the depot, was for the consideration of the jury. Whether he went there of his own volition, or at appellant's instance, either for a lawful or unlawful purpose, should have been left to the jury under proper instructions, which would have allowed them an unqualified opportunity of determining the true nature and purpose of what he did.

Appellant's statement explanatory of certain movements and acts of his, which he did shortly before the killing, were not competent, but as a new trial is bound to be given to him, we forbear expressing any reasons for this view except to say that where his acts are proven the jury are the judges of their meaning and object disconnected from his explanation of them unless they constitute part of the homicide, which is the main fact in issue.

Wherefore the judgment is reversed and cause remanded, with directions to grant appellant a new trial.

SUPREME COURT OF ILLINOIS.

TAXATION—LICENSE FEE ON DOGS— NOT A TAX—POLICE POWER OF THE STATE.

PHILIP COLE ET AL., v. JOHN HALL, COLLECTOR.

May 12, 1882.

The license fee imposed on the owners of dogs, under the act of 1879, entitled "An act to indemnify the owners of sheep in cases of damage committed by dogs," is in no sense a tax, and is therefore not within the constitutional provision that all needful revenue shall be raised by levying a tax by valuation. Such fee is imposed under the police power, and not under the taxing power of the State.

Everything hurtful to the public interest is subject to the police power of the State, and may be brought within restraining and prohibiting influence. Therefore the act authorizing a license fee to be imposed upon and collected of the owners or keepers of dogs is not subject to any constitutional objection.

The matter of imposing a license fee upon the owners or keepers of dogs is sufficiently expressed in the title of the act entitled "An act to indemnify the owners of sheep in cases of damage committed by dogs."

SCOTT, J.

The bill in this case was brought by owners of dogs, resident in the town of Serena, against the collector of taxes for the town, and is to enjoin the collection of a "license fee" of one dollar on each dog owned by complainants, respectively, and which was imposed by the proper authorities under the act of May 29, 1879, entitled "An act to indemnify the owners of sheep in cases of damage committed by dogs." It is not questioned the statute has been complied with by the proper authorities in charging the "license fee" upon complainants for dogs owned by them, but the questions argued have exclusive reference to the constitutionality of the act under which it is sought to be imposed.

The "license fee" imposed under the provisions of the statute is in no sense a tax, and is not therefore within the operation of section 1, art. 9, of the constitution, which provides all needful revenue shall be raised by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to his, her or its property, and hence all questions as to the value of property to be taxed are of no consequence in this case. It is simply what it purports to be, a "license fee," and is imposed under the police power, and not under the taxing power of the State. Undoubtedly "dogs" are regarded as species of property for some purposes, but owing to their habits, which are known to be hurtful sometimes to persons and to some kinds of domestic animals, the keeping of them may be the subject of regulations provided by law. Everything hurtful to the public interest is subject to the police power of the State, and may be brought within its restraining or prohibitory influence, otherwise a public evil might exist, with no power to abate it. This ought not to be. It is known that "dogs" often impart a most fearful disease to persons injured by them, and that they are oftentimes destructive to domestic animals, such as sheep, and the State may well provide such regulations for the keeping of them as will insure safety, and may, with a view to effectuate that purpose, impose upon the owners or keepers either a license or a penalty. There is nothing in the constitution that forbids it.

As to the objection the matter of imposing a "license fee" upon the owners or keepers of dogs is not expressed in the title of the act, a majority of the court are of opinion it is sufficiently germane to the subject expressed as to be fairly embraced in it, and that under the decision of this court in *Johnson v. The People*, 83 Ill. 431, answers the constitutional requirements in this regard.

It would seem it can make no difference what

disposition is made of the "license fee" when collected. By the provisions of the act it is appropriated as indemnity to persons that have sustained damage done by dogs, other than their own, to sheep, and that would appear to be in the interest of justice and right. No better disposition could be made of it.

The demurrer to the bill was properly sustained, and the decree of the circuit court will be affirmed.

Decree affirmed.

AGREEMENT—SETTLEMENT.

SUPREME COURT OF MINNESOTA.

SCHWEIDER v. LANG.

July 3, 1882.

An agreement between the maker and holder of a note not due, that the former will pay and the latter receive a sum less than the unpaid amount called for by the note in full satisfaction of the same, is valid.

If the maker duly offer to perform on his part, and the payee refuses to perform on his part, an action lies by the former for the damages resulting to him from the breach of contract by the latter.

BERRY, J.

On September 27, 1881, defendant, as payee, holding plaintiff's promissory note upon which there was an unpaid balance of \$1,850, falling due November 10, 1882, with interest to accrue, they agreed as follows: Defendant agreed to accept \$1,750 in full satisfaction of the balance of principal and interest called for by the note; \$150 to be paid by plaintiff within one week and \$1,600 within two weeks from said September 27; the note to be thereupon delivered up and a mortgage securing the same cancelled. Plaintiff agreed to raise the \$1,750 and pay the same to defendant as above specified. It was subsequently mutually agreed that defendant should call upon plaintiff at his residence, within a week from September 27th, to receive the \$150 payment, plaintiff to have the same there in readiness. Plaintiff had and kept the \$150 in readiness during the week; but defendant failed to call for it at any time, and plaintiff was unable to find him during the week mentioned. Within two weeks from September 27th, plaintiff, after much expense and trouble, procured the sum of \$1,600, and on October 10, 1881, duly tendered the sum of \$1,750 to the defendant in fulfilment of his (plaintiff's) agreement, and requested defendant to fulfil on his part. Defendant refused to receive the money or to perform his part of the agreement, having on October 1st, without plaintiff's knowledge, sold and transferred the note and mortgage to a third party, to whom plaintiff became thereby bound to pay the full unpaid amount called for by the note.

Plaintiff brings this action for damages for breach of contract. The agreement between the parties was not for the sale of the note and mortgage, but one by which the maker of these instruments was to be discharged from liability thereon

by the payee. The agreement is, therefore, not within the statute of frauds, so as to be required to be in writing. The agreement is what is known as an accord executory; that is to say, it is an agreement upon the sum to be paid and received at a future day in satisfaction of the note. If the accord had been executed there would have been a satisfaction extinguishing the note, the case being taken out of the rule by which payment of a part is held insufficient to satisfy the whole of a liquidated indebtedness by the fact the payment was to be made before the indebtedness fell due. *Sonnenberg v. Riedel*, 16 Minn. 83; *Brooks v. White*, 2 Metc. 283.

The case is, then, one of a promise on the part of the plaintiff to do something of advantage in law to the defendant, and on the part of the defendant to do something of advantage in law to the plaintiff—a case of mutual promises, one of which if the consideration of the other. The agreement was valid and binding upon both parties. The plaintiff has duly offered to perform on his part. The defendant has refused to accept the proffered performance, as also to perform on his part at plaintiff's request, and has moreover disabled himself from performing by disposing of the note. The plaintiff is, therefore, in accordance with the general rule which gives damages for breach of contract, entitled to recover the damages which have resulted to him from this breach by defendant. *Billings v. Vanderbeck*, 23 Barb. 546; *Scott v. Frank*, 53 Barb. 533; *Vesey v. Levy*, 13 How. 345.

The order overruling the demurrer is affirmed.

Digest of Decisions.

INDIANA.

(Supreme Court.)

SCARCE v. GALL.

Promise for benefit of another—Novation.—The complaint of appellee alleged that he had a judgment lien on real estate senior to a mortgage held by appellant; that one Haverstick sold the land under a mortgage prior to both, and that appellant purchased from the latter his certificate of purchase, and in consideration of the sale agreed, in writing, to pay appellee's judgment.

Held: The contract could be enforced. A written promise, founded upon a new and valuable consideration, to pay the debt of a third person, is valid, although there is no release of the original debtor. The consideration of the promise made to Haverstick for the benefit of the appellee was the assignment of the sheriff's certificate.

Judgment affirmed.

Ohio Law Journal.

COLUMBUS, OHIO, : : AUGUST 3, 1882.

A SOMEWHAT novel proceeding was heard last week in the Circuit Court of Fairfax County, Va. John Johns, who is contesting the will of his father, the late Bishop Johns, of Virginia, in the Baltimore courts, sued for an injunction to restrain the circuit clerk of Fairfax County from furnishing the Baltimore court with a copy of proceedings showing that the will was properly probated in Virginia. This is certainly an original method of interposing objections to testimony. The decision upon the application for injunction is not announced.

THE AMERICAN BAR ASSOCIATION.

The Fifth Annual meeting of the Association will be held at Saratoga, August 8th, 9th, 10th, and 11th, 1882.

The opening address will be by Hon. Francis Kernan, Vice President, acting, by request of the Executive Committee, in the place of Hon. Clarkson N. Potter, deceased.

During the sessions of the Association the following papers will be read: "The Doctrine of Punitive Damages, and its Effect upon the Ethics of the Profession," by Gustave Koerner, Esq., of Illinois; "The Civil Law, as transplanted in Louisiana," by Thomas J. Semmes, Esq., of New Orleans; "The Laws governing the Issue and Collection of Municipal Bonds," by J. B. Henderson, Esq., of Missouri; and "Trial by Jury, its Defects and their Remedies," by Isaac M. Jordan, Esq., of Ohio.

The Annual Dinner will be given at the Grand Union Hotel, at 8 o'clock P. M., on Friday, August 11th.

CONSPIRACY.

The Star-Route cases may afford an excellent opportunity to clear up some of the fog which encumbers the legal idea of conspiracy, but whether the opportunity will be improved remains to be seen. We all know how largely the cases in England which fall under this head have been colored by the character of contests between citizens and the monarchical government; and conspiracy has come to suggest inevitably to many minds the idea not only of acting in concert in a criminal purpose, but also the idea of deliberately and expressly concerting such

action by meeting and interchanging views in advance. The popular notion of conspirators enters to a considerable extent into the legal notions entertained in the profession; and is thought to imply a meeting of those in the combination—a mutual communication of their purposes, a joint contriving of the means by which the purpose shall be carried out, and all this under a secrecy indicating consciousness of danger and of guilt.

In truth, the legal doctrine of conspiracy in our law involves nothing more than intelligent pre-concert for the sake of effecting the criminal purpose. It does not require subterranean meetings, nor dark lanterns, nor pass words, nor, indeed, any of the incidents of express confidence, either as to the result to be attained, or as to the means to be used. It is enough that the parties understand each other; that they are possessed of a common purpose, and that each is sufficiently conscious of the purpose of the other to expect co-operation, and that their action is thus intelligently though it may be silently concerted. If the confederates are inexperienced in crime, they may require actual meeting, common deliberation, and express concert. If they are old offenders, they may understand each other with scarcely a word, and form the same common purpose of co-operation in the same illegal purpose, and with the same mutual reliance, but with more interchange of expressed intention than old partners with cards, or young people playing "hunt the slipper." The degree to which express interchange of idea and expressed intention between them will exist has nothing to do with the legal question of conspiracy, although it ordinarily has much to do with success in convincing a jury with the popular notions to which we have alluded. The degree of such interchange depends upon the novelty of the enterprise and the intimacy of the participants. There are plenty of pals among the rogues of New York with whom a wink or a nod might be all the communication between the two necessary to the working up and carrying into effect of a conspiracy; and if, where this was all that could be shown, it might be impossible to convict, it would not be because the legal elements of a conspiracy essentially require anything more, but because a charge of conspiracy is one which in the popular mind raises the expectation of something more. The characteristic element of conspiracy is not found in every crime committed by a combination of men, it is true, but on the other hand, it is found in many crimes committed without previous intercommunication of plot and scheme expressed in language and in the assigning of parts. Whether these are involved or not, the real question is whether there was intelligent pre-concert of action.

We do not suggest or infer anything in the present state of the case as to the merits of the controversy on trial at Washington, but the discussion of the legal question which is now going on is calculated to present this aspect of the case

and may perhaps admonish prosecuting attorneys of the peculiar difficulty of practicality attending indentments of this character.—*N. Y. Daily Register.*

LIABILITY OF PRINCIPAL FOR USURIOUS LOANS MADE BY AN AGENT.

Usury is defined to be "The excess over the legal rate charged to a borrower for the use of money." (2 Bouv. L. Dic. 629.) Originally the word was applied to all interest reserved for the use of money. Blackstone says: "A capital distinction must therefore be made between a moderate and exorbitant profit; to the former of which we usually give the name of interest, to the latter, the truly odious name of usury; the former is necessary in every civil state, if it be but to exclude the latter, which ought never to be tolerated in any well-regulated society. For, as the whole of this matter is well summed up by Grotius, 'If the compensation by law does not exceed the proportion of the hazard run or the want felt by the loan, its allowance is neither repugnant to the revealed nor the natural law; but if it exceeds these bounds it is then oppressive usury; and though the municipal laws may give it impunity, they can never make it just.'" (2 Bla. Comm. 456.)

In the third of the twelve tables it is said: "Let him who takes more than one per cent. interest for money be condemned to pay four times the sum lent." (Coop. Just. 658.) In the English statute of 12 Anne, stat. 2, ch. 16, it was enacted that all bonds, contracts, and assurances whatsoever, made for payment of any principal, or money lent, whereby usurious interest taken or received, shall be utterly void. A bill or note was held under this statute to be void for usury, even in the hands of an innocent holder. (Cuthbert v. Haley, 8 Term Rep. 390; Low v. Waller, Doug. 735; Ferrall v. Shaen, 1 Saund. 295; Parr v. Eliason, 1 East, 92.) By the statute 58 Geo. III, ch. 93, it was enacted that all bills and notes thereafter made upon usurious consideration or contract should not be void in the hands of an endorsee for valuable consideration, unless such endorsee had actual notice of the usury before paying the consideration. The statute of 1787 of New York, for preventing usury, declared that all bonds, bills, notes, contracts, and assurances whatsoever, made or taken upon an usurious consideration, shall be utterly void. It will be seen that this statute included bills and notes by name which were not designated in the statute of Anne, but held by the courts to be within its provisions.

In 1830, the Legislature of New York adopted the English statute of 58 Geo. III., above referred to, and this act continued in force until 1837, when it was repealed. By this repeal, commercial paper in New York founded on a usurious consideration was void, even in the hands of a *bona fide* holder. And the party guilty of usury seems to have been liable to a criminal prosecution. These facts must be borne in mind in con-

sidering the New York cases, and those from States having similar statutes.

In the case of Meagoe v. Simmons, (1 Moo. & M. 121,) the action was brought by the endorsee against the acceptor of a bill of exchange, for £1,000. The defense was, that the bill had been usuriously discounted by the plaintiff through the agency of one Coates. It was clear, from the facts, that Coates, who had procured the discount for De Lisle, the payee of the bill, had withheld from him £100 by way of premium for procuring the discount. But it was doubtful whether the plaintiff had retained any part of this sum, or whether he was cognizant of the agreement between Coates and De Lisle that anything beyond legal discount had been retained; the defendant endeavored to make out that Coates was the agent of the plaintiff, and the plaintiff that he was the agent of De Lisle only. Lord Tenterden, C. J., in summing up to the jury, said: "I give it my opinion in point of law, most distinctly, that if the plaintiff caused this transaction to pass through the hands of Coates, in order that he might receive from De Lisle the premium over and above the regular discount, there is usury, and the plaintiff cannot recover, though he himself retained nothing beyond the legal discount. If he has engaged, beyond the regular discount to himself, for Coates's benefit, that he should receive the payment, then the transaction is unlawful, and your verdict must be for the defendant." The jury found for the defendant.

In Large v. Passmore (5 Serg. & R. 51,) the plaintiff advanced money to the defendants, in consequence of which he received a mortgage of real estate and a pledge of goods. He had, besides, undertaken to procure a discount for the defendants of \$60,000, in notes of Edward Thomson. For these considerations it was agreed that John Large was to have a commission of two and a half per cent. on all property placed by the defendants in his hands, as well as upon Mr. Thomson's notes of \$60,000, leaving out the amount of \$37,000 if the same was paid when it became due. The court say: "Where money has been loaned, it is so easy to cloak usurious interest under the name of commission that the law contemplates it with a jealous eye. In the case of French v. Baron (2 Atk. 120,) there was a private agreement between mortgagor and mortgagee, that the latter should have 'commission for his trouble in receiving the rents and profits.' This might not be usury, strictly speaking, but Lord Hardwicke refused to allow the mortgagee any more than his principal and interest." The commission on the notes was not allowed.

In Grubb v. Brooke, et al., (47 Pa. St. 485,) three judgments had been obtained against the defendants, amounting to the sum of \$30,000, on which executions were issued, and their property, an ore bank on Chestnut Hill, advertised to be sold. A proposition was made to the parties, by the firm of Brooke & Coates, to the effect that they would advance a certain sum in coal,

and give their notes and acceptances for the balance of the indebtedness; and when the amount due on the judgments was fully paid, they were to be assigned to them and held for their use. On the part of the defendants it was agreed that they would consign iron to the plaintiffs to sell on commission, to enable them to meet these notes and acceptances as they came due. The judgments were all paid and assigned to Brooke & Coates, but as the quantity of iron was not furnished, they sued out executions to collect the balance claimed to be due them. Brooke & Coates had rendered to Grubb & Company periodical accounts charging them with interest on the balances due them, with an additional two and a half per cent. as commission on advances, according to the alleged custom and agreement of the parties. The court say: (47 Pa. St. 488,) "The defendants object to this (the commission,) as usurious, and we think it is." (*Large v. Passmore*, 5 Serg. & R. 51.)

In *Pearson v. Bailey*, (23 Ala. 537,) it was alleged that the complainant borrowed \$300 from James M. Pearson, at sixteen per cent., and to secure its payment executed to him notes amounting in the aggregate to the sum of \$348, which were payable December 25th, 1842; that in the spring of 1843 the original notes were taken up and new notes for the sum of \$307 made in lieu thereof, payable to John R. Slaughter, to draw interest at twelve per cent. It was alleged that the complainant had made various payments on the debt, but on the 10th of October, 1845, Pearson claimed there was still due the sum of \$418. This sum was secured by a mortgage containing a power of sale, and in December, 1847, the complainant paid Pearson \$196 on the debt, and in February following, the further sum of \$25. The action was for an account, and to have the mortgage declared satisfied. The court say: (23 Ala. 541, 542,) "The answer of James M. Pearson, the principal actor in the usurious contract, does not deny the rate which was agreed upon between himself and Bailey when the loan was effected, as it is charged in the bill, but admits that it was stipulated that the borrower was to pay sixteen per cent. for the loan, which was reserved in the notes given at the time; but he seeks to avoid the force of our statute against usury by stating in his answer that the money loaned by him to Bailey was not his own, but belonged to Mrs. David, in the State of Georgia, who had deposited it with him for the purpose of loaning it out, but that he has been compelled to pay it to her. This, we apprehend, will not be allowed to change the nature of the contract; it is as clearly usurious when made by him under pretence of agency for another as though he stood alone in making it. But in such case the plea of usury can avail nothing in removing the unlawful character from the transaction. The law forbids the making of a usurious contract, and no one has authority to give authority to another to do an unlawful act. The parties in such case are all principals. But in this case it does not appear that Mrs. David ever di-

rected Pearson to lend her money on a corrupt and usurious agreement; his authority, according to his own showing, was to lend it out; and this must be held to mean only such loaning as is sanctioned by law. If he should go further, and loan it on an usurious contract, he exceeds his authority, and if not afterwards sanctioned by his principal, and loss result, he is liable to her. But no consideration arising out of the relation of principal and agent could divest the loan of its usurious character or deprive the borrower of his right to set it up against the lender in any proceeding against him on the usurious contract."

In *Steele v. Whipple*, 21 Wend. 103 where the holder of a note, payable to himself, requested another person to procure the note to be discounted, who, by placing his name upon it as an indorser, procured it to be done, received the avails, and paid over the same, except the sum of \$30, which he retained for his indorsement and trouble in the matter, it was held that the transaction was usurious and that the usury might be alleged in bar of the subsequently substituted note.

In *Condit v. Baldwin*, 21 N. Y. 219 the plaintiff, a resident of New Jersey, placed in the hands of one Williams, an attorney-at-law in Wayne County, New York, \$400 to invest for her at lawful interest. One Baldwin, a resident of Wayne County, applied to one Mills, a resident of that county, to procure a loan for him of \$400, for two years, on his note. Mills applied to Williams for the loan. Williams stated that he preferred to loan the money on bond and mortgage, as in that event he would be paid for drawing the same and for examining the title. An arrangement was then entered into whereby Mills promised to pay Williams \$25 as attorney's fees. Mills then received \$400 from Williams and paid it to Baldwin, and charged him \$40 for his (Mills') services. Of this sum Mills paid \$25 to Williams. It was held by a divided court that this did not constitute usury.

In the majority opinion it is said: (21 N. Y. 223.) "Williams availed himself of his position as the plaintiff's agent, to make a contract on his own account and for his own individual benefit. In thus dealing he did not act nor assume to act as the plaintiff's agent. He required compensation for a service which he alleged he rendered to Baldwin. It was his individual affair, not that of the plaintiff; and if it was a shift or device on his part to take and receive usurious interest to himself on this loan, he has subjected himself to the penalties of the statute. (3 Hawks, 28; *The Commonwealth v. Frost*, 5 Mass. 53.) It was conceded on the argument that the plaintiff had not subjected herself to an indictment for misdemeanor; that she was not liable *criminaliter* for these acts of her agent. Does not this concede too much on the part of the defendants? Is it not a concession that she has not taken and received any usurious interest on this loan? If so, how can it be contended that she has forfeited her money loaned, so far

as she is concerned legally? The agent has taken and received the gratuity or usury, and not the principal."

It is evident that the arrangement to pay Williams \$25 as a bonus for the loan was made without the knowledge or consent of the principal, and this fact seems to have been conceded. And the court lay great stress upon the fact that "she has not subjected herself to an indictment for misdemeanor; that she was not liable *criminally* for these acts of her agent," and ask, Is it not a concession that she has not taken and received any usurious interest in this loan? The majority of the court assume that because an indictment would not lie against the principal, that, therefore, there was no usury in the transaction. That this position is untenable will readily be seen. A principal would not be criminally liable for the criminal acts of an agent acting under either general or special employment, unless the principal commanded, advised, or consented to the agent's acts. But if the principal claims the benefit of a bargain made for him by an agent, he takes it subject to the means employed by the agent to bring it to a consummation.

This will be more fully discussed hereafter. Comstock, Denio, and Welles dissented. In the able dissenting opinion of Comstock, C. J., it is said: (21 N. Y. 229.) "Only one contract was made which embraced the whole transaction. There was no agreement between the plaintiff, through her agent, and the borrower, to lend \$400 at lawful interest, and then a separate and distinct agreement between the agent and borrower for the extra \$25. It was all included in one contract. The agent said in substance: 'I will lend you the \$400, if, besides the legal interest which you pay to my principal, you will pay to me the sum of \$25.' This was a single indivisible proposition, and as such it was accepted by the borrower. In consideration of the loan he agreed to repay it at a certain day with interest, and he agreed also to pay \$25 more to the lender's agent. Here was one consideration and one agreement. That agreement might all have been expressed in one or two writings, or it might have been without any writing. In fact, one of these premises was evidenced by a promissory note, the other rested in parol. These circumstances are immaterial. There was but one original agreement, which included the whole subject. When there is usury at the root of a transaction, it has never before been thought that the merely formal separation of the borrower's contract into different parts could take the case out of the statute." This case was followed in *Bell v. Day* 32 N. Y. 165 (Davis and Brown JJ., dissenting) and *Esterez v. Purdy*, 66 N. Y. 446 as stated in the opinions, upon the principal of *stare decisis*. In the case of *Philo v. Butterfield*, 3 Neb. 556 where the borrower employed an agent and paid him the sum of \$50 to obtain a loan for him, it was held that the person lending the money was not chargeable with usury.

In *Cheny v. White*, (5 Neb. 261) one White applied to Perkins, an agent of Cheny, for a loan of \$500. The loan was obtained for five years, at seventeen per cent. per annum, with an additional charge of \$15 as commissions of the agent for doing the business. It was held that the principal was bound even if he had no knowledge of the unlawful agreement, and derived no advantage from it. In *Cheny v. Woodruff*, (6 Neb. 151) the agent who made the loan testified that he acted as the agent of the borrower in procuring the loan and as the agent of the lender after the loan was affected. It was held that the principal was bound by the acts of the agent. In *Olmstead v. New England Mortgage Security Company*, (11 Neb. 487), a loan of \$350 was contracted for, and a promissory note and mortgage to secure the same were made for that amount, but the plaintiff was paid only the sum of \$250. The business, both before and after the loan was made, was transacted by one A. W. Ocabock and the Corbin Banking Company. It was held that the principal was affected by the usury. In the case of *Acheson v. Chase*, (9 N. W. Rep. 734), it was held by the Supreme Court of Minnesota, that the principal was not affected by a usurious loan made by his agent.

In the case of *Payne v. Newcomb et al.*, (16 West. Jur. 89), decided by the Supreme Court of Illinois, in November, 1881, it appears that one Mary M. Payne was the owner of about four hundred acres of land in Livingston County, in that State, and that in the year 1867 she and her husband applied to Newcomb, a loan-agent in Chicago, for a loan of \$2,000. He loaned them the money, taking their note, payable to Herick Stevens in two years, with ten per cent. interest, semi-annually, the notes being secured by a trust-deed for the land to one Pierce, with a power of sale. The plaintiffs subsequently procured other loans, in all about \$6,630, and gave other notes and trust-deeds. When each loan was made, Newcomb deducted from the amount five per cent., which he claimed as commission for procuring the loan. There were several extensions of the time for payment, and when they were made he charged two and one-half per cent. for procuring them. When interest was not promptly paid it was compounded at the rate the notes bore.

The plaintiffs paid in all about \$5,800 on the debt, yet on the 1st of November, 1877, Newcomb furnished a statement to them, in which he claimed there was still due \$11,967.17.

A sale of the land being about to be had under the trust-deed, the plaintiffs filed a bill to enjoin the sale, and for an account to ascertain what was equitably due after deducting usury and illegal charges. The Circuit Court dismissed the bill, and, on appeal to the Appellate Court, the decree was affirmed. In the Supreme Court the defendants insisted that Newcomb was not the agent of Stevens when the several loans were made, but was the agent of the plaintiffs, and had a legal right to charge them for such services.

In his examination, Newcomb testified that, "In making loans in this State, in the usual course of business, a loan-agent, for the commission he gets, has to first find the money; learn and know all about the property; often go on it; examine the title and see to the collection of the interest and principal when due. If the title proves defective, and it is shown that the agent has not been careful enough, or should have known about the defects before making the loan; or if the property is valued too high, whereby losses ensue, it is understood that the agent makes himself personally liable. * * * I had to submit to him (Stevens) the application for every one of these loans, and afterwards sent him Payne's letters. I became his agent immediately after he agreed to make the loan, in looking after it. I stated in my direct examination that if I made any mistakes in examining the title he would have held me for it." He further testifies that he had been a loan agent since 1854; that he commenced making loans to Stevens in that year, and had so continued up to the time he testified—more than twenty years.

The court say: "From all of this testimony we are compelled to believe that Newcomb was the agent of Stevens from the time the application was made for the loan. The whole transaction is not susceptible of any other construction. It is apparent that Stevens regarded and relied on Newcomb as his agent, and would have held him liable for loss growing out of neglect of duty. Newcomb testifies that Stevens would have held him liable for a mistake in examining the title. If so, then he was Stevens' agent, as well before as after the loans were made, and no such distinction can be reasonably drawn as that Newcomb was Payne's agent before, and Stevens' after the loan was made. * * * It is, however, claimed that Stevens is not liable for what Newcomb retained and charged for what is called commissions; that he had the right to charge any sum he chose, and that would not render the loan usurious. Had Stevens not known that Newcomb was making such charges it may be that he would not have been affected by them. But here it was agreed between Stevens and Newcomb that the latter should charge a commission of the borrower to pay him for his services. Stevens obtained the services of Newcomb; they were of value to him and no one will pretend that Newcomb rendered them as a gratuity. They were rendered for Stevens and they were paid for by him, by indirectly charging the amount to and requiring the borrower to pay it, and this, too, by the express authority of Stevens. Had he directed Newcomb to loan at fifteen per cent. for the first year, and ten per cent. for each succeeding year, and to retain five per cent. on the loan for the first year, and two and one-half per cent. for renewals and extensions, and to retain the extra per cent. above ten per cent. as compensation for his services, would any one say that was not usury? And in what does the transaction differ by the form given it

by the agreement of the parties? In each case Stevens would get Newcomb's services and compel the borrower to pay for them. There is no more familiar rule in the law, than that the usury laws cannot be evaded by mere pretences, shifts, or evasions." (See also *Rogers v. Buckingham*, 33 Conn. 81; *Algur v. Gardiner*, 54 N. Y. 360; *Gokey v. Knapp*, 44 Iowa, 32.)

All of these cases recognize the rule that if the bonus or commission is taken by the agent with the authority, consent, or knowledge of the principal, and he ratifies the acts of the agent, the loan will be tainted with usury; while some of the courts hold that if the agent of the lender in making the loan charge the borrower a commission or bonus in excess of legal interest, either with or without knowledge of the principal, the principal is affected by the acts of the agent. The reason is the employment affords the means of committing the injury—the business itself furnishes the means of violating the law. And there is but one contract for the loan, and the commission or bonus is paid for that loan, no matter what the form of the transaction may be. The agent, therefore, in regard to that subject-matter, cannot make a separate contract for himself and one for his principal. Besides, the principal who claims to recover on a contract made by his agent, takes it subject to such defences as the conduct of the agent, in making the contract, make available.

In the case of *Bennett v. Judson*, (21 N. Y. 238), an agent of the vendor, upon false information, made false representations in regard to lands in Indiana and Illinois. In an action to recover for the fraud, the court say: "There is no evidence that the defendant authorized or knew of the alleged fraud committed by his agent (Davis) in negotiating the exchange of lands. Nevertheless, he cannot enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may no doubt rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefit of the dealing he cannot claim immunity on the ground that the fraud was committed by the agent and not by himself." (*Elwell v. Chamberlain*, 31 N. Y. 619; *Fuller v. Wilson*, 3 Ad. & E. (N. S.) 56; *National Express Co. v. Drew*, 32 Eng. Law & Eq. 1.) And the rule above stated is general. Can any good reason be given for excepting loans made by an agent from the operation of the rule? The statute declares that interest upon the loan or forbearance of money shall not exceed a given rate. The language is plain and unambiguous, and there is no room for construction. There can be no doubt as to the meaning of the words. They apply to all contracts and persons. The law is the expressed will of the people through the law-making power. By what authority does a

court interpolate words into the statute not necessary in construing it, nor sanctioned by its language, or purpose, by limiting it to principals. If the law is wrong, if agents should not be included in its provisions, if any modification is desired, the remedy is with the law-making power and not the courts. Let the Legislature insert a provision in the law, "unless made by an agent," but until then the courts have a plain duty to perform — to enforce the law. In the language of the able opinion in *Pearson v. Bailey*, "No consideration arising out of the relation of principal and agent can divest the loan of its usurious character, or deprive the borrower of his right to set it up against the lender."

SAMUEL MAXWELL.

Fremont, Neb., May 1881.

Southern Law Review.

TRUST—VERBAL. TRUST—PART PERFORMANCE.

NEW YORK COURT OF APPEALS.

ROBBINS v. ROBBINS.

May 30, 1882.

A verbal trust will be enforced when it is partially performed.

In September, 1869, the defendant, for \$100,000, purchased lands in Rye, Westchester County, and satisfied the price thereof. He, for reasons which do not appear, directed the deed therefor to be made out to one Fay, who was then in his employment, and who accepted the conveyance at his request, and upon an oral understanding that he would hold the premises subject to the order and for the convenience of the defendant. On December 9, 1871, at the request of the defendant, and in execution of the trust and confidence so reposed in him, and upon no other consideration, Fay conveyed the premises to the plaintiff, who is the son of the defendant. The plaintiff gave no consideration whatever either to Fay or the defendant for such conveyance or the premises described therein. At this time, the defendant was in the habit of reposing great confidence in the plaintiff, and making or procuring to be made to him conveyances of lands belonging to or purchased by the defendant, in the trust and confidence that the plaintiff would dispose of such lands and premises for the use and benefit of defendant, and as he might direct and request, and at the time of the conveyance from Fay the plaintiff expressly agreed with the defendant, although not in writing, to hold the title to the premises described therein for his use, benefit, and convenience, and subject to his order. The defendant, at the time of his purchase, went into the actual possession of the premises, and notwithstanding the conveyance to Fay, and that from Fay to the plaintiff, continued in possession thereof by himself or his tenants, and received at all times the proceeds and rent of the land,

and solely and without direction from the plaintiff managed the property. In October, 1872, at the request and for the benefit and convenience of defendant, the plaintiff conveyed the premises to Fredrick J. Ferris and John Shillito, Jr., for the consideration expressed on the conveyance of \$100,000. To secure payment of part of this purchase-money they executed to the plaintiff two bonds and mortgages upon the premises, one for \$45,000, the other for \$15,000. The \$15,000 bond and mortgage was subsequently, in July, 1873, sold by the defendant for his own benefit, and by his direction the plaintiff executed to the purchaser an assignment thereof, the defendant then claiming to be the owner of the property and giving a reason (which involved no immoral or illegal purpose) why he had the title in his son's name, and the latter, although present, neither "contradicted, denied, or questioned it." The other bond and mortgage, which is the one now in question, were a few days after execution, with the knowledge and consent of the plaintiff, delivered to the defendant, and have since remained in his custody. These facts are found by the trial court. In November, 1879, the plaintiff demanded of his father the bond, and being denied commenced this action in February, 1880, for the purpose of having it adjudged "that he is the sole owner and holder of the bond and mortgage," and entitled to the immediate possession thereof from the defendant. Thus the facts which were not in writing have in a litigation moved by the plaintiff been found to exist, and upon them the court is to say "whether the plaintiff hath title in conscience to recover or not."

DANFORTH, J. In the first place it is obvious that a clear and absolute trust in the plaintiff in favor of the defendant was established in regard to the premises conveyed to the former by Fay, which a court of equity would recognize and enforce (*McCartney v. Bostwick*, 32 N. Y. 53 unless prevented by the statute (§ 51 and 6 *infra*). But here we are to consider that the defendant is not in court of his own motion. He is brought in by the plaintiff, who is compelled to come here and ask for relief which he cannot obtain elsewhere. He concedes the defendant's case, but to defeat it relies upon the statute (§ 51, tit. 2, pt. 2, c. 1, art. 2, 1 R. S. 723), which declares that "where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance," subject to an exception in favor of creditors of no importance here.

The existence of a state of facts embraced in this provision, and but for which the defendant would have a clear case, is assumed by the learned counsel for the respondent, and the claim made that under these circumstances the defendant cannot make out a trust "except by a writing declaring the trust and subscribed by the plaintiff," relying in support of this proposi-

tion upon §6, tit. 1, pt. 2, c. 7, page 134, vol. 2, R. S., which prescribes these formalities in the creation of certain interests in lands.

It may, however, be observed at the outset that it is also provided by the same statute (§10) that the provisions of that title shall not be construed to abridge the powers of courts of equity to compel the specific performance of agreements, in cases of part performance of such agreements, and that it is the well settled doctrine that in cases of fraud, equity will relieve even against the words of a statute. The question then is, whether the plaintiff has such a right to the bond and mortgage in controversy as a court of equity will enforce; or, to bring the question into narrower compass, whether provisions of law intended to prevent fraud can be successfully invoked to secure to a wrong-doer the fruits of his iniquity. The answer is easy. See *Reech v. Kennegal*, 1 Ves. 123; *Nelson v. Worrall*, 29 Iowa 469; *Haigh v. Kaye*, L. R. 7 Chan. App. Cas. 469. The same principle has frequently been acted upon by this court. *Ryan v. Dox*, 34 N. Y. 307; *Wheeler v. Reynolds*, 66 Id. 227, in both of which cases a full and careful examination was made of the reasons and authorities on which it rests. Indeed, the decisions are all one way. They establish as a fundamental doctrine of a court of equity that the statute of frauds was not made to cover fraud. In the cases especially referred to the wrong doer was forced into court. In this case he comes in voluntarily asking the court to aid him in the perpetrating of his fraud, and without even the poor excuse found in other cases that by the conveyance to him that defendant meditated a fraud on others.

In the next place the plaintiff is not entitled to have the statute (§51 *ante*) strained in his favor, and taken literally it does not cover his case. The grant to him was from Fay; and for that no valuable consideration was paid; Fay conveyed because in common honesty and in fulfillment of his trust he was bound to convey. The plaintiff's claim is *stricti juris*. The statute (§51 now invoked by the plaintiff, if operative in such a case, and according to the plaintiff's claim, was effectual as between Fay and the defendant and vested in the title so completely that the defendant had no legal or equitable interest in the land. *Garfield v. Hatmaker*, 15 N. Y. 475. He had a right, however, to recognize his moral obligation and convey it to such person as he chose; *Siemon v. Schurck*, 29 N. Y. 598; *Foote v. Bryant*, 47 lb. 544; and upon such conditions as the defendant thought fit to impose or prescribe. It was the plaintiff's promise to perform those conditions which led to the execution of the deed to him.

But another and conclusive answer to the plaintiff's case is that, as by his express agreement he was to hold the title to the land conveyed "for the use, benefit, and convenience, and subject to the order, of the defendant," he did, in consummation of the sale to Ferris and Shillito, by direction of the defendant, and for

his benefit and convenience, execute a deed to them. At the same time possession went to them from the defendant. The trust was executed, and whether the defendant could have compelled it or not, is immaterial. The plaintiff responded to the call of his *cestui que trust*, and from that moment had no further concern or interest, real or apparent, in the property. His whole duty as trustee was discharged. Nothing then remained but a right to the purchase-money, and this vested at once in the defendant. Although the bond and mortgage in form ran to the plaintiff, he took as trustee for the defendant by implication of law, if not by agreement.

Those securities were personal property only, and had no relation to the statute.

It is not necessary to inquire whether the defendant could by any legal proceeding have compelled the plaintiff to convey the lands; he has done so in performance of his undertaking and without compulsion. Nor is it necessary to inquire whether, if he had received the consideration of the deed in money, it could have been taken from him. He did not receive it, and is in a court of equity seeking to obtain it. We have found no ground upon which the claim can stand.

Judgment reversed, complaint dismissed, and bond and mortgage adjudged the property of the defendant.

CRIMINAL LAW.

SUPREME COURT OF NEBRASKA.

RAY v. STATE OF NEBRASKA.

June 22, 1882.

At the November term, 1880, of the district court of F. county, T. J. W. was indicted, tried, and convicted of horse stealing. On the same day J. R. was indicted, tried, and convicted for having concealed the said T. J. W. shortly after he had stolen the said horse, knowing him to be a horse thief. T. J. W. brought his case to this court on error, when the judgment of the district court against him was reversed and the cause remanded to the district court, in which last-named court the said T. J. W. was discharged on his personal recognizance to appear at the next term of court. The case of J. R. being also before this court on error, *held*, without examining the errors assigned, that the judgment of the district court be reversed.

COBB, J.

The plaintiff in error was indicted, tried, convicted, and sentenced for a term of six years in the penitentiary for the offence of concealing Thomas J. Wells, an alleged horse thief. The record is brought to this court on error. On the same day on which Ray was tried and convicted, Wells was tried and convicted of the crime of stealing a horse, being the same offence of which it is alleged that Ray knew him to be guilty when he concealed him. That case was brought to this court on error, and the judgment of conviction reversed. *Wells v. State*, 11 Neb. 409; The cause was remanded to the district court, and Wells discharged on his personal recognizance. The spectacle is thus presented of a man serving as a felon in the penitentiary for concealing a horse

thief, while by virtue of the judgment of this court the alleged horse thief himself has had the brand of felony removed from him and is enjoying his liberty. While there is no bill of exceptions accompanying the record in this case, and so we cannot tell upon what testimony Ray was convicted, yet it will be presumed that the record of Wells' conviction and the judgment against him was a necessary and indispensable part of it. That record has been pronounced erroneous, and reversed. I therefore conceive it to be the duty of this court, having jurisdiction of the cause by virtue of the petition in error, to reverse the judgment in this case.

The judgment of the district court is therefore reversed, and the cause remanded for further proceedings in accordance with law.

TRESPASS BY RAILROAD COMPANY.

SUPREME COURT OF MINNESOTA.

LEBER V. MINNEAPOLIS & N. W. RY. CO.

July 3, 1882.

Mere silence, in the presence of a wilful trespass upon one's property, waives nothing and consents to nothing.

The commencement of the construction of its road by a railroad company upon the land of a private person without his consent, or without first having paid or secured to him compensation, is a trespass for which a right of action immediately accrues. In subsequent condemnation proceedings by the railroad company to acquire the right of constructing the road over such land it is not regularly proper for the commissioners or the jury, in case of appeal, to include in their assessment the damages which the land-owners suffered prior to the filing of the commissioners' award.

For all such damages the land-owner has his remedy as for trespass.

If, however, the question of the damages thus suffered before the filing of the award is in fact litigated, in connection with the matter properly before the commissioners or the appellate tribunal, as the case may be, submitted for determination, passed upon, and the amount of the damages included in the award (as shown by the award itself) and payment thereof received by the land-owner, the result is a conclusive settlement and satisfaction of such damages, notwithstanding the irregular character of the proceedings.

It seems, also, that, even if payment had not been received, the damages would be regarded as *res ad judicata*. This being an action for the recovery of damages of the character mentioned, viz., damages to plaintiff by trespass committed before the filing of an award in condemnation proceedings, the following question was properly permitted to be put to one of plaintiff's witnesses, who saw the plaintiff's land before the filing of the award, and after defendant's trespass thereon: "Considering the property as you saw it when you were there, with the cut through it, . . . what, in your opinion, would the market value of that property be lessened at that time by reason of that cut through it, as it was then, supposing the defendant had gone off and abandoned it afterwards?"

BERRY, J.

1. The plaintiff complains that between July 1 and October 1, 1880, defendant, "with its agents, contractors, and large force of men, entered upon his land and committed trespasses by digging," etc. Defendant answers that the acts complained of were done by sub-contractors of a railroad company with which defendant had contracted for the construction of a railroad from

Minneapolis to Ossea, *Which defendant was engaged in constructing*, and that in order to construct the same it was necessary to enter upon plaintiff's land and dig, etc. This is in effect an admission that the work constituting the acts complained of was done under a contract entered into by defendant, or in other words that defendant had contracted for its performance, and thereby directed it to be done. In such circumstances defendant's liability is the ordinary liability of one who commands or directs the commission of a trespass. The rule by which an employer is relieved from responsibility for the negligence of a sub-contractor working by the job, has no application here.

2. This action is brought to recover damages for the trespass mentioned, and as a defence the answer sets up certain condemnation proceedings in which and on October 1, 1880, an award was made by commissioners for defendant's appropriation for its right of way of the strip of plaintiff's land upon which the trespasses were committed. Defendant also alleges an acceptance by plaintiff of the amount awarded by a jury upon appeal from the commissioners. It appeared in the case that the plaintiff, although he saw the trespassers at work upon his premises, remained silent. He testifies that he did so from fear of violence, though this does not seem to be important, except, perhaps, to rebut any claim that his silence was intended as a sanction. It is contended on defendant's behalf that plaintiff's silence and failure to institute proceedings were a waiver of his right to prepayment of compensation for the appropriation of his property—a consent that the work might go on, or a license to that effect.

There is no rule of law that requires a property owner, in order to save his rights, to enter into an argument with a wilful trespasser, or to forbid him to commit the trespass. He is under no obligation of any kind to utter a word of remonstrance or objection, but may rely upon the law of the land for his redress. His mere silence in the presence of the trespass waives nothing and consents to nothing. In this state, where the rule is that a railroad company has no speck of right to commence the construction of its road upon the land of a private person without his consent, or without first having paid or secured to him compensation, (*Gray v. Railroad Co.* 13 Minn. 315; *Harsh v. Ry. Co.* 17 Minn. 439,) it follows that the commencing of such work without consent, payment or security, is a trespass for which, as a matter of course, a right of action immediately accrues.

The rule first announced in this State in *Winona R. Co. v. Denman*, 10 Minn. 267, (Gil. 208,) and which has been steadily adhered to, is that the assessment of compensation in condemnation proceedings is to be made as of the time of the filing of the award of the commissioners—that is to say, the assessment is to be made with reference to the value and condition of the premises at that time, (*Sherwood v. Railroad Co.*, 21 Minn. 122; *Warren v. Railroad Co.* Id. 424;

Carter v. Railroad Co. 22 Minn. 342;) and hence damages for any trespass upon the premises committed before that time are not regularly proper to be taken into account in making up the award. From all this it follows that in this state there is no such thing as a waiver of prepayment of compensation for property taken under the eminent domain upon any theory or idea that compensation for damages, whether by trespass, consent, or license, before the filing of the award, can properly be included in the award, as such, and therefore the authorities which hold a contrary doctrine elsewhere are not applicable here. It further follows that as respects damages for trespass committed before the filing of the award, though committed in the course of the construction of the road, the landowners must have a remedy outside of the condemnation proceedings and the award thereon, or he has none at all which he can enforce. Nevertheless, if the question of damages (by trespass, consent, or license) suffered before the filing of the award is in fact litigated in connection with the matter properly before the commissioner or the appellate tribunal, (as the case may be), submitted for determination, passed upon, and the amount of the damages included in the award, (as shown by the award itself,) and payment thereof received by the claimant, the result is a conclusive settlement and satisfaction of such damages, notwithstanding the irregular character of the proceedings. Even if payment has not been received, it is very likely that the damages would be regarded as *res adjudicata* though this case does not necessarily call for a decision on that point. But unless the award shows upon its face that it includes the damages spoken of, it would be presumed that it included only what it should properly include, namely, compensation for the appropriation of the claimant's land, with sole reference to its value and condition at the time when the award was filed, and it would not be admissible to show by evidence *dehors* the award that the damages mentioned were included in it. We are therefore of opinion that upon the trial of this action below, the court was right in excluding the evidence offered for the purpose of showing that upon the trial in the condemnation proceedings a part at least of the grounds upon which damages are claimed in the present action was submitted to the jury to be considered by them in arriving at their verdict. No claim was made that the verdict, which was the award of the jury, showed that it included any such damages, or was anything but the ordinary verdict, fixing the compensation to which the landowner was entitled for appropriation of his land as of the date of the filing of the commissioners' report.

This, we believe, disposes of all the errors assigned by defendant except one. R. P. Russell, (one of the commissioners,) called as a witness by the plaintiff, was asked the following question, defendant excepting: "Considering the property as you saw it when you were there, with the cut through it, * * * what, in your opin-

ion, would the market value of that property be lessened at that time by reason of that cut through it, as it was then, supposing they [i. e. the defendant] had gone off and abandoned it afterwards?" The time referred to in the question is the time at which the witness, as commissioner went upon the premises to examine them prior to the making of the award. The defendant's principal objection is to the latter part of the question, viz., "supposing they had gone off and abandoned it." But we do not perceive that these words really add anything substantial to what precedes them. The object of the question was to find out what damage had been done to the plaintiff's property when the witness saw it, "as it was then" in the exact language of the inquiry; that is to say, what damage had the defendant suffered up to that time. The amount of that damage was a measure of plaintiff's recovery, without reference to what the defendant might do afterwards, upon taking proper condemnation proceedings, or otherwise.

This seems to us to have been the scope of the question, and we think it was properly allowed. It is, of course, not claimed that the defendant did anything subsequently to make the damage any less than it then was. It is not perceived that the correctness of the ruling of the court in admitting the question is affected by what came out upon defendant's cross-examination of the witness.

The order denying a new trial is affirmed

PROMISSORY NOTE—BURDEN OF PROOF.

SUPREME COURT OF IOWA.

DARROW v. BLAKE.

July 12, 1882.

Where the transferee of a fraudulent note seeks to recover thereon, he has the burden of showing that he purchased it in good faith; and where the transferee is a partnership, the burden is on the partnership to show that all the members were ignorant of the fraud at the time of the purchase.

Action upon a promissory note. The defendant admits the execution of the note, but avers that the same was obtained from him without consideration, and by fraud. There was a trial by jury, and verdict and judgment were rendered for the defendant. The plaintiffs appeal.

ADAMS, J.

The note was executed payable to the order of the maker, and indorsed by him in blank, and given to one Parsons, who transferred it before maturity and for a valuable consideration to the plaintiffs, who are partners. The note was given under an arrangement whereby the defendant was to become the agent of the American Hog Cholera Cure Company, of Eureka, Iowa. Without setting out in detail the facts relied upon by defendant, it is sufficient to say that there was evidence tending to show that the note was procured by fraud, as the defendant avers. Upon this evidence the court instructed

the jury, in substance, that if they found that the note was procured by fraud they should find for the defendant, unless they found that the plaintiffs purchased the note before maturity for a valuable consideration without knowledge of the fraud, and in case they found that the plaintiffs did so purchase the note, then the verdict should be for them. The plaintiffs do not complain of this instruction; but they say that under it the verdict should have been for them, because, while the jury might have been justified in finding that the note was procured by fraud, the evidence was conclusive that it was purchased by plaintiffs without knowledge of the fraud. The purchase was made by one Tenny, a member of the plaintiffs' firm, who testified that he had no knowledge of any of the circumstances connected with the note. To rebut this evidence the defendant showed that there had been other victims of hog-cholera notes in that community, and that Tenny had been informed that it was claimed that the hog-cholera notes, as a class, were fraudulent. But it is not shown that whatever information Tenny received upon this subject was received after the purchase. Tenny's testimony, therefore, is uncontradicted.

There remains, then, only to be considered whether proof that Tenny was at the time of the purchase without knowledge of the fraud was sufficient. The defendant contends that it was not. He contends that while Tenny's knowledge would be deemed the knowledge of the firm, his ignorance would not necessarily be deemed the ignorance of the firm. It must be admitted, of course, that the fact that Tenny was ignorant of the fraud would not show that his partners were. The general rule is that where the transferee of a fraudulent note seeks to recover thereon he has the burden of showing that he purchased in good faith. Now, where the purchaser is a partnership, will it be deemed a purchaser in good faith if it is simply shown that the purchasing partner had personally no knowledge of any fact which would preclude good faith? No decision directly upon this point has been cited by counsel, and none has come to our notice. Upon principle, it appears to us that the question should be answered in the negative. We know of no ground upon which it could be presumed that the purchasing partner's copartners were ignorant of the fraudulent character of the note because he was. He might have been the one selected and put forward to make the purchase, because he was ignorant. We are aware that if the rule is as we hold that where a partnership seeks to recover as a *bona fide* purchaser of a promissory note fraudulently procured the burden is upon the partnership to show that all the members were ignorant of the fraud at the time of the purchase, it is necessary for the entire safety of a partnership in purchasing a note that all the members should be consulted or inquired of by the purchasing partner. But this is imposing no great burden. We cannot suppose that promissory notes are often purchased by partnerships under

such exigency upon their part that the necessity for the caution required by the rule laid down would impose an unnecessary restriction upon the business.

In our opinion the plaintiffs did not show that they purchased without knowledge of the fraud, and the judgment must be affirmed.

LIFE INSURANCE.—WAIVER.—ESTOPPEL.

NEW YORK COURT OF APPEALS.

ROBERTSON v. THE METROPOLITAN LIFE INS. CO.

April 11, 1882.

A policy of life insurance provided that it should cease if any premium should not be paid within thirty days after it fell due. A premium having fallen due Jan. 10, 1877, Plaintiff's agent called on Feb. 10 to attend to it and was informed by defendant's secretary that it had been attended to, but in fact the premium was never paid. *Held*, that defendant was not estopped by the statement of its secretary from asserting the forfeiture, as plaintiff was not harmed or prejudiced thereby, the policy having lapsed before such statement was made, and that there was no waiver of the forfeiture, as the secretary's statement was made under a mistake of fact.

This is an action upon a policy of insurance issued by defendant to plaintiff on the life of her husband. It provided that any payment of premium could be made within thirty days after the same became due and payable by the term of the policy. It also provided that in case any premium should not be paid on or before the time required by the policy the policy should cease, and all previous payments of premiums should be forfeited to the company. It was also provided that if, after the company has received three or more annual premiums, the assured should fail to pay any further premium when due, upon a surrender of the policy within thirty days after such unpaid premium became due, the company would in exchange therefor issue a paid up policy for at least the full amount of even dollars of premiums received by it on the policy. The policy was issued in 1868. Plaintiff failed to pay the portion of the annual premium which fell due January 10, 1877, on that day or within thirty days thereafter. It appeared that on February 10, an agent of plaintiff went to defendant's office and stated to its secretary that he had come to attend to Mr. Robertson's premium, and would like to know what the condition of it was. The secretary looked at the books and replied that Mr. Robertson had attended to that himself, plaintiff's agent understanding the secretary to mean that Mr. Robertson had paid the premium. Upon the return of her agent with the information thus obtained from its secretary plaintiff learned from her husband that the premium had not been paid. Three or four days after she went to defendant's office and tendered the amount of the premium then past due, and the company refused to receive payment. Upon the trial defendant's secretary testified that he had no recollection of stating to plaintiff's agent that the policy had been attended to. There was no allegation in the complaint and the case does not

disclose that there was any claim at the trial that the premium had actually been paid or in any manner attended to or arranged prior to February 10, 1877.

Held, That as by the very terms of the policy it ceased by the non-payment of the premium within the time stipulated, it could only be revived or continued in life by a new agreement, by the operation of an estoppel or of a waiver. No new agreement was proved or alleged in the complaint. There was no estoppel, as the plaintiff was not harmed or prejudiced by the mistaken or untrue statement made to her agent on February 10, 1877. The policy had then lapsed and it was too late for her to do anything to restore or continue it. There was no waiver of the forfeiture of the policy, because what was said by the secretary on February 10, 1877, was plainly said under a mistake of fact.

Ordinarily a party should not be held to have waived a forfeiture in the absence of facts constituting an estoppel, unless he intended to waive it, nor can he be held to have waived it unless he knew of the facts constituting the forfeiture. 25 Alb. L. J., 274; 2 Platt on Leases, 469; 81 N. Y., 419; 46 Barb., 333.

Judgment of General Term, affirming judgment for plaintiff, reversed, and new trial granted.

CRIMINAL LAW—INSANITY—BURDEN OF PROOF.

SUPREME COURT OF CALIFORNIA.

PEOPLE v. HAMILTON.

May, 1882.

In criminal cases, where insanity is relied upon as a defence, the burden of proof is on the defendant, and the proof must be such in amount that if the issue of sanity or insanity of the defendant were submitted to a jury in a civil case they would find he was insane.

Indictment for murder. Among the errors assigned by the defendant, it is alleged that the court erred in its instruction to the jury on the subject of insanity, which defence was interposed to the charge.

McKee, J.

The court did not err in charging the jury on the subject of insanity as follows: "Where insanity is relied upon as a defence, the burden of proof is on the defendant; and that the proof must be such in amount that if the single issue of the sanity or insanity of the defendant should be submitted to the jury in a civil case they must find that he was insane. The insanity must be clearly established by satisfactory proof." Such is the law as expounded by this court in *People v. McDonnell*, 47 Cal. 184. The instruction is substantially the same as was approved in that case. Insanity, when relied upon as a defence in a criminal case, is a fact. As a fact it must be proved as any other fact in the case. "It must," says the court in *People v. Coffman*, 24 Cal. 230, "be established with

the same clearness and certainty as any other fact alleged by the defendant in his defence, that is to say, the proof must be such in amount that if the single issue of the sanity or insanity of the defendant should be submitted to the jury in a civil case, that they would find he was insane." The rule thus established in this state is not subject to the criticism that it deprives a defendant in a criminal case of the benefit of a reasonable doubt; for, although a defendant is required to prove every fact, in the defence upon which he relies, by satisfactory evidence,—evidence which ordinarily produces moral certainty or conviction in an unprejudiced mind (§ 1853, C. C. P.), yet if out of his evidence, together with the evidence of the prosecution,—all the evidence on both sides,—there arises a reasonable doubt about it, he is entitled to the benefit of the doubt. But it will be observed, that it is the *corpus delicti*,—the criminal act,—which must be proved beyond a reasonable doubt (§ 2061, C. C. P.), and not a fact in the case itself. In that respect the rights of the defendant were properly guarded in the trial of the case. For while the court told the jury that insanity was a fact for the defendant to establish by satisfactory proof, it at the same time charged them that the burden of proof to make out the guilt of the defendant was on the prosecution; "that the defendant must be presumed innocent until his guilt is established by proof; and that he is entitled to the benefit of all reasonable doubts, and cannot be convicted of any degree of crime, unless the jury are convinced by the evidence in the case, beyond all reasonable doubt, that he is guilty."

Judgment affirmed.

Digest of Decisions.

IOWA.

(Supreme Court.)

CONN. v. CONN AND OTHERS. JULY 12, 1882.

Homestead—Dower—Election by Widow.—A widow may take out of her real estate owned by her husband either the distributive share or the homestead for and during her life, but she cannot take both; and occupancy of the homestead for more than 10 years after the death of her husband should be regarded as an election to take it for life, instead of her distributive share or dower.

Where the widow mortgaged the property, including her share inherited from a deceased child, and the mortgage was subsequently foreclosed, the purchaser at the mortgage sale becomes a tenant in common with the surviving heirs, and cannot acquire a tax title to the prejudice of his co-tenants; and an intervenor holding under a quitclaim deed from him has no better right.

ORMOND v. CENTRAL IOWA RY. JULY 12, 1882.

Custom—Negligence—Railroad.—The custom of a neighborhood is not admissible in evidence to prove a want of contributory negligence, in an action brought by plaintiff against a railroad company for damages caused by the burning of stacks of oats in a field along the line of defendant's right of way, and caused by sparks from defendant's engine.

In such action it is competent to show that plaintiff raised the oats on rented land on shares to prove that he did not own all the grain destroyed.

STUHLMEYER, Adm'r, v. CLOUGHLY. JULY 12, 1882.

Mispractice—Measure of Damage.—In an action for damages for wrongfully causing the death of a married woman by negligent medical treatment and want of ordinary skill as a physician, an instruction to the effect that the damages, if any, thus caused should be assessed the same as though she had been an unmarried woman, taking into account her age, health, habits, education, expectancy in life, and her degree of ability to perform various kinds of labor and earn money, is erroneous, as the damages should not be assessed on the same basis as though she were unmarried.

DICKEN v. MORGAN. JULY 12, 1882.

Contract—Consideration—Highway over Land.—There is nothing in the statutes of this state which requires exceptions to the decree in an equitable action to be taken to justify a trial on appeal.

Plaintiff sold land to defendant, and for part of the consideration agreed to procure the legal establishment of a highway across one side of the land. This he failed to accomplish. *Held*, that for that part of the consideration money agreed to be paid for the establishment of the highway defendant was not liable.

Where an action was brought against the road supervisor to prevent the opening of a certain road, and there was a trial involving the validity of said road, and the opening of the same was perpetually enjoined, this must be regarded as an adjudication binding upon the public and upon all persons interested, and no road could thereafter be legally established along said line.

JOHN A. CARTON & CO. v. ILLINOIS CENTRAL R. CO. JULY 12, 1882.

Constitutional Law—Freights.—An act of the state legislature, whose object and purpose is to control and regulate the shipment of freight to points in other states, is in violation of article 1, § 8, of the constitution of the United States, as being legislation on inter-state commerce—a subject which is in its nature national, and requiring the exclusive legislation of congress.

An inter-state contract of shipment, entered into by a common carrier, is an entire contract,

and the laws of the state wherein it was made, so far as they attempt to regulate interstate commerce, do not enter into it as a part of the contract, being repugnant to the federal constitution.

BECK, J., dissenting.

A contract is subject to the laws of the state wherein it is made and which are applicable thereto.

A state may enact statutes regulating charges on shipments of goods, unless they should be found to be in conflict with the constitution of the United States as a regulation of commerce, and in the absence of any legislation by congress upon the subject, such laws cannot be regarded as an encroachment upon the authority of the general government.

Such regulations of commerce only as impose burdens and restrictions are forbidden to the states by the constitution of the United States, but laws which aid in securing expeditious and cheap transportation, and which remove burdens, impediments, and restrictions imposed on commerce by common carriers through unnecessary delays, and by their unreasonable and unjust exaction and discriminating charges, are not regulations of commerce within the contemplation of the constitution of the United States.

VAN VECHTEN v. SMITH. JULY 13, 1882.

Promissory note—Interlineation—Statement of Seller.—In an action upon a promissory note defendant is not prejudiced by the instruction that if the word "bearer" was interlined after delivery of the note that would be a material alteration and vitiate the note; but if they should find that the word "bearer" was interlined at or before delivery, the note would be negotiable and the plaintiff would be entitled to recover, though they found that the note was procured by fraud and without consideration, even if erroneous, unless there was some evidence of fraud or want of consideration.

A statement by a seller of property as to its value is a mere opinion, and not to be treated as a false representation, however insincere the seller may have been; and such statement is no defence to an action upon a note given for the property.

A party cannot rescind an agreement involving several matters without surrendering or offering to surrender what he has received upon such agreement.

An agreement by parol cannot be admitted in evidence to contravene the terms of a written contract. So *held*, where a note sued on was attempted to be contravened by proof of an agreement that it should be paid by commissions for future services as agent of the holder.

An agent appointed to collect a note has no authority to bind his principal by his opinion as to the reading of a particular word in such note.

The assignee of a note is not affected by an interlineation made before he purchased the note.

Ohio Law Journal.

COLUMBUS, OHIO, : : AUGUST 10, 1882.

VERY IMPORTANT!

With this number we complete our second year.

The OHIO LAW JOURNAL has taken its place permanently as one of the standard law publications of the country, and as a representative of the great State of Ohio, is at least fairly creditable. We ought perhaps to leave this remark for others to make; but others may not have the opportunity—possibly not the mind to do so.

We would simply say however, that we have been nobly seconded in our effort to give to the profession of this great State, a *Law Journal*—a medium by which the action of the highest court of the State could be at once transmitted to those most deeply concerned, as litigants, attorneys or as lawyers at large. We are proud of the fact that *our subscribers, our patrons*, those who appreciate our paper best and pay for it most promptly, are the very best and most successful lawyers of the State. This is true of every town, city and county in Ohio. It is but natural obedience to the law of cause and effect. No lawyer can succeed except by *knowing the law*. And the law of the first importance to all lawyers, is the law of their own state. The infallible indication of a successful lawyer is his familiarity with *recent enactments* and judicial decisions.

There is but *one* method of obtaining these immediately after their enactment and promulgation and that method is by reading the OHIO LAW JOURNAL. And the only method by which the publication of a law journal is rendered possible is by that generous support which we derive from the members of the profession.

To our old friends we would further say, that prompt renewals accompanied by cash will be until Sept. 1st, particularly gratifying and opportune.

Look over your files of the LAW JOURNAL, and ascertain *at once* whether any are missing. *We have but few back numbers!* Those who come first will be first served of course. When you have found what numbers you desire, let us know at once—with your order for renewal, and we will complete files as far as our numbers on hand will go. *Do not wait!* Attend to this at once!

VIRGINIA MILITARY LANDS IN OHIO.

CIRCLEVILLE, OHIO, JULY, 26, 1882.

Publishers of the Ohio Law Journal.

Columbus, O.

GENTLEMEN:

Some weeks since I promised you to write for your Journal, and for publication, my views on Virginia Military Land titles and the rights of locators and owners of lands in the Virginia Military district in Ohio, and the bearing of the several acts of congress, on the subject, none of them having ever been repealed.

I presume it is well understood that Virginia ceded to the United States all right &c., which that commonwealth had to the territory or tract of country within the limits of her charter situate, lying and being to the northwest of the river Ohio, reserving that part of the country between the rivers Scioto and Little Miami, on the northwest side of the said river, Ohio, for the use of the officers and soldiers of the continental line or so much of the country between those rivers as might be necessary to make up any deficiency of good land, on the southeast side of said river Ohio, which had been reserved by law for the Virginia troops upon continental establishment.

A deficiency of good land for the satisfaction of said troops on the southeast side of said river Ohio, having been reported to congress, she passed her act of August 10th, 1790, entitled "An Act to enable the officers and soldiers of the Virginia line on continental establishment to obtain titles to certain lands lying northwest of the river Ohio, between the Little Miami and Scioto." U. S. L. Vol. 1, p. 182.

And on the 9th day, of June, 1794, amended her said act. U. S. L. Vol. 1, p. 394.

On March 23rd, 1804, congress, passed an Act entitled "an Act to ascertain the boundary of the lands reserved by the state of Virginia, northwest of the river Ohio, for the satisfaction of her officers and soldiers on continental establishment and to limit the period for locating the said lands."

By the 1st section of this act she declared, "that the line run under the direction of the surveyor general of the United States from the source of the Little Miami toward the source of the Scioto, and which bounds on the east, the surveys of the lands of the United States, shall, together with its course continued to the Scioto River, be considered and held as the westerly boundary line, north of the source of the Little Miami, of the territory reserved by the State of Virginia, between the Little Miami and Scioto Rivers, for the use of the officers and soldiers of the continental line of that state, provided that the State of Virginia shall within ten years after the passing of this act, recognize such line as the boundary of the said territory."

By the 2nd section she provided "that all the officers and soldiers or their legal representatives who are entitled to bounty lands within the

above mentioned reserved territory shall complete their locations within three years after the passing of this act, and every such officer and soldier, or his legal representatives, whose bounty land has or shall have been located within that part of the said territory to which the Indian title has been extinguished shall make return of his or their surveys to the Secretary of the Department of War within five years after the passing of this act, and shall also exhibit and file with the said Secretary and within the same time, the original warrant or warrants under which he claims, or a certified copy thereof, under the seal of the office where the said warrants are legally kept: which warrant or certified copy thereof shall be sufficient evidence that the grantee therein named or the person under whom such grantee claims, was originally entitled to such bounty land, and every person entitled to said lands, and thus applying shall thereupon be entitled to receive a patent in the manner prescribed by law.

And the 3rd section of said act declared:

"That such part of the above mentioned reserved territory as shall not have been located, and these tracts of land within that part of the said territory to which the Indian title has been extinguished, the surveys whereof shall not have been returned to the Secretary of War within the time and times prescribed by this act, shall thenceforth be released from any claim or claims for such bounty land, and shall be disposed of in conformity with the provisions of the act entitled, 'An Act in addition to, and modification of the propositions contained in the act entitled 'An Act to make the people of the eastern division of the territory northwest of the river Ohio, to form a Constitution and State government, and for the admission of such State into the Union, on an equal footing with the original States, and for other purposes.'"

Previous to the expiration of the three years limited in said first section for completing locations on the 2nd day of March, 1807, congress passed an act extending the time for locating lands in said district, by section one of which she provided "That the officers and soldiers of the Virginia line on continental establishment, their heirs or assigns entitled to bounty land within the tract reserved by Virginia, between the Little Miami and Scioto rivers, for satisfying the legal bounties to her officers and soldiers upon continental establishment, shall be allowed a further time of 3 years from the 23rd of March, next, to return their surveys and warrants, or certified copies of warrants, to the office of the Secretary of the War Department, anything in the act entitled, An Act to ascertain the boundary of the lands reserved by the State of Virginia, northwest of the river Ohio, for the satisfaction of her officers and soldiers on continental establishment, and to limit the period for locating the said land, to the contrary notwithstanding. Provided that no locations, as aforesaid, within the above mentioned tract shall,

after the passing of this act, be made on tracts of land for which patents have previously been issued, or which have been previously surveyed, and any patent which may nevertheless be detained for land located contrary to the provisions of this section, shall be considered as null and void." U. S. L. Vol. 2, p. 424.

These acts extending the time for locating lands and returning surveys, were continued to the 1st day of January, 1852, since when no acts have been passed extending the time to make new locations, but on the 3rd day of March, 1855, congress passed an act extending the time for making surveys &c., as follows:

"Sec. 1. That the officers and soldiers of the Virginia line on continental establishment, their heirs or assigns, entitled to bounty lands, which have, prior to the first day of January, Anno Domini 1852, been entered within the tract reserved by Virginia, between the Little Miami and Scioto rivers, for satisfying the legal bounties to her officers and soldiers upon continental establishment, shall be allowed the further time of two years from and after the passage of this act to make and return their surveys and warrants, or certified copies of warrants to the "General Land Office." U. S. L. Vol. 10, p. 701.

The period limited in this act expired March 3rd, 1857.

On the 18th day of February, 1871, congress ceded to the State of Ohio the lands remaining "unsurveyed and unsold" in the Virginia Military District. U. S. L. Vol. 18, p. 416.

And on the 25th day of March, 1872, the legislature ceded the same lands to the Trustees of the "Ohio Agricultural and Mechanical College," (Laws of Ohio, Vol. 69, p. 52) to whom the Honorable Aaron F. Perry furnished an opinion that under the 3rd Section of the said act of congress of March 23rd, 1804, all the location of lands in said Military District, standing upon entry merely, and upon entry and surveys not returned to the "General Land Office" (Substituted by the Act of Congress of April 25th, 1812, for the Secretary of War. U. S. L. Vol. 2, p. 717,) on or before the 3rd day of March, 1857, had under the 3rd Section of the said act of March 23rd, 1804, lapsed to the United States, and within the meaning of the said act of February 18th, 1871, were "unsurveyed and unsold lands," and by the terms of said cession and the act of the legislature of Ohio, the title to said lapsed locations had become vested in the said Trustees. This opinion brought congress to an explanation in the form of her act of May 27th, 1880, U. S. L. Vol. 21, p. 142, entitled "An Act to construe and define 'An Act to cede to the State of Ohio the unsold lands in the Virginia Military District in said State,' approved February 18th, 1871, and for other purposes," section one of which is in the following words, viz:

"That the Act ceding to the State of Ohio the lands remaining 'unsurveyed and unsold' in the Virginia Military District in the State of Ohio, had no reference to lands which were included in any survey or entry within said district

founded upon military warrant or warrants upon continental establishment, and the true intent and meaning of said act was to cede to the State of Ohio, only such lands as were unappropriated and not included in any survey or entry within said district which survey and entry was founded upon military warrant or warrants upon continental establishment."

Section two then declared: "That all legal surveys returned to the 'Land Office' on or before March 3rd, 1857, on entries made on or before January 1st, 1852, and founded on unsatisfied Virginia military continental warrants are hereby declared valid," and section 3 provides:

"That the officers and soldiers of the Virginia line on continental establishment, their heirs or assigns, entitled to bounty lands which have on or before January 1st, 1852, been entered within the tract reserved by Virginia, between the Little Miami and Scioto rivers, for satisfying the legal bounties to her officers and soldiers upon continental establishment shall be allowed 3 years from and after the passage of this act, to make and return their surveys for record, to the office of the principal surveyor of said district, and may file their plats and certificates, warrants, or certified copies of warrants, at the 'General Land office,' and receive patents for the same."

The foregoing acts are the material acts bearing on the questions to be discussed in this article.

The questions now presented are, whether the act of May 27th, 1880, like the former acts extending the time to locate and survey and return surveys to the "General Land Office," suspends the 3rd section of the act of March 23rd, 1804, forfeiting those tracts, the surveys whereof had not been returned to the "General Land Office," and extends the right conferred by the 2nd section of said act to return surveys to said office, for patent, and validates patents issued in the interim.

Of these questions in their order:

I. The act of March 2nd, 1807, says the Honorable Aaron F. Perry, in his able opinion (we cannot regard this opinion other than very able, for it was so powerful that nothing less than an act of Congress could repel its conclusion), furnished the trustees of said College, and fully reported in miscellaneous Document No. 42, 47th, Congress, 1st Session, House of Representatives, June 23d, 1882, p 41, extending the time for locating Virginia military warrants and returning surveys &c., confirmed by the 2nd section of the act of 1804, and suspended the forfeiture of the 3rd section of said act of those tracts, the surveys whereof had not been returned to the General Land Office. This construction of the act and of all the subsequent acts of extension has been adhered to, so long as the acts of extension to make new locations existed, and to the 1st day of January, 1852, at which period or time, it is to be conceded the 3rd section of said act of 1804, ceased to be further suspended, but certainly

was within the control of Congress as before, and in justice to those holding locations in said district, standing upon entry merely and upon entry and survey, Congress passed her said act of March 3rd, 1855, extending the period for making surveys and returning surveys to the "General Land Office," to 2 years longer, coming up to the 3rd day of March, 1857, but upon entries only made previous to the 1st day of January, 1852.

This act of 1855, like the former acts, it is conceded by Mr. Perry in his able opinion, and also, by the Honorable N. C. McFarland, Commissioner of the "General Land Office," in his decision of Norvell's case, reported in Vol. 2, No. 42, p 540, of the OHIO LAW JOURNAL, for June 1st, 1882, extends the right of the 2nd section of the act of 1804, to survey entries made previous to January 1st, 1852, and return surveys to the "General Land Office," and suspends the forfeiture of surveys previously made and not returned, declared in the 3rd section of said act of 1804, and this construction is confirmed by the 2nd section of the act of May 27th, 1880, declaring all such surveys returned to the "Land Office" on or before March 3rd, 1857, valid.

And such must be the construction of the 3rd section of the act of 1880, which is a mere copy of the act of March 3rd, 1855, but more full and perfect to sustain the construction given all the previous acts, to return surveys under the 2nd section of the act of 1804, and to suspend the forfeiture of the 3rd section of said act.

There is another rule however, which further confirms this construction of the act of 1855, and the act of 1880.

If you subtract the act of 1855, or the 3d section of the act of 1880, from sections 2 and 3, of the act of 1804, and you have left the right under the act of 1804 to make new entries only or if you please take from 2nd and the 3d sections of the act of 1804, the right to make new entries and you have the act of 1855, or the 3d section of the act of 1880 left; or in other words you have all the rights conferred by the 2nd section of the said act of 1804, minus the right to make new entries with the forfeiture of the 3d section of that act suspended.

I have always conceded the force of the construction given to the act of March 23rd, 1804, by Mr. Perry in his opinion as to the forfeiture of the locations.

But I have ever insisted that congress by the provision of the act of March 2nd, 1807, took into her special protection such surveys, and that it was never intended by congress to deprive the locators of them, but to preserve them for the officers and soldiers for whom they were originally reserved by Virginia, and when the forcible opinion of Mr. Perry was presented to congress she said in the 1st section of her act of 1880, just what I advised Colonel Leet she would say of her act of February 18th, 1871, ceding the land remaining unsurveyed and unsold, in the Virginia military district to Ohio.

I never had any confidence in the open letter

of the Hon. William Lawrence to the Hon. N. C. McFarland, Commissioner of the General Land Office of August 23, 1881, reported in the 2nd vol. no. 4 p. 49, of the OHIO LAW JOURNAL for September 8th, 1881, and the opinion in said letter announced, of the meaning of the act of May 27th, 1880, or of the disinterestedness of the writer. I regarded it in the light of a letter of a politician who was not a candidate if the other man was, or unless the people called him out.

I am glad congress passed her act of May 27th, 1880, to enable the people to perfect their title to the locations in said district, standing upon entries and surveys. There ought never to have been any limitation on the right to make surveys or to return them for patent. From the time the entry was made, the land has borne its share of taxes and the limitation has clogged the right to perfect the title, and it is the duty of congress to repeal this limitation at once. It will do more to quiet the titles in the district than any act congress can pass upon the subject.

II. These acts of extension however under the retroactive constructions always given them and which has become a rule of property in the district, the effect of which is to validate all surveys previously made and patented, has operated to confirm these titles, that certain parties engaged in the practice of law in the district, assuming to know the law of Virginia Military Land Titles in Ohio, and go about the district discrediting them by giving out in speeches and publications that there are 130,000 acres of land in the district to which the people occupying them have no title, but which have lapsed to the United States and become a part of the public domain by such forfeiture. Justice Matthews held in his decision of the case of *Chamberlain v. Marshall*, in the Circuit Court of the United States, N. D. of Ohio, August, 1881, reported in the Federal Reporter, vol. 8, no. 6, p. 444-5 that a sale of such location for taxes cannot survive such forfeiture but must equally come to naught.

Congress should at once report a bill, repealing so much of section two, of said act of 1804, as limits the time for completing surveys and all subsequent statutes of limitations of the right to complete such surveys and to repeal section 3, of said act of 1804, and all other acts or parts of acts limiting the time for return, location, &c. for patent.

Had the officers and soldiers and their representatives been justly and fairly treated by the deputy surveyors, who were interested with the locations of their warrants, and congress had left them free to return their surveys for patent, there would to-day not be 1,000 acres of land in the district standing upon entry and survey but the titles would all be perfect. But as the business was conducted under the forfeiture of the 3d section of the act of 1804, it is manifest, that all sales, for taxes or other sales depending upon the validity and subsistence of the location

standing upon entry or upon entry and survey, previous to the act of May 27th, 1880, went to the ground with the forfeiture of the location, and are only restored by this act and destined to go there again if not now returned to the "General Land Office"; if returned there, they are safe; or if the limitation is repealed they are safe. But take not the advice of any man who boasts he has in any manner defeated the passage of acts of congress to enable the people to perfect these titles. I had supposed that Mr. Lawrence, who was counsel for Chamberlain in the case alluded to, would have felt the force of the remark of Justice Matthews in that case that the sale of a location for taxes could not logically survive the forfeiture of the location itself; a conclusion from the premises not to be controverted; but here in the face of this decision, in the form of his said open letter, he comes and boasts, he has had the honor of defeating acts which would not only have validated the original location, but perhaps confirmed the sale for taxes alleged by him in said action.

His letter only proves he has no land to be affected by the decision that the commissioner may make.

I am &c. very respectfully yours,

JEREMIAH HALL.

LAW AND LAWYERS.

The following is from the address of Hon. Wm. P. Black, of the Chicago Bar, before the graduating class of the Union College of Law, June 15th:

"Law is eternal! She hath her seat in the bosom of God!" So wrote the panegyrist, centuries ago—meaning by Law, probably, the impulse which leads the rightly constituted mind to seek the accomplishment of justice among men. And worthy of even such praise is this impulse, having its origin in the highest good of which we can conceive. Very blessed is it, too, that in all ages there have been those who esteemed truth above triumph, justice above success, right above revenue; and who, even in "the corrupted currents of this world," where "oft 'tis seen, the guilty prize itself buys out the law," have held earnestly by a grand ideal, conceiving of justice as throned with God, and dreaming of its establishment in the earth. These, to the measure of their ability, and according to their apprehension of right, have striven to realize, in legal enactments and judicial determinations, exact justice among men, and to establish a system of law, common and statute, which should secure this end. That they have failed—that as the result of the labor of such men, we have, in the various civilized nations of the world, bodies of statutes and multiplied precedents, contradictory and irreconcilable, supporting different views on numerous questions, so that a precedent can be found for almost any proposition having any degree of

plausibility, while many a statute operates to accomplish absolute wrong, is resultant upon two things: First, that even the best of those instrumental in the establishment of our system of law were fallible men, whose minds, though "reflecting an image of heaven," were yet "darkened by shadows of earth," the prejudices and faults of education, the atmosphere of the time in which they wrought, the errors of ignorance and the warpings of interest: and Second, that always among the co-laborers in the structure of law have been found many of ignoble heart and purpose who have betrayed the great trusts committed to their hands, and who, for their own ends, have sought to make of the law a system of chicanery, using it to defeat justice and to buttress wrong. It results, that never within recorded history has any system of law deserved the panegyric quoted never has any code or body of law, whether confessedly sought out and set in order or established by men, or professedly of divine origin, *deserved* to endure, or represented to us the highest conceivable good!

It does not follow that simply because a thing is lawful, it is therefore right—that because it has the sanction of precedent or the authority of enactment, it is therefore equitable and just—and this is a truth important to be remembered by every one engaging in, or purposing to enter upon, the practice of the law, and who would preserve a clear conscience, a quick, true sense of justice. From the days when the law provided that for theft above the value of thirteen pence half-penny the punishment should be hanging, and that the counterfeiter should be boiled in oil—when penalties for even trivial offences were so atrocious that we shudder to read the black page chronicling them—and when the entire administration of what was termed justice was in the interest of oppression—from those days we have made vast progress; but we are yet far from the ultimate of excellence and he who would render the highest service to the profession and the public in the administration of law, must not only aim at securing the observance of right laws, but must labor for the improvement of its provisions, and the correction of abuses or failures in its administration.

But if the law, by which is now meant the system of laws obtaining among us, is far from perfect, much more faulty is the administration of law under existing circumstances—an administration which in our cities, has become a mocking and by-word, so that it has come to be a saying, that no richman—no man who can command money—can be punished for crime: while many hold that it is the part of wisdom to forego even a just debt rather than attempt its collection at law, if the debtor be an unprincipled man ready to employ a disreputable attorney, or to corrupt a juror willing to accept a bribe. While, doubtless, the evil which exists, the abuses of this nature which are practiced, are greatly exaggerated in the mouth of public

rumor, still the evil *does* exist, tainting the administration of justice as a whole, and bringing reproach upon the law.

In this connection it may not be out of place to advance a suggestion which, if acted upon, will, it is believed, result in the removal of most of this ground of complaint.

The jury system, as applied to the determination of civil controversies, is illogical and absurd. This system grew up in the days of the law's ferocity, and was then a valued safeguard, essential to the well-being of the subject. But that to-day, before a man can collect a disputed claim or enforce a contested liability, he must have the concurrence of twelve men in the verdict; that in this one particular there should be a departure from the principle of majority rule, which obtains with us, not only in political matters but also in all other branches of judicial administration—so that a majority of arbitrators make a finding upon which a court enters judgment—a majority of appraisers make a report which, as a rule, the court accepts and acts on—and a majority of the judges of all courts sitting *en banc*, whether at *nisi prius* or in the Appellate or Supreme Court, determine the weightiest questions alike of law and fact—that the principle of requiring a unanimous jury in order to a verdict in civil cases should be enforced, is not only out of harmony with all the tendencies of our times and the theories of our Government, but it is absolutely pernicious in its results. To this requirement of our law, incorporated in our very Constitution, may properly be attributed the entire system of jury packing, with its attendant evils. There are men who engage in the practice of the law, not because they are lovers of justice, or seeking the triumph of right, but because they believe they will find a profitable field for their disreputable practices; and these men are retained by unscrupulous litigants, particularly in defending against obviously just claims, to render the unexpressed service, directly or indirectly, of bribing a juror and thus securing a disagreement. Under the present system all that is required of these men, in order to the defeat of justice, is that they find and reach in a panel of twelve jurors, one man who will accept the wages of iniquity—for that one man can "hang" the jury. If a second can be found on the panel at no very great expense, he also will be "fixed," so that the concurrence of the two may make the corruption less obvious. Give to a majority of the jury, or say at most two thirds of the panel, the power to find a verdict in any matter involving dollars and cents only, that is to say, in all actions not involving the personal liberty or the life of the defendant, so that in order to corrupt a jury and defeat justice, it would be necessary to bribe at least five of the jurors, and the difficulties of this business would be so enormously increased, because of the practical impossibility of finding in any panel five depraved men, that the jury-bribing industry would come to an end, and jury bribers would be driven from the profession they dis-

grace, because of the loss of their occupation. Let it still be demanded that in grave criminal matters, twelve men shall concur in order to a verdict—for here comes in the righteous rule of giving to the accused the benefit of every doubt, and of the presumption of innocence, so that it is meet the State should, by its evidence, be required to convince the entire panel, ere taking the liberty or life of the defendant; and if it be objected that in such cases are found the very strongest incentives to bribery, when guilt is probable, and that experience has shown that professional jury-packers ply their vocation in our criminal courts, the answer must be, that yet we cannot, consistently with our established theories of criminal jurisprudence, break down any of the immemorial safe-guards defending the life or liberty of the accused; to which may be added this suggestion, that if jury bribery in civil cases can be brought to an end, this will so far operate to discourage corrupt men from entering our profession, and other corrupt men from seeking places on the jury lists, as to reduce this evil even in criminal cases, to the minimum.

* * * * *

What are the requisites to our highest efficiency in this service? What are the characteristics that should be possessed and cultivated by every lawyer?

First in order and importance is honesty. No one should engage in the practice of law who is not essentially honest. That the profession is, in the popular apprehension, considered an asylum for the dishonest—that an upright lawyer is deemed rare, is unquestionable. It is not uncommon to hear people, and people of fair intelligence, too, express a doubt whether any one can be honest and be a lawyer. It is lamentable that such an impression should prevail—but it would be infinitely more lamentable were the impression well-founded. And, indeed, it may well be questioned whether this impression is in the form of a conviction, or only a suspicion. It will be admitted that no man is so fully trusted, so unreservedly and generally relied on, as the lawyer, into whose hands are placed the most important business interests of the community, not alone as a result of the necessity of the situation, but in the absolute confidence that such interests will be faithfully guarded and duly accounted for. Prominent examples of unfaithfulness are, of course, to be found in almost every community—cases of men inherently dishonest, who have engaged in the practice of the law with the purpose of carrying on a system of secret pillage—but in fact such cases are the exception, not the rule; and among the intelligent, certainly, the suspicion of dishonesty while perhaps entertained with reference to “the other man’s” lawyer, finds no entertainment as to one’s own. As a rule a lawyer is selected by the intelligent because of a well-grounded belief that such lawyer may be trusted—and in the exceptional cases, the secret of the choice lies in

the client’s own dishonesty, which he wishes furthered.

Undoubtedly, however, there are strong temptations to the practicing lawyer to surrender his integrity, not so much nor so often in his own supposed interest as in the supposed service of his client; and these temptations are most potent from two sources—*first*, from the suggestions of dishonest clients; and *second*, from the temptation to ignore the “ministry of justice” in the strife for success. As to the first mentioned source of temptation, it must be admitted that it is dangerous in the extreme. The dishonest are almost sure to be litigious (though it by no means follows that the litigious are even presumably dishonest,) these seeking to evade the requirements of justice through the frailties of law, its technical rules unknown to the multitudes, and its delays and expenses denying its relief to the poor. A dishonest litigant does not seek a lawyer to be advised as to his rights or liabilities—in reference to these he is probably fully posted—but only with a view to requiring that lawyer’s services to accomplish injustice, if possible. The jury briber, the suborner of perjury, the deviser of a defence or scheme of recovery known to be false or unjust, plies his vocation because he finds a clientele ready to make such practice profitable, with a profit commensurate to the character and peril of the service rendered; just as the lobby exists because its services are in demand. Many an honest young lawyer yields to the insidious temptation presented to him by a client who has, in the first instance, engaged his services in legitimate directions, until the lawyer has come to have a feeling that he owes to such client his utmost endeavor, and the client has then suggested and secured such a service as has corrupted that lawyer’s entire professional life. Beware of a dishonest client! and beware of the first suggestion of a departure from an upright course! All the more is there occasion for this caution and need of watchfulness in this regard, because there is a *natural* tendency to seek success by any means, the excitement of the contest often blinding the judgment, and the longing for victory lulling the conscience, particularly when joined to the tempting suggestion that the lawyer’s duty is to advance, by all *possible* means, the cause of his client—the interests of the adverse party resting in the care of opposing counsel—and many an unconscionable advantage taken, being excused by such bastard logic. For in this process of reasoning, the fact is ignored that the lawyer’s position is that of one aiding in the administration of justice, called to further his client’s cause only by *proper* means, to urge his suit only by *right* argument, not attempting to mislead the court, nor to take advantage of the ignorance, mistake or inexperience of an adversary to the furtherance of known wrong. The lawyer’s oath, binds him *only* to a right use of his powers derived from study and experience—and every lawyer *should* advise his client to deal justly without regard to technical advantage, or

the possibilities of unscrupulous conduct dictated by superior craft or cunning. Do not be afraid to be honest toward an adversary. You may at times be required to forego an apparent advantage, and perhaps an important one, and to put your own success in jeopardy—you may even sometimes be required by such a rule as this to relinquish easy victory—and you certainly will, by observing such a rule of conduct, eliminate the openly dishonest from your clientage, sooner or later, to your own temporary, and perhaps permanent, pecuniary disadvantage. But you can not afford to win success by the sacrifice of integrity or to hold as your clients those who would make dishonest practices on your part a condition of the compensation however munificent, they would render to you—and in the preservation of conscious rectitude, and the keeping of a clear conscience, essential to honorable and self-satisfying *being*, you will preserve that which can not be compensated by any golden dole.

Of course I do not say that honesty is essential to success—on the contrary, many of the members of our profession winning the most pronounced success, have not been honest men, their very dishonesty being the foundation of their success. But I do say, that honesty in a lawyer, sterling, inflexible probity, is absolutely requisite to the ideal lawyer, and lies at the very basis of any success worth striving for, faithfulness in any cause or to any interest in life, being surely predicable only of an upright man; and the man known to be dishonest, whatever the measure of his success in minor things, makes failure to win an honorable repute among his fellows because of the remediless shipwreck of his character. No one needs more than the lawyer to treasure the apostolic injunction, "Provide things honest in the sight of *all men*!"

Judge Bleckly, of Georgia, having resigned, read the following verses on the conclusion of his last opinion. The verses may be found in 64 Ga. 452:

IN THE MATTER OF REST.

I.

Rest for my hand and brow and breast,
For fingers, heart and brain!
Rest and peace! a long release
From labor and from pain:
Pain or doubt, fatigue, despair—
Pain of darkness everywhere,
And seeking light in vain!

II.

Peace and rest! Are they the best
For mortals here below?
In soft response from work and woes
A bliss for men to know?
Bliss ofttime is bliss of toil:
No bliss but this, from sun and soil
Does God permit to grow.

TRESPASS—FREQUENTED PATH ACROSS RAILROAD—NEGLIGENCE—RAIL- ROAD—CONTRIBUTORY NEG- LIGENCE.

SUPREME COURT OF PENNSYLVANIA.

PHILADELPHIA AND READING R. R. Co. v. TROUTMAN.

April 10, 1882.

1. When a foot-path across a railroad has been used by the public for many years and is well-known, and there is no evidence of objection to its use on the part of the railroad company, a person using the path to cross the railroad cannot be considered a trespasser.

2. Where a train intended for a flying switch is detached some three quarters of a mile from, and out of sight of a crossing, and is sent at the rate of from ten to fifteen miles per hour down a main track, and is then, without warning, suddenly thrown upon a siding upon which a person is walking at a point near the crossing, the railroad company will be held guilty of negligence.

3. Where a locomotive blocks a crossing it is not contributory negligence for a person desiring to cross to go upon a side track for the purpose of going around the locomotive, there being at the time of his going on no car in sight upon the side track, and no apparent likelihood of any coming thereon, although the accident happened to him from the sudden throwing of a train upon said track, without warning.

Case for negligence. On the trial the evidence showed the following facts: The plaintiff, a weak-minded girl, had been sent on an errand on the line of the defendant's railroad, which was crossed by a well-beaten path, which had been used by the public many years. At this point the railroad consisted of three tracks. The plaintiff walked along the path, and on reaching the first track, known as the Kaufman siding, stopped and stood still until an engine coming down the third track, stopped at some fifty or sixty feet distance. She then looked up and down and seeing nothing walked down the siding intending to go around the engine; while walking toward it, she was struck from behind by some cars which had been disconnected from the engine some three quarters of a mile away, and had been run on a flying switch upon the track on which the plaintiff was. She was seriously injured. No warning was given her, neither the conductor nor brakeman seeing her, and the engineer of the locomotive not seeing that she was on the track. From the point of contact of the path and the railroad, the railway signal tower, about three quarters of a mile away, could not be seen even by a full-grown person. The cars were going at the rate of from ten to fifteen miles per hour. The defendant asked the court to charge, *inter alia*, that there was no evidence of negligence on the part of the defendant (second point), and that the plaintiff was a trespasser and therefore could not recover. Sassaman, J., answered that there was no direct and positive evidence of negligence except such as might be inferred from all the evidence, and that though the plaintiff was a trespasser, yet if the defendant suffered such repetitions of trespass which led the child over the path, the fact of her being there would negative

the liability incurred by her negligence. Verdict and judgment for plaintiff. The defendant took this writ.

GORDON, J.

The case turns mainly on the fourth point. The place where the accident happened was not in the open country but in a small village. At a point one hundred and six feet from the public road crossing there was an old and well used foot-path leading over the railroad, and while attempting to cross by this path the plaintiff was injured.

The court below thought that a person using this path to pass over the tracks could not be regarded as a trespasser. We can discover nothing wrong in this conclusion. If this was a common and well known foot-path, used by the public for many years, it must have been well known to the employees and officers of this company, and if, without let or hindrance, the use of it was permitted to persons desiring to cross and recross the roadway, we cannot see how one thus using it could be treated as a trespasser. Certainly if a private person had so permitted his land to be used an action of trespass by him against one passing over it without previous notice of prohibition would meet with but little favor. But we cannot in this respect clothe corporations with powers superior to those of natural persons. Indeed, if we regard *Penr. R. R. v. Lewis*, 29 P. F. S. 33, as authority, even a trespasser may have some rights which a railroad company is bound to respect, *a fortiori*, as to a person who is on the roadway by permission. To hold otherwise would be but a poor comment upon our civilization and upon the wisdom of this court.

As the negligence of the employees having charge of the cars by which the injury was done there can be no doubt. A more perfect trap for destruction could scarcely have been devised. The train designed for the flying switch is cut from the engine some three quarters of a mile from and out of sight of the crossing; the locomotive is run forward and stationed directly across the foot-path; the train comes down at a rapid rate, and when within one hundred and fifty-nine feet of the place where the child stood, by some sleight of hand unknown to persons not skilled in the management of railroads, and without warning of any kind, it is suddenly turned on to the switch. When, in addition, we understand that the hands on and about this train paid no attention whatever to the track upon which it was running, and that the engineer actually saw the child in the act of approaching and did nothing to warn her, we cannot understand how any one can have the face to say that there was no negligence on the part of those having charge of the train, or, indeed, that they were not guilty of very gross negligence.

As to the plaintiff's contributory negligence, we can find no evidence of it; certainly not of that conclusive kind which would require the court to take the question from the jury.

It is true, a witness, an engineer, says the girl remained upon the siding two or three minutes before she was struck; but in events of this kind, time is at best but a mere matter of guess-work. Be this as it may, it is no serious reflection upon the discretion of a child of her age, that she waited and watched until the locomotive had stopped, and until, so far as she could see, the track was entirely clear, even though standing upon the siding. To an ordinary observer not aware that the flying switch movement was about to be executed, her position was one of no danger. "Even had she seen the train moving upon the main track how could she know that it would not continue on that track?" How could this child tell that by a single motion of a lever the cars would be upon her within a space of time measured by some ten or fifteen seconds. This would be too much to ask of a grown person, much more of one of such tender years.

Judgment affirmed.

INJURY FROM DEFECTIVE SIDEWALK—DAMAGES.

COURT OF APPEALS OF KENTUCKY.

CITY OF LEXINGTON v. AUGER, JR.

June 10, 1882.

For injuries caused by falling into a hole in a sidewalk in the city of Lexington, of which hole, members of the city council had notice, the plaintiff recovered a judgment against the city for the sum of \$500. That judgment is affirmed.

The quantum of damages in such a case is with the jury, and they had the right to consider the physical suffering of the plaintiff in estimating the amount of recovery. A drunken man has the right to presume that the streets and sidewalks of a city are safe to passers thereon.

PRYOR, J.

It is not material to the decision of this case that an inquiry should be made as to the sufficiency of the first paragraph of the appellee's petition. The second paragraph contains every essential averment necessary to constitute a cause of action, and the appellant only traverses the question of negligence. That the hole was dug or was in the street, of which the appellant had notice, is a fact admitted by the pleadings, and the sole question was, that of negligence on the part of the city authorities. The issue being formed as to the question of negligence, there is no reason for reversing this case, if the testimony authorized the finding, and this involves the question made by counsel for the city, on the motion for a peremptory instruction.

No exceptions were taken to any of the instructions by the appellant and, therefore, it is not necessary to discuss them. And one of the grounds for a new trial being that there was no evidence to support the verdict, permits the question made by the peremptory instruction.

It appears from the evidence that Broadway street is one of the principal streets in the city, and that in or near the pavement of the sidewalk of this street, not far from the depot of the Cin-

cinnati Railway, where foot passengers were in the constant habit of passing, a hole three feet deep and two feet wide was dug for the purpose of putting down a gasoline post; that this hole was dug about the middle of November by the directions of the city council, and left open and exposed without any guard around it or near it or anything to notify the passer-by of his danger. This hole, together with others, was left open for several weeks, although some of the council, according to the testimony of a member of the police, had been notified of the danger. It is true there was ample room on the sidewalk for the traveler and he would have to make a diversion from the main path in order to reach the danger, still he had the right to use any part of the street, for the purpose of travel, and there was no excuse for the negligence on the part of the city in leaving these holes uncovered for such a length of time. It is attempted to be shown that the appellee was under the influence of liquor at the time the accident occurred, and if this was even true, and it is not sustained by the testimony, he had the right, although drunk, to presume that no such danger existed in one of the great thoroughfares of the city, and if in a helpless condition the greater the necessity for vigilance on the part of the city fathers in order to prevent such injuries. The hole dug for this post had been filled with *snow* and there was nothing to apprise the appellee of his danger, nor was there anything from which a man of ordinary prudence had the right to suppose that the danger existed. The quantum of damage was with the jury. The testimony was heard as to the character of the wound, and while the actual expenses incurred, including the loss of time, might not have exceeded one hundred dollars, the physical suffering of the appellee had to be considered in estimating the amount of recovery, and with the proof on this subject we are not prepared to say that the verdict was the result of prejudice or passion. The judgment below is therefore affirmed.

The judgment appealed from and affirmed in this case was for \$500.

LOSS OF GOODS BY CARRIERS.

In the case of *Eyre v. Midland Great Western (of Ir.) R. Co.*, recently decided by Harrison, J., on appeal, it appeared that a railway passenger in consequence of the non-arrival of his luggage, had been obliged to purchase various personal necessities in substitution for those which were detained; but in the award of damages nothing was included for this consequential loss. This rather surprised us at the time, but on inquiry we ascertained that no claim in respect of those articles had been pressed for. We made some researches for authorities on the subject, but could find none directly in point—the nearest, which, however, are distinguishable, being *British Columbia Saw Mill Co. v. Nettleship* (L. R. 3 C. P. 499; 37 L. J. C. P. 235) and *Wilton v. Fothergill*, (9 C. & P. 394) and to those

cases we refer accordingly. It is satisfactory that at last a decision rather more in point has been reported which we find in last Saturday's *Law Times* *Millen v. Brash & Co.* (45 L. T. (N. S.) 653). And not only may that case be collated with those already collated in our papers on remoteness of consequential damage, but on several special points in the law of carriers, to which we have previously adverted, it will be found of importance, as indeed, Lopes, J., indicated.

The defendants were carriers from London to Rome; and on November 13, 1879, the plaintiff's agent delivered to them a trunk to be sent by rail from London to Liverpool, and then shipped in one of Bibbey's steamers for Italy. It happened that the defendants had in their possession a case of paper goods (Christmas cards) consigned to Mr. Hamburger, of New York; and by the carelessness of the defendants' servants, the trunk belonging to the plaintiff was taken to the Victoria Docks, and shipped as and for Hamburger's case to New York. The defendants did not become aware of this mistake till about the 15th of December, following, on which day they wrote to Hamburger, and on the 19th the trunk arrived in New York. On the 11th of March, 1880, the miscarried trunk arrived at the defendant's offices, and, at the plaintiff's request was retained there till June, and then delivered to the plaintiff. The plaintiff afterwards brought an action for £210 damages for the loss of the trunk and injury to its contents. The miscarriage and loss for the time were admitted, as also that some of its contents had been injured in New York, owing to the custom house officer unpacking the trunk, and negligently and unskillfully repacking it. It was further admitted that certain silk dresses and a sealskin jacket which it contained were articles within the Carriers Act, that their value exceeded £10, and that no declaration had been made. The jury was discharged by consent, and all questions of law and fact were left to the decision of Lopes, J., who presided at the trial. The amount of damages, in case the plaintiff was entitled to a verdict, being agreed upon, including the sum of £10 for the re-purchase by the plaintiff of certain other articles of clothing in Rome at enhanced prices, to replace those contained in the trunk.

The defense rested on the Carriers Act. It was, in the first place, contended on behalf of the plaintiff, that the act did not apply, because the loss was temporary and not permanent. Lopes, J., however, observed that there was nothing in the act or in the authorities to justify the placing of so narrow a construction on the word "loss," and in his opinion, it was immaterial whether the loss was temporary or absolute, and, not being delivered within a reasonable time, the trunk and its contents were lost to the owner within the meaning of the act. He cited no decision on the subject, but the reader will do well to refer to *Hearn v. London, etc R. Co.*, (10 Ex. 793; 24 L. J. Ex. 180) holding that

"loss" within the act means total loss, and does not apply to protect the company from liability for consequential loss by reason of delay in delivery; while in *Wallace v. Dublin, etc. R. Co.*, (8 Ir. L. T. Rep. 163) a plea excusing delay in delivery upon the ground of a temporary loss of the goods, while in charge of the defendants, was held a good answer to an action for not delivering within a reasonable time. In the next place, the plaintiff contended that the act did not apply, because the defendants were not carriers of the trunk by land, the trunk having been accepted to be carried partly by land, and partly by sea. But *Lopes, J.*, rightly held that the contract was divisible, and that the trunk was lost, within the meaning of the act, directly it was on the road to the Victoria Docks instead of to Liverpool. As an authority for this position he referred to *Le Conteur v. London, etc. R. Co.*; (L. R. I. Q. B. 54) to which we may add references to *Pianciani v. L. & N. W. R. Co.*; (18 C. B. 225) *Baxendale v. Great Eastern R. Co.*; (L. R. 4 Q. B. 244) *Moore v. Midland R. Co.*; (8 Ir. L. T. Rep. 165) *Doolan v. Midland R. Co.*; (L. R. 2 H. L. 792) and *London, etc. R. Co. v. James*. (L. R. S. Ch. App. 241.) Again, it was contended by the plaintiff that the defendants were not entitled to the protection of the act, because they were wrong doers—wrong doers in that they sent the trunk on the wrong road and not on the journey contracted for. But *Morritt v. North Eastern R. Co.*, (1 Q. B. D. 302) affords an answer to that objection; *Blackburn, J.*, saying: "Unless it is proved the misdelivery was intentional, the case is within the act;" and *Mellish, L. J.* saying: "If goods by negligence of the carrier are carried beyond the point of destination and injured, this is within the Carriers Act."

But, lastly, remained the question whether the plaintiff was entitled to recover the £10 for repurchase of other articles in Rome at enhanced prices, irrespective of the Carriers Act—the plaintiff contending that the act did not apply to that part of his claim. "I think the plaintiff is right," said *Lopes, J.*, "for this is not a loss by the carrier of the trunk, nor an injury to its contents, but damages sustained by the owner in consequence of the non-delivery within good time; it is something consequential to its loss. I do not think this £10 is within the protection of the Carriers Act. But the defendants say if it is not within the protection of the Carriers Act, this portion of the claim is too remote. Much depends on whether it was a reasonable and necessary act of the plaintiff to buy these articles in Rome. This is a question of fact which I have to decide, and I think it was both the reasonable and necessary consequence of defendants' failure to deliver, that plaintiff should purchase what he did in Rome—a necessity arising from the non-delivery of a trunk which the defendants might fairly assume contained wearing apparel. The observations of *Mellish, L. J.*, in the case of *Le Blanch v. London, etc. R. Co.*, (1 C. P. D. 286) are not inapplicable here.

That was a case where a passenger, delayed in his journey by the want of punctuality in the arrival of the defendants' train, sought to recover the costs of a special train which he had engaged. *Mellish, L. J.*, said: "Now one mode of determining what, under the circumstances, was reasonable, is to consider whether the expenditure was one which any person in the position of the plaintiff would have been likely to incur, if he had missed the train through his own fault, and not through the fault of a railway company. I think the plaintiff would have gone to the same expense and bought the same articles for the use of his wife if there had been no railroad company to look to, and if the trunk had been lost by his own fault. There was nothing extravagant or unreasonable in his so doing. I do not think these damages too remote." This conclusion seems to us to be fortified by the cases of *Walton v. Fothergill* and *British Columbia Saw Mill Co. v. Nettleship*, to which we referred at the outset; the former case seeming to hold that, if the plaintiff, in order to perform a contract, was forced to buy other goods at an increased price, in consequence of the non-arrival of those which the defendant had contracted to carry, this would be such a natural result of the defendants' neglect as to entitle him to recover his loss; while in the latter case the court considered the plaintiffs entitled to recover the sum necessarily expended in replacing the lost box of machinery there in question. Nor can we any longer deem it doubtful that in *Eyre v. Midland Great Western R. Co.*, (15 Ir. L. T. 291) the plaintiff would have been entitled to recover for the loss incurred by having to replace the personal necessities contained in his trunk. —*Irish Law Times.*

Digest of Decisions.

IOWA.

(Supreme Court of Iowa.)

CRAIG v. FOWLER. July 13, 1882.

Writ—Officer—Fund.—A writ in the hands of an officer does not authorize him to seize property belonging to another than the defendant named in the writ. In such case he is a trespasser, and such owner has a valid claim against him and a right of action for the value of the goods seized.

The burden of proof of fraud is on the party alleging it, and fraud, or knowledge or participation in fraudulent designs or practices, is usually proved by facts and circumstances, and the exclusion of such evidence, when it tends to establish fraud, is erroneous.

An instruction to the effect that if a wife held an honest claim against her husband she could not use it for the purpose of hindering or delaying other creditors, implies that though she holds an honest claim, she could not, under pre-

tence thereof, cover her husband's property so as to defeat or delay his creditors, and is substantially correct.

Any fraud of the husband in encumbering or disposing of his property cannot affect the wife's rights, unless she knew of and assented to the fraud and aided in the particular fraudulent transaction.

RICHARDSON BROS. v. PETERSON. JULY 11, 1882.

Landlord's Lien on Chattels.—The landlord's lien given by statute is a charge upon the tenant to secure the rent due under the lease, and it cannot be defeated by the sale or removal thereof.

If a statute creating a lien provides for no protection in favor of persons having no notice thereof, property subject thereto cannot be transferred free of the lien on the ground that the purchaser has no notice of its existence.

Horses kept by a tenant for use on a farm and not for sale, according to the tenant's ordinary business, are subject to the landlord's lien.

ELLIS v. ELLIS. JULY 11, 1882.

Where a wife had no knowledge that her husband, living apart from her had married again, or was cohabiting with another woman, until after his death, and there is no evidence tending to show that she did not at all times regard the marriage as an existing fact, no presumption can be indulged that he had procured a divorce. A subsequent marriage will not raise the presumption of a divorce from a prior marriage.

ILLINOIS.

(Supreme Court.)

THE ST. LOUIS & IRON MOUNTAIN RAILROAD COMPANY v. RUSSEL M. LARNED. JUNE 21, 1882.

1. *Carrier—Liability beyond its own line of conveyance.*—While it is true that a railroad carrier may restrict its liability to its own line, there is no doubt that it may extend its liability beyond its own line.

2. So, where a railroad company in its own wrong shipped a lot of cotton from its depot in Arkansas to Waterville, in the State of Maine, beyond the terminus of its road, and on the application of the agent purchasing the cotton, gave him a bill of lading containing a printed stipulation, restricting its liability to its own line of road, naming the number of bales and containing this entry written in a blank: "to be forwarded from Waterville, Maine, (where the cotton is now lying), at consignee's expense. All charges for transportation to that point, and necessary charges to be paid by him," and the oral evidence showed it was to be transported to Putnam, Connecticut, it was held that the company was liable to the assignee of the bill of lading, the consignee, for the value of the cotton, on account of its non-delivery at Putnam.

3. *Which of two carriers liable.*—An agent for

Eastern parties bought cotton in Arkansas, which he left at the defendant's railroad depot, taking receipts for the same, but gave no orders for its shipment, and the railroad company, without any authority from such agent, shipped the same to Waterville, Maine where the Maine Central Railroad Company delivered the same to a person for whom it was not bought. On learning the facts the defendant railroad gave a bill of lading agreeing to transport the cotton to the person for whom it was bought in Connecticut, at the consignee's cost and expense, which was not done, the person receiving the cotton refusing to give it up, claiming it was bought for him. The agent drew a draft on his principal, to which he attached the bill of lading properly assigned, which was paid by the principal, and the latter brought suit against the defendant railroad for the value of the cotton, and recovered. It was contended that the consignee should have sued the Maine Central Railroad and not the defendant; held, that while he might have waived the defendant's contract and have sued the other company for a conversion or the person receiving the cotton, he was under no obligation to do so, and that the recovery against the defendant was warranted.

4. *Estoppel.*—To assert facts that would defeat transfer of property by an assignment of a bill of lading.—While it may be that property in the adverse possession of another is not transferable so as to pass the title, yet where a railroad company gives a bill of lading reciting that the property is then lying in a depot at a certain place and agrees to forward the same to the consignee, and others advance money on the faith of such bill of lading, which is assigned by the shipper, the railroad company will be estopped as against such persons from showing that at the time of giving such bill of lading, and its indorsement the goods were in the adverse possession of another person, so as to defeat an action brought by the consignee so advancing money on the bill of lading.

PENNSYLVANIA.

(Supreme Court.)

PETRY'S APPEAL. April 3, 1882.

Partnership—Dissolution—Authority of Liquidating Partner.—Where a liquidating partner is given, by the articles of dissolution, authority to settle claims due to the firm, by allowing a deduction or otherwise, and the late firm has been in the habit of selling on credit, the liquidating partner may dispose of the firm's assets upon credit; and will not, so long as he acts in good faith, be held liable for a loss arising to the firm from an injudicious allowance of credit.

SUMMIT GROVE CAMP-MEETING ASSOCIATION v. SCHOOL DISTRICT OF NEW FREEDOM. May 29, 1882.

1. *Taxation—Exemption—Actual Place of Religious Worship.*—Buildings upon a camp-meeting

ground, other than the one actually used for religious meetings, such as a boarding-house, store, and dwellings, though only used in camp-meeting time and by the attendants thereat, are not exempt from taxation.

2. *Ibid.*—*Ibid.*—*Exempt and Unexempt Portions of Same Property.* Even if the building appropriated to religious services is exempt, yet where there is no evidence given by which the tax can be apportioned, the entire tax assessed should be sustained.

WISCONSIN.

(Supreme Court.)

WILLIAMS v. WILLIAMS. May, 1882.

Executors and Administrators — Loss of Money deposited in Bank.—An administrator who deposits in a bank for safe-keeping, funds of the estate, in his own name, is personally liable for the subsequent loss of the fund by the failure of the bank, although he informed the bank officer at the time of the deposit that the money was a trust fund, and he had no other account with the bank.

NORTH CAROLINA.

(Supreme Court.)

STATE v. ROTEN. February, 1882.

Criminal Law—Carrying Concealed Weapons.—Upon trial of an indictment under the Act of 1879, c. 127, for carrying a weapon concealed, it was shown that defendant had two pistols buckled around him without scabbards and naked on a belt, on the outside of his clothing. *Held*, that defendant was not guilty, the presumption of concealment raised by the statute being rebutted. *Held, also*, if the privilege of carrying arms in this manner should be abused, the party would be liable to indictment at common law.

VIRGINIA.

(Supreme Court of Appeals.)

SUBLETT v. CARY. March, 1882.

1. *Attachment — Motion to abate — Onus.*—On motion to abate an attachment for having been issued without cause, the onus is on the plaintiff to show sufficient cause.

2. *Ibid — Existence of Grounds for Attachment—Mere Belief.*—It is the existence of the probable fact sworn to by the affiant in the affidavit to obtain an attachment, and not his mere belief that the fact exists, which justifies the remedy of attachment.

CIRCUIT COURT OF THE UNITED STATES.

(District of Oregon.)

A. H. TANNER v. THE DUNDRE LAND INVESTMENT COMPANY AND WILLIAM REID. JULY 5, 1882.

Interest on Note.—When a note is made payable at a future day "with" interest at a prescribed rate per annum, such interest does not become due or payable until the principal sum does, unless there is a special provision in the note or contract to that effect.

Specific Performance.—A contract to convey real property will be specifically enforced as prayed for by the plaintiff where its terms are admitted by the defendant, and the only objection made to such performance is based upon a construction of the contract, as to the part to be performed by the plaintiff, which in the judgment of the court is unsupported by the language of the contract or the circumstances of the case.

W. S. CHAPMAN v. E. P. FERRY AND EUGENE WHITE. JULY 10, 1882.

Discovery.—A demurrer will lie to an allegation in a bill, the answer to which may subject the defendant to anything in the nature of the penalty or forfeiture—as an allegation concerning the number of copies sold and on hand of a pirated map.

Penalties and Forfeitures.—The penalties and forfeitures given by Section 4065 of the Revised Statutes (17 Stat. 214), for an infringement of a copyright, cannot be enforced in a suit in equity; and a prayer in a bill, that the plate and unsold copies of a pirated map be delivered up to an officer of the Court for cancellation and destruction is demurrable, as asking the enforcement of such forfeiture.

Damages.—Damages as well as profits may now be recovered in a suit in equity for an infringement of a patent, but not a copyright.

JOHN CONNELL KING v. A. Y. HAMILTON. JUNE 21, 1882.

Promissory Note.—A note of 500 pounds sterling is payable in a certain sum of "money," and, therefore, negotiable and prima facie made upon a sufficient consideration.

Pound Sterling.—By section 2 of the Act of March 3, 1873 (11 Stat. 603; Sec. 3565, R. S.), it is provided that, "in the construction of contracts payable in sovereigns or pounds sterling," each pound shall be valued at \$4.866½. *Held*, that in an action upon a note payable in pounds sterling, it is not necessary to aver or prove the value of such pound in money of the United States, but that the Court will give judgment for the value of the contents of the note in money of the United States, according to the ratio prescribed by the statute.

TERRITORY OF UTAH.

(Supreme Court.)

SARAH SKEWES v. BALLARD S. DUNN. JULY 7, 1882.

Practice—Substitution—Party in Interest.—Where an action has been commenced in the Justice Court in the name of the husband, and judgment given for him, it is error for the District Court to substitute the wife as plaintiff upon the petition and affidavit of the husband that she is the true owner of the original demand, and that he has transferred the judgment obtained by him to her; the action was not begun by the real party in interest.

Id.—Evidence—Husband and Wife.—Assuming that the husband was the owner of the notes sued on, and therefore had an assignable interest in the judgment, he would have no right to substitute his wife as plaintiff in order that she might testify in support of the claim which she could not have done had her husband remained plaintiff.

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